

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2013] NZEmpC 4
CRC 47/10**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN PAUL DALLEY
Plaintiff

AND NORRELL BUILDING LIMITED
Defendant

Hearing: 20 and 21 February 2012
(Heard at Christchurch)

Appearances: David Goldwater, counsel and Robert Thompson, advocate for the
plaintiff
Penny Shaw, counsel for the defendant

Judgment: 31 January 2013

JUDGMENT OF JUDGE A A COUCH

[1] Mr Dalley was employed by Norrell Buildings Limited (the Company) as a foreman builder. He was in charge of the construction of a house at a remote location on Banks Peninsula. Following an altercation with an apprentice working on the site, Mr Dalley was dismissed with several reasons for dismissal subsequently given.

[2] Mr Dalley pursued a personal grievance alleging that his dismissal was unjustifiable. He also sought a penalty for the Company's failure to provide him with a written employment agreement. These claims were investigated by the Employment Relations Authority (the Authority) which determined¹ that the dismissal was unjustifiable. The Authority found, however, that Mr Dalley had

¹ CA204/10.

contributed substantially to the situation giving rise to his dismissal. He was awarded compensation of \$2,300. Although Mr Dalley sought reimbursement of lost wages, the Authority found that his decision to move to Australia was the cause of his lost income rather than his dismissal. The Authority also declined to impose the penalty sought.

[3] Mr Dalley challenged that determination, renewing the claims for remedies originally sought before the Authority. The Company denied that the dismissal was unjustifiable and, in the event it was found to be so, opposed the grant of any remedies. The matter proceeded before the Court by way of a hearing de novo.

Background and sequence of events

[4] The Company is a small family owned business which has been in operation about 20 years. Its principal and manager is Jason Norrell who is an experienced builder.

[5] Mr Dalley is an experienced carpenter. He was employed by the Company on 16 February 2009, initially as a carpenter but, from 28 April 2009, as a foreman. He was a good worker.

[6] In 2009, the Company won a contract with a building company, Homes of Distinction, to construct a house at Le Bons Bay, which is a relatively isolated location on Banks Peninsula about two hours' drive from Christchurch. The house was described as "prestigious" and was to be built and finished to a very high standard. Mr Norrell appointed Mr Dalley as the foreman for this job. The project manager for Homes of Distinction was Brent Hyde.

[7] Because of its remote location, the conditions for staff working on the job were unusual. Each week, staff travelled to the site on Monday morning and returned to Christchurch on Thursday evening. For the three nights in between, they stayed near the site in a bach which the Company had rented. They were expected to work at least 40 hours during the four days on site and, if they did, they had Friday off as well as Saturday and Sunday. As an incentive, staff were all paid \$2 per hour

more than their usual rate. Mr Norrell visited the site infrequently, relying on Mr Dalley to manage it.

[8] During the early part of the job, there were three men working on site; Mr Dalley and two others. By January 2010, that was increased to four. Other than Mr Dalley, they were Andrew Hardy, a qualified builder, and two apprentices, Leigh McIlroy and Andrew Ahpene. Mr Ahpene was more experienced than Mr McIlroy, who had been an apprentice for about two years.

[9] In December 2009, Mr McIlroy had become dissatisfied with the quality of the work he was being given. He raised this with Mr Dalley and subsequently with Mr Norrell who asked Mr Dalley to ensure that Mr McIlroy had the opportunity to learn new skills.

[10] By late January 2010, the house was framed up, roofed and building paper applied to it.

[11] On Wednesday 27 January 2010, it was arranged that the owners would visit the site towards the end of the working day. One reason for the visit was for the owners to finalise how some of the soffit brackets were to be placed. As well as supporting the soffit, these brackets were decorative and the owners were very particular about their appearance.

[12] Shortly after the afternoon tea break, there was a discussion between Mr Dalley and Mr McIlroy. Mr McIlroy wanted to install the soffit brackets. Mr Dalley told him that he intended doing that work himself. The discussion eventually developed into an argument which took place immediately outside an entrance to the house from the area where a veranda was to be constructed. The two men were very close to each other and there was an angry exchange. Mr Dalley pushed Mr McIlroy away. At some point each man took off his tool belt. The altercation ended when Mr Ahpene intervened, reminding all concerned that the owners were on site.

[13] Shortly after that, Mr McIlroy telephoned Mr Norrell, using a landline on the site. He spoke to Mr Norrell for about 15 minutes. Mr Norrell then spoke to Mr

Dalley. The subject of both discussions was the incident which had just occurred. Mr Norrell told Mr Dalley to apologise to Mr McIlroy and to “smooth things over”. All staff on site then went back to work and there were no further incidents that day or the following day.

[14] On Thursday 28 January 2010, Mr Norrell telephoned Mr Ahpene and had a brief conversation with him about the incident between Mr Dalley and Mr McIlroy the previous day. Later that day, Mr Norrell telephoned the site again and spoke to Mr McIlroy. Mr Norrell told Mr McIlroy that he wanted to speak with him and Mr Dalley at his home at 10 am the following day. At Mr Norrell’s request, Mr McIlroy passed that message on to Mr Dalley.

[15] As the men on site had done at least 40 hours’ work that week, they were all entitled to have Friday off. Anticipating this, Mr Dalley had planned to do personal business that day. He and his then fiancée, now his wife, had contracted to purchase land in Lyttelton and Friday 29 January 2010 was the last day for payment of the deposit. Mr Dalley had arranged to visit his bank and his solicitor during the morning to make this payment.

[16] At 7.52 am on Friday 29 January 2010, Mr Norrell sent a text message to Mr Dalley saying “Hi Paul. Can you please come to my place at 10.30 now I will see Leigh alone at 10?” Mr Dalley read this message some time after 9.00 am and sent a text message back to Mr Norrell saying that he could not make it as he had plans for that day. Mr Dalley suggested a meeting on Sunday. Mr Norrell immediately replied by text saying “this is not a request Paul, you’ll be there this is a serious matter that needs to be sorted.”

[17] Shortly after that, Mr Norrell telephoned Mr Dalley. They spoke for some time. Mr Norrell insisted that Mr Dalley attend a meeting with him that morning. Mr Dalley repeatedly replied that he had to go to the bank and see his solicitor. In the course of this conversation, Mr Norrell said that Mr Dalley’s position as foreman was at risk. Mr Dalley replied “give it to someone else then”. Towards the end of the conversation, the two men agreed that they would meet that afternoon. Mr Dalley was to telephone Mr Norrell at noon to arrange a time to meet before 3 pm.

[18] Following that telephone discussion, Mr Dalley telephoned the Building Trades Union to seek advice. He spoke to a member of the office staff who told him that an organiser would be back about noon and would call him.

[19] Mr Norrell met with Mr McIlroy as arranged at 10 am. They had a lengthy discussion. Mr Norrell gave Mr McIlroy a warning for misconduct and required him to write a letter of apology to the owners. Mr Norrell then telephoned Mr Dalley at 10.59 am. This was a brief conversation. Mr Norrell told Mr Dalley that he was dismissed with immediate effect. The reason he gave was that he regarded the push Mr Dalley gave Mr McIlroy as assault and that the incident had occurred in front of the owners. Mr Dalley asked for the reasons to be put in writing.

[20] Mr Norrell wrote a letter to Mr Dalley confirming the dismissal and giving several reasons for it. The text of that letter was:

Regarding: Termination of employment

Dear Paul

We regret to inform you your employment with Norrell Building Limited has been terminated effective immediately for the reasons listed below

- Serious misconduct (Pushing a fellow staff member during a heated argument)
- Blatant disregard for authority and not following instructions (Justin asked you to speak to Leigh regarding the matter and apologise and you ignored these instructions)
- Rudeness to clients (The clients witnessed the entire incident and we have had to deal with the fall out from this via a formal complaint from [the owners] and Homes of Distinction)
- Not acting in the best interests of Norrell Building Limited in a Foreman capacity

We will forward any wages owing to you on receipt of your timesheet and any company property you may have in your possession.

Please call Justin at your earliest convenience should you wish to discuss any of the above issues.

Sincerely

[signed]

Justin Norrell

[21] Some time after 11 am, shortly after he was dismissed, Mr Dalley telephoned Mr Hyde to tell him what had happened. Mr Hyde was unaware of the incident the previous Wednesday and asked Mr Dalley to tell him about it. After Mr Dalley did

so, Mr Hyde said that there was a good probability that Homes of Distinction would engage Mr Dalley directly to complete the work on the house at Le Bons Bay. Mr Hyde then telephoned the owners. They told him that they had heard the incident but not seen it. They regarded the incident as ridiculous and the language used as offensive but they wanted Mr Dalley to continue working on the job.

[22] At about 4 pm on Friday 29 January 2010, Mr Hyde went to see Mr Norrell. Mr Hyde was concerned that the house at Le Bons Bay be completed to a high standard and questioned how Mr Norrell would do this without Mr Dalley. Mr Norrell replied that he had another employee available to take over as foreman and that, if Homes of Distinction tried to take the work elsewhere, the Company would take legal action. On Saturday 30 January 2010, Mr Hyde had another conversation with Mr Dalley but Mr Dalley was not offered the job of completing the build.

Was the dismissal justifiable?

[23] The test for justification in the context of a personal grievance is set out in s 103A of the Employment Relations Act 2000 (the Act):²

103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred

[24] In this case, there can be no doubt that Mr Dalley's dismissal was unjustifiable. That is for several reasons.

[25] The investigation undertaken by Mr Norrell fell well short of what a fair and reasonable employer would have done in the circumstances. Although Mr Norrell discussed the events of 27 January 2010 at some length with Mr McIlroy on two occasions, he spoke only very briefly to Mr Dalley. That was on the afternoon in question. The following day, Mr Norrell spoke briefly to Mr Ahpene but, inexplicably, did not speak to Mr Hardy, who was in a position to see and hear all

² This is s 103A as it was at the time of the events in question in this case. It has since been amended.

that occurred. In what can only be described as a fundamental breach of fairness, Mr Norrell did not tell Mr Dalley what Mr McIlroy and Mr Ahpene had said or give him an opportunity to respond to it. Rather he leapt prematurely to a decision to dismiss.

[26] When asked to explain this, Mr Norrell said that he believed Mr Dalley would not meet with him that afternoon even though it had been expressly agreed that he would do so. Mr Norrell said he reached this conclusion because Mr Dalley had initially been so reluctant to meet with him at the time he nominated. That explanation was irrational and unreasonable. As Mr Norrell accepted in answer to questions put to him in the course of his evidence, Mr Dalley had good reason to be reluctant to meet on the Friday. It was his day off and he had arranged to do important personal business which could not wait. Mr Norrell also agreed that it would have made little or no difference if he had not met with Mr Dalley until the following Monday, in work time.

[27] The manner in which Mr Norrell behaved on behalf of the Company was also a serious breach of good faith. The first part of s 4 of the Act provides:

4 Parties to employment relationship to deal with each other in good faith

- (1) The parties to an employment relationship specified in subsection (2)—
- (a) must deal with each other in good faith; and
 - (b) without limiting paragraph (a), must not, whether directly or indirectly, do anything—
 - (i) to mislead or deceive each other; or
 - (ii) that is likely to mislead or deceive each other.
- (1A) The duty of good faith in subsection (1)—
- (a) is wider in scope than the implied mutual obligations of trust and confidence; and
 - (b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
 - (c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and
- (ii) an opportunity to comment on the information to their employer before the decision is made.

[28] In terms of the application of s 4(1A)(c), Mr Norrell said that he did not consider dismissing Mr Dalley until the Friday morning when he was having difficulty arranging a meeting with him. Earlier in his evidence, however, Mr Norrell said that he regarded Mr Dalley's behaviour as serious misconduct from the time he first heard about the events of 27 January 2010, that day. When asked what he understood the term "serious misconduct" to mean, Mr Norrell replied "as I understand it serious misconduct, end of job." That strongly suggests that Mr Norrell was considering dismissal much earlier than the Friday. In any event, it is clear that the Company totally failed in its duty to give Mr Dalley access to all the information relevant to the continuation of his employment and an opportunity to comment on that information before a decision was made.

[29] This failure to investigate events fairly and in good faith was not just a matter of inappropriate procedure. The effect of it was to render the decision to dismiss unsustainable in substance. That is because Mr Norrell did not have the information necessary to draw any proper conclusions about what actually happened on site on 27 January 2010. Although it was common ground that Mr Dalley pushed Mr McIlroy that day, it is not every push which will justify dismissal. To make a justifiable decision, Mr Norrell needed to know in as much detail as possible the circumstances in which that push occurred. On the basis of the limited information available to Mr Norrell at 11 am on Friday 29 January 2010, no fair and reasonable employer would have made a decision, let alone a decision to dismiss Mr Dalley.

[30] So far in this discussion, I have focussed on the events of 27 January 2010 as the reason for the decision to dismiss Mr Dalley. In his letter following the dismissal, however, Mr Norrell gave three other reasons. It was clear from the evidence that none of those issues were raised with Mr Dalley prior to the dismissal. They therefore add to the unfairness and lack of good faith which pervaded the process. It was also apparent from the evidence that those reasons had little or no substance.

[31] Mr Norrell included as a reason for dismissal “Blatant disregard for authority and not following instructions (Justin asked you to speak to Leigh regarding the matter and to apologise and you ignored those instructions)”. When asked in evidence why he did not apologise to Mr McIlroy, Mr Dalley gave what I regard as a sensible explanation. Mr Dalley was responsible for managing the site which was remote. The four men not only worked together but ate and slept in the same house. As well as telling Mr Dalley to apologise to Mr McIlroy, Mr Norrell also told him to “smooth things over”. Mr Dalley’s assessment of the situation after everyone returned to work on the Wednesday was that relationships on site had largely returned to normal and that raising contentious issues again might be counterproductive. That is supported by the evidence that no further issues arose during the Thursday or during the trip back to Christchurch. In light of that explanation and that information, no fair and reasonable employer would have regarded Mr Dalley’s decision not to apologise to Mr McIlroy as any more than a minor breach of instructions.

[32] The next reason for dismissal given by Mr Norrell was “Rudeness to clients (The clients witnessed the entire incident and we have had to deal with the fall out from this via a formal complaint from [the owners] and Homes of Distinction”. The evidence provided no basis at all for what is in parentheses. At the time of the dismissal, Mr Norrell had not spoken to Mr Hyde or the owners about the incident on the Wednesday. Indeed, Mr Hyde said that he was unaware of the incident before Mr Dalley told him about it late in the Friday morning, after the dismissal. It was also clear from Mr Hyde’s evidence that the owners did not see any of what occurred and that they were not sufficiently concerned about it to want Mr Dalley off the site. That is apparent from the fact that they did not mention it to Mr Hyde themselves. Consistent with that, there was no evidence that Mr Hyde or the owners made any complaint about the incident, let alone a “formal complaint”.

[33] The final reason given was “Not acting in the best interests of Norrell Building Limited in a Foreman capacity”. In the absence of any particulars, this reason was meaningless and no evidence was given to explain it. It appears to have been included simply as a makeweight.

Remedies

[34] Mr Dalley claimed reimbursement of wages for a period of 11 weeks. That is the time between his dismissal and 17 April 2010 when he went to Australia to live. The court can only properly order reimbursement of income lost as a result of the dismissal. That means there must be a causal link between the dismissal and the loss.

[35] There was evidence from Mr Dalley that he made enquiries about alternative work for a period of three or four weeks after his dismissal. He did that by telephoning some employment agencies and potential employers he located through the Yellow Pages. Mr Dalley said that he gave up looking for work after four weeks because he felt disheartened.

[36] That evidence was minimal and insufficient to sustain the claim for 11 weeks' wages. While it is undoubtedly disheartening to be rebuffed repeatedly when seeking work, it is a claimant's duty in most cases to continue seeking work throughout the period for which reimbursement is sought. I find that this evidence justifies an award of four weeks' wages at most.

[37] Ms Shaw submitted that no reimbursement of lost wages should be ordered. She based that submission on evidence from Mr Hyde. He said in his evidence in chief that, when Mr Dalley telephoned him on Friday 29 January 2010, his immediate response to the news that Mr Dalley had been dismissed was to tell him that there was "a very good probability" that Homes of Distinction would engage him to complete the build. Mr Hyde went on to say that he discussed that possibility with the managing director of Homes of Distinction who wanted to know if Mr Dalley was interested in such an arrangement. Mr Hyde telephoned Mr Dalley the next day to discuss this. According to Mr Hyde, Mr Dalley was keen to do the work but said that he was leaving for Australia in a month. As the build then required about 6 months to complete, Homes of Distinction did not pursue the idea any further. Ms Shaw submitted that, on this evidence, Mr Dalley would have had alternative employment immediately but for his decision to move to Australia. This,

she said, broke the chain of causation between Mr Dalley's dismissal and his loss of income.

[38] This submission overlooks three things. Firstly, there was no evidence that Mr Dalley was actually offered employment by Homes of Distinction. Rather, the discussion between Mr Hyde and Mr Dalley was about whether Mr Dalley would be interested in accepting an offer if one was made. Secondly, and perhaps more importantly, it overlooks the evidence that Mr Norrell had threatened to sue Homes of Distinction if the contract was taken away from the Company. Mr Hyde did not mention this in his evidence in chief but readily conceded it when it was put to him in cross examination. Significantly, in answer to a question from the court, Mr Hyde said that this was a factor in his thinking about whether to offer employment directly to Mr Dalley. The third factor is that Mr Dalley gave evidence that, on or about 1 February 2010, the managing director of Homes of Distinction unexpectedly died. According to Mr Dalley, all important decisions were then put on hold and he heard nothing further from Mr Hyde. This evidence was unchallenged.

[39] Overall, I find that the decision by Homes of Distinction not to offer employment to Mr Dalley was not simply the result of the perception that he was going to leave the country before the Le Bons Bay job was finished. Even if he had been available for the remainder of the build, the probability is that he would not have been offered employment on that job.

[40] It is appropriate to order reimbursement of the wages lost by Mr Dalley for a period of four weeks. At the time of his dismissal, Mr Dalley was being paid \$28.00 per hour. Based on a 40 hour week, that equates to \$4,480 for four weeks. From that amount must be deducted the money Mr Dalley said he earned from doing casual work he obtained through his father. Mr Dalley was vague about when he did this work and exactly how much he was paid. As the onus lies on Mr Dalley to prove his loss, and to avoid the possibility of unfairness to the Company, I treat this evidence conservatively. I take it into account on the basis that the income was derived during the month after Mr Dalley's dismissal and that the "few hundred dollars" he said he received for that work was after tax. On this account, I reduce the amount of reimbursement to \$4,000.

[41] Turning to compensation, Mr Dalley gave evidence that he felt humiliated being dismissed by telephone, by having to discuss his dismissal with Mr Hyde and by having to contact prospective employers looking for work. He also said that the loss of employment caused sleeplessness and worry about finances. He spoke of “shutting down emotionally”. Mr Dalley’s wife, then his fiancée also gave evidence but very little of it related to his distress resulting from his dismissal. Based on the evidence before me, a just award of compensation is \$6,000.

Contribution

[42] Having found that Mr Dalley was unjustifiably dismissed, I must assess the extent to which he contributed to the situation giving rise to his dismissal and, if appropriate, reduce the remedies awarded accordingly. This requires me to make some findings of fact about what actually occurred on 27 January 2010.

[43] The accounts given by the witnesses were inconsistent. I find, however, that the most likely sequence of events was this. Following afternoon tea, the men were heading back to work. Mr McIlroy was very keen to do the soffit bracket fixing work. Mr Dalley was conscious that the owners required a high standard of work and that they had only just enough material on site to do the work. Quite reasonably, he felt he could not risk any errors in that work and decided to do it himself. When he told Mr McIlroy that, he mentioned that Mr McIlroy had recently made mistakes. Mr McIlroy felt aggrieved about this but did not immediately pursue it. After returning to his previous work for five minutes, Mr McIlroy went back to speak with Mr Dalley again. This is when the argument started. Mr McIlroy wanted to know what he had done wrong on the previous job and disagreed with Mr Dalley’s explanation.

[44] Mr McIlroy then escalated the matter by starting to use profane language. Mr Dalley responded in similar language. They were talking loudly and abusively to each other. This occurred while the two men were standing at a door frame leading to the space where the veranda would be. Mr Dalley was standing on the floor slab. Mr McIlroy was standing outside on the ground about 20 to 30 centimetres lower. Between them was a piece of timber nailed to the door frame about 80 to 100

centimetres off the ground. Mr McIlroy advanced towards Mr Dalley continuing to speak loudly in abusive terms. Their faces came very close to each other and this made them both feel uncomfortable. Mr Dalley pushed Mr McIlroy away and stepped back. This push was sufficient to open up the space between them and not intended to cause Mr McIlroy any harm. Mr McIlroy lost his balance briefly but did not fall over. After regaining his balance, Mr McIlroy took off his tool belt and advanced again towards Mr Dalley, stepping over the piece of timber between them. Mr Dalley took off his tool belt and took a fighting stance. Mr Ahpene then intervened and both Mr Dalley and Mr McIlroy went back to work.

[45] Mr McIlroy was the instigator of the argument and altercation which occurred on 27 January 2010 and must bear most of the responsibility for it. By responding to Mr McIlroy's profanity with profanity, however, Mr Dalley needlessly escalated the argument. Had Mr Dalley remained calm and measured, it is likely the matter would not have become confrontational. Although profane language and robust behaviour is common on worksites such as this, both men were aware that the owners of the property were due on site and should have moderated their behaviour so as not to offend them. As foreman, Mr Dalley had a particular duty to control his behaviour.

[46] Although I have found that Mr Dalley's decision not to apologise to Mr McIlroy was not a serious breach of instructions in the circumstances, it was nonetheless unwise of him to have made that decision without at least telling Mr Norrell that he had done so and why.

[47] I do not find that Mr Dalley's response to Mr Norrell's efforts to arrange a meeting on Friday 29 January 2010 was blameworthy. It was Mr Norrell who was unreasonable by insisting that Mr Dalley put aside his personal business on his day off when there was no real urgency to the situation. It was sufficient on Mr Dalley's part that he did ultimately agree to meet Mr Norrell in the afternoon.

[48] Overall, I assess Mr Dalley's contribution at one third.

Interest

[49] Mr Dalley is properly entitled to interest on the reimbursement of wages but not on the compensation. Interest will be at the rate of 5 per cent per annum from 12 February 2010, being the date half way through the period of reimbursement, down to the date of payment.

Penalty

[50] It was common ground that the Company failed to provide Mr Dalley with a written employment agreement as required by s 63A(2) of the Act. There was, however, no evidence that this failure was wilful or that it had any adverse consequences for Mr Dalley. The Company has limited resources and its culpability with respect to this breach of the Act was minimal. In all the circumstances, and having regard to the fact that remedies are being awarded against the Company for the unjustifiable dismissal, I decline to impose a penalty.

Comment

[51] During the hearing, it became apparent to me that the evidence provided to the Court differed significantly in parts from that apparently provided to the Authority. This accounts in large part for the differing conclusions reached.

Conclusion

[52] In summary, my decision is:

- (a) Mr Dalley was unjustifiably dismissed.
- (b) The Company is ordered to pay Mr Dalley \$2,670.00 (rounded up) as reimbursement of lost wages together with interest on that sum at the rate of 5 per cent per annum from 12 February 2010 down to the date of payment.

- (c) The Company is ordered to pay Mr Dalley \$4,000.00 as compensation pursuant to s 123(1)(c)(i) of the Act.
- (d) By operation of s 183(2) of the Act, the determination of the Authority is set aside and this decision stands in its place.

Costs

[53] Mr Dalley has been moderately successful in his challenge. Subject to any matters of which I am not aware, he is entitled to a reasonable contribution to his costs. I urge the parties to agree costs. If that is not possible, a memorandum should be filed and served on behalf of Mr Dalley within 20 working days after the date of this judgment. Counsel for the Company is then to have a further 20 working days in which to respond.

AA Couch
Judge

Signed at 11.00 am on 31 January 2013.