

[2] Mark Duncan and his wife Moya own and operate Duncan Plumbing. Mr Duncan says that Mr Aldwin resigned of his own volition on 11 November 2008 and that he did not at any time dismiss Mr Aldwin.

Issues

[3] The issue for the Authority to consider is whether Mr Aldwin was unjustifiably dismissed on 11 November 2008 by Duncan Plumbing or whether he simply walked off the job never to return again, thereby resigning from his employment.

What was the background to the exchange on 11 November 2008?

[4] Mr Aldwin had worked on two previous occasions prior to his last period of employment in 2006/2007 for Duncan Plumbing. The first of those occasions was in 2002/2003 when Mr Duncan employed Mr Aldwin through the *Work & Income Subsidise a Worker Scheme*. It was known to Duncan Plumbing that Mr Aldwin had a pre-existing issue with his elbows/forearms. The evidence supports that on that occasion, Mr Aldwin left Duncan Plumbing to have an operation and he did not return.

[5] Mr Aldwin worked again for Duncan Plumbing from November 2004 and he left that period of employment after seven months and was on ACC from that time on.

[6] There was some dispute about these initial periods of employment and who approached who and the reason for Mr Aldwin leaving on each occasion. I am not required to resolve those disputes, but I am satisfied that on the two previous occasions of employment, there were no formalities when the employment ended in terms of any formal written resignations.

[7] Mr Aldwin was taken on again by Duncan Plumbing in April 2007. His duties included operating a mini-excavator, laying drains, loading excess fill with a mini-excavator onto a tip truck and offloading at a dump site.

[8] It was agreed that Mr Aldwin would work four days on and three days off at a point during this final engagement so as to assist with his arms by enabling him to have three days rest from work. Mr Aldwin said that although he was promised a worker, one was not provided until some months after he started. Mr Duncan said

that six months before 11 November 2008 he offered Mr Aldwin a labourer to work with him if he required help. He said that prior to that he made it very clear to Mr Aldwin that he needed to keep him informed of any issues or problems with his injury and that he only needed to ask and assistance would be provided.

[9] I am not satisfied that the scope of my investigation is required to extend whether there were breaches of any health and safety obligations prior to 11 November 2008. I do not find that this was a situation where Mr Aldwin asked for assistance in the intervening period before he was assigned the labourer, but none was provided. I accept Mr Duncan's evidence as more likely that Mr Aldwin was somewhat reluctant to ask for help and although I accept his arms were an ongoing issue for him to manage, it was reasonable for Mr Duncan to consider that he was managing his condition in the absence of any issues being raised with him to the contrary.

Assisting another employee move to Oamaru

[10] During the last period of employment with Duncan Plumbing, Mr Aldwin had the use of the tip truck to get to and from work. Haimona Eddy was one of Mr Duncan's employees. Mr Eddy was leaving work with Duncan Plumbing and was moving to Oamaru on the weekend of 8/9 November 2008. Mr Duncan put on a going away shout for Mr Eddy and the other staff at Duncan Plumbing at a local pub.

[11] Mr Duncan, who it was accepted by Mr Aldwin was a generous man, offered his tip truck to Mr Eddy all fuelled up to move his family's belongings. Mr Eddy did not have a licence to drive the truck and that meant that whilst Mr Duncan's offered the truck, the issue of the driver was left up in the air. Mr Aldwin said that Mr Duncan advised Mr Eddy at the social function that he could provide the truck/fuel but *can't speak for the driver*. Mr Duncan's evidence is that he told Mr Eddy that he would have to sort out the driver. Mr Eddy in his evidence confirmed that he was asked to sort a driver out and said that he put pressure on Mr Aldwin to drive the truck.

[12] I accept that Mr Aldwin did feel under some pressure to volunteer to drive the tip truck for Mr Eddy full of furniture down to Oamaru. Objectively assessed, Mr Aldwin seems to have been the obvious person short of anyone else volunteering as he took the tip truck home. I am not satisfied though that the pressure to drive the

truck came any more from Mr Duncan than it did from Mr Eddy. Human nature being as it is, I accept that Mr Aldwin did not want to be seen to say no at the social function and I accept that he felt some anger when he reflected at a later time about being put on the spot. He felt that he was placed in the situation he was by Mr Duncan. Mr Aldwin dropped the truck around to Mr Eddy's home on Friday, 7 November 2008 as arranged. Mr Aldwin's usual days off were Friday, Saturday and Sunday.

[13] The furniture shift proper commenced on the Saturday and there was another trip down on the Sunday. Although there was evidence about some other people being available to help, they were not there the whole time and the evidence supports that Mr Aldwin and Mr Eddy did the lion's share of the work in loading and unloading the furniture from the truck. Mr Eddy, who I found to be a straightforward witness, said that Mr Duncan had asked him not to let Mr Aldwin carry furniture but Mr Eddy said that he wanted to get the job done.

[14] I also heard from Mr Eddy's fiancée, Carley McDougall, about some comments Mr Aldwin made around a picnic table outside during that weekend. In terms of the matter I am required to determine, I do not place any particular weight on what was said except that it was clear that Mr Aldwin was unhappy during the shift and as matters transpired this was because of pain to his elbows/arms.

Monday, 10 November 2008

[15] Mr Aldwin would ordinarily have attended at work on Monday 10 November 2008. Mr Aldwin said that he did not attend at work that day but cleaned up some rubbish from Mr Eddy's flat and, as he put it, completed the shift process. Mr Aldwin did not advise Mr Duncan that he was not going to be at work, but Mr Duncan said in his evidence that he was not overly surprised or troubled by that as it was not unusual for Mr Aldwin not to turn up and that over the years Mr Duncan simply put up with these *no shows*.

Tuesday, 11 November 2008

[16] The evidence supports that it was more likely than not that Mr Aldwin was at work before Mr Duncan arrived. Mr Aldwin said that he knew that he would not be able to work for a considerable period of time because of the injury to his arm and that he had arrived at work on the Tuesday to return the tip truck and that he had a

doctor's appointment later on that day. The evidence from Mr Aldwin and Mr Duncan is quite different as to who said what. I shall set out both accounts.

[17] Mr Aldwin said that he hopped off the truck when he saw Mr Duncan arrive and went toward him advising him that his arms were sore and that he should never do that again and referred to Mr Duncan as a *bloody idiot*. Mr Aldwin said that he advised Mr Duncan that he would be off for a very long time and that it was at that time Mr Duncan responded *don't bother coming back*. Mr Aldwin said that he asked Mr Duncan twice if he was sacking him and that Mr Duncan nodded twice to indicate that he was. Mr Aldwin said that he then called Mr Duncan a *stick wacker* or words to that effect and walked off.

[18] Mr Duncan's recollection of events is that he arrived at work before 8am and saw the tip truck outside the office which he found a little unusual. He said that as he was proceeding to get out of his own vehicle, Mr Aldwin roared over and it was obvious that he was very angry. He said that Mr Aldwin said that he had set him up with the shift and that his arms were *fucked* and that *you can fucking well stick your job*. Mr Duncan denied that he said anything during the exchange at all except *give it to me in writing Mark*.

[19] There was a dispute about whether Mr Aldwin removed his gear at that stage from the tip truck before he left the premises. Mr Duncan recalls he did. Mr Aldwin says that he returned later with his car to remove his gear from the tip truck. I do not find that resolution of that matter is material to the issues that I am required to determine.

What happened next?

[20] Mr Aldwin went to see the doctor who provided him with a medical certificate which confirmed that he was unable to resume any duties for a period of time. Mr Aldwin did not provide his employer with a copy of the medical certificate. Mr Aldwin said that he considered that he had been dismissed from his employment at that stage.

[21] Mr Duncan said that, given the history that he had with Mr Aldwin, he was not sure whether Mr Aldwin would turn up or not the following day. On Thursday, 13 November, Mr Duncan said he had a call from someone who had previously employed Mr Aldwin and that that person advised that they had heard Mr Aldwin was

looking for work. They wanted to confirm whether Mr Aldwin was still working at Duncan Plumbing and Mr Duncan said that he told the person that he had not heard from Mr Aldwin since he walked off on Tuesday morning.

[22] I am satisfied that Mr Duncan then had Mrs Duncan make out Mr Aldwin's final pay which included holiday pay owing. Payment was made into Mr Aldwin's account on 14 November 2008 as verified by a bank statement provided to the Authority after the investigation meeting.

[23] About three to four weeks after 11 November 2008 Mr Duncan visited Mr Aldwin at home to invite him to a shout as a large job that Mr Aldwin had worked on along with the other men had been finished. Mr Aldwin told Mr Duncan in no uncertain terms to get off his property.

Conclusion

[24] Having heard the two different accounts of what took place, I find that I prefer Mr Duncan's evidence to that of Mr Aldwin. I am not satisfied from the evidence that there was a sending away of Mr Aldwin from his employment at Duncan Plumbing so as to conclude that Mr Aldwin was dismissed. I have reached that view for the following reasons.

[25] Mr Aldwin attended at work on 11 November in an angry state because he considered, and still believes, that Mr Duncan was responsible for the injury which he suffered to his arms whilst helping Mr Eddy shift. I accept that Mr Aldwin was in pain in the morning of 11 November 2008 and that was the cause of his anger that day. Mr Aldwin was intending to visit the doctor that afternoon; although I am not satisfied that he told Mr Duncan of this. Mr Aldwin had a reason in those circumstances' to tell Mr Duncan exactly what he thought.

[26] Mr Duncan, on the other hand, had no reason on the morning of 11 November 2008 to expect an angry outburst from Mr Aldwin or indeed to terminate the relationship between them. I find it likely in those circumstances that Mr Duncan was taken aback by Mr Aldwin's rapid approach towards him as he got out of his vehicle quickly followed by an angry outburst. I find in those circumstances it is less likely that Mr Duncan had time to assimilate the reason for the anger and then to respond to Mr Aldwin along the lines that he should not come back.

[27] I accept that in all probability neither Mr Aldwin nor Mr Duncan recall with absolute accuracy what was said. It is possible, for example, that Mr Aldwin said *stick wacker* and not *stick your job* to Mr Duncan. I accept that at the end of the conversation Mr Duncan thought that Mr Aldwin had in all probability left for good, but he still thought that there was a possibility that Mr Aldwin would turn up the next day. When he did not do so it was not in my view unreasonable that Mr Duncan placed some reliance on the informal way the two earlier periods of employment had ended to conclude that he was not coming back. Mr Aldwin did not advise to the contrary.

[28] I do not find on the balance of probabilities, that Mr Duncan said words to Mr Aldwin or nodded his head to indicate that Mr Aldwin was dismissed and that he should not come back.

[29] Consistent with a view that Mr Aldwin may return Mr Duncan waited a few days before arranging holiday pay to be credited to Mr Aldwin's account. Also I find consistent with the view that Mr Aldwin had chosen not to return rather than being dismissed was the visit, and I find it is likely that there was only one, by Mr Duncan to Mr Aldwin's place to invite him to the shout. Had Mr Duncan terminated Mr Aldwin's employment, then I find it less likely that he would have gone to extend the invitation to that shout. Mr Duncan I accept was genuinely surprised at Mr Aldwin's attitude to him when he arrived at the house.

[30] In conclusion I do not find that Mr Aldwin has made out his personal grievance that he was unjustifiably dismissed from his employment with Duncan Plumbing. His application, therefore, is dismissed.

Costs

[31] I reserve the issue of costs. I understand that Mr Aldwin is legally aided and I do not imagine there will be an application in those circumstances to the Authority. However, if there is to be an application, then the respondent has 28 days to lodge and serve submissions as to costs and the applicant has a further 14 days to respond.

Helen Doyle
Member of the Employment Relations Authority

