

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 267
3055372

BETWEEN DAVID ALLISON
Applicant

AND CERES NEW ZEALAND LLC
Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant
Sarah Townsend, counsel for the Respondent

Investigation Meeting: 25 February 2020 and 19 March 2020 at Christchurch

Submissions [and further 20 March 2020 and 3 April 2020 from the Applicant
Information] Received: 27 March 2020 from the Respondent

Date of Determination: 2 July 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] David Allison commenced with Ceres New Zealand LLC (Ceres) in or about late 2015 as a Welder and Boilermaker. The employment relationship ended in October 2018 when his employment was terminated for reason of redundancy.

[2] Ceres is a company domiciled in New Zealand, incorporated in the United States of America and registered in June 2011 under the Companies Act 1993 to carry on business in New Zealand. It is in the business of providing contracting services, specialising in the

planning and execution of large scale complex construction, disaster recovery, demolition and deconstruction, environmental remediation and materials recycling projects.

[3] The sole director of Ceres is David McIntyre. Mr McIntyre resides in Florida, United States of America when he is not in New Zealand or elsewhere.

[4] On 19 September 2018 Mr McIntyre wrote to Mr Allison proposing to disestablish his role. The letter referred to identifying that Ceres may not need a full time welder/boilermaker because the current and forecast workflows did not seem to support this. The letter provided that whilst it was likely Ceres would still need some welding work carried out, the preliminary view was that this could be adequately serviced by engaging a contractor on an “as required” basis as opposed to employing a full time resource. Mr McIntyre wrote that he would like to consult with Mr Allison to seek his views and comments before reaching a decision by meeting and/or feedback could be provided in writing. This was to be provided by no later than 4.00pm 21 September 2018. Mr Allison was advised he could bring a support person or representative to any meeting to discuss the matter.

[5] On 21 September 2018 there was a request from Ms Oberndorfer’s firm for an extension to the time for Mr Allison to respond and this was granted.

[6] On 28 September 2018 an advocate from Ms Oberndorfer’s firm, Ms Lauren Archer, responded to Mr McIntyre on behalf of Mr Allison. Ms Archer wrote amongst other matters that she did not believe that the proposed restructure is due to a “downturn” in business. In support of that she set out the “facts that give rise to our disagreement.” She referred to some events that took place on 31 August 2018 where locks to the workplace were changed. Further, there was reference to a conversation on 7 September 2018 between Mr Allison and Mr McIntyre that she wrote was recorded. The letter stated that it was clear the proposed restructure was a “sham” and that the recorded conversation of the discussion on 7 September 2018 established that the real purpose of the proposed restructure was to attempt to resolve the non-communication issues within the company. She stated that should Mr Allison’s position be disestablished then he would have grounds for a personal grievance.

[7] On 1 October 2018 Mr Allison was advised that Ceres was investigating an incident that occurred that day. The letter advised a decision had been made to suspend Mr Allison with pay.

[8] By letter dated 9 October 2018 from Mr McIntyre to Mr Allison, the suspension was lifted and Mr Allison was advised that Ceres did not intend to take any further action in respect of the incident.

[9] By letter dated 12 October 2018 Mr McIntyre wrote to Mr Allison and responded to Ms Archer's letter of 28 September 2018 that the restructure was a sham. Mr McIntyre denied in his letter that the proposal to disestablish Mr Allison's role was a sham and he responded in some detail to the concerns Ms Archer had raised. This included reference to the business making a substantial loss and significant negative equity for earlier years and that the demolition market is slowing down. There was reference to the company being unsuccessful in bidding for a major contract on the West Coast. In the letter, Mr McIntyre stated that the proposal around Mr Allison's role was based on clear and genuine business grounds. There was reference to Mr Allison leaving work early on 31 August 2018 being unconnected to this matter.

[10] Mr McIntyre set out in the letter that he had made a decision to disestablish Mr Allison's role and had looked to see whether there were any redeployment opportunities. He asked Mr Allison if he would be interested in carrying out any contract welding work. Mr Allison was asked to provide any feedback about that or any potential redeployment opportunities within the company by 17 October 2018.

[11] By 25 October 2018 there had been no response by Mr Allison.

[12] By letter dated 25 October 2018 Mr McIntyre advised Mr Allison that he had not identified other than the potential for contracted welding work any other potential redeployment opportunities. He asked Mr Allison to take the letter as formal notice of his redundancy and entitlement to two weeks' notice. The letter provided that the notice period was not required to be worked out. Mr Allison was asked if he was interested in carrying out welding work on a contract as required basis to get in touch.

[13] On 5 November 2018 personal grievances were raised on behalf of Mr Allison and he comes to the Authority for resolution of a number of employment relationship problems.

[14] He says that he was unjustifiably dismissed from his employment because redundancy was not the main reason for the termination of his employment.

[15] Mr Allison further says that there were unjustified actions that caused him disadvantage in the workplace from August 2018 as follows:

- (a) That he was locked out of his place of employment without any notification or discussion;
- (b) That he was suspended contrary to clause 23.4 of his employment agreement;
- (c) That he was subjected to an unfair and unreasonable disciplinary process.

[16] Mr Allison says that Ceres additionally breached obligations of good faith and that it embarked on a course of conduct with the motivation to terminate Mr Allison's employment. Mr Allison seeks reimbursement of lost wages, compensation in the sum of \$25,000, a penalty for alleged breach of good faith and reimbursement of costs and filing fee.

[17] Ceres says that Mr Allison was not unjustifiably dismissed and the redundancy was justified in all the circumstances. Ceres deny that it unjustifiably disadvantaged Mr Allison in his employment. It does not accept that Mr Allison was prevented from having access to his place of work. It says that the locks to the workplace were changed when a manager arrived on site to find the site unlocked with no-one in attendance. Further, that Mr Allison was provided with keys for the new locks.

[18] Ceres says that it suspended Mr Allison pending investigation into allegations of serious misconduct that he threatened an individual and badmouthed the respondent to third parties.

[19] It denies that it pursued an unfair and unreasonable disciplinary process but rather investigated serious concerns brought to its attention and then determined not to take any disciplinary action against Mr Allison.

[20] Ceres denies that it breached the statutory duty of good faith and says that it has complied with its duty of good faith at all times.

The issues

[21] The Authority in this case needs to determine the following issues:

- (a) What did Mr Allison's employment agreement provide for redundancy?
- (b) Was the dismissal for reason of genuine redundancy or ulterior motive?

- (c) Did Ceres follow a fair and reasonable process in making Mr Allison redundant;
- (d) Do actions of Ceres on 31 August 2018 amount to unjustified actions that caused disadvantage on behalf of Ceres?
- (e) Was Mr Allison disadvantaged as a result of the change of locks?
- (f) Was Mr Allison's suspension an unjustified action?
- (g) Was an unfair and unreasonable disciplinary process pursued against Mr Allison?
- (h) Did Ceres embark on a course of conduct with motivation to end Mr Allison's employment in breach of the duty of good faith?

What did Mr Allison's employment agreement provide for redundancy?

[22] Mr Allison entered into an individual employment agreement (the employment agreement) with Ceres dated 5 February 2016. It provided in clause 13 for redundancy. When an employee shall be regarded as redundant is described as below:

13.1 The Employee shall be regarded as redundant where the position held by the Employee becomes surplus to the requirement of the Employer or is otherwise disestablished as a result of the closing down of all or part of the Employer's business or a reduction in the work available or as a result of any other genuine business decision of the Employer.

[23] Clause 13.3 provided that if an employee's employment is terminated on account of redundancy the employee is entitled to notice as set out in schedule 1 or 2.

[24] In Mr Allison's employment agreement the notice period for redundancy is 2 weeks.

Was the dismissal for reason of genuine redundancy or ulterior motive?

[25] The evidence supports that leading up to September 2018 there were a number of matters impacting on Ceres. There were concerns about the financial state of the company. There was a reduction in demolition work and lack of forecasted work. A large contract on the West Coast had not been secured and an increase in future work was unlikely. There were issues with purchase orders and there had been conflict between staff.

[26] In June 2018 Mr McIntyre had engaged an experienced advocate in the employment area to undertake an investigation into the allegations that staff were making. Mr Allison although not a complainant was interviewed as part of the investigation. The report that came from that investigation recommended that the structure of the organisation be reviewed as it may be contributing to the situation.

[27] Mr McIntyre returned to New Zealand in September 2018 and held meetings with staff including Mr Allison on 7 September. This was the conversation Mr Allison covertly recorded. Mr McIntyre spoke about the report received about the staff conflicts and the financial situation of the company. Mr Allison accepts that the financial situation was discussed and he raised his concerns regarding the 31 August 2018 event. Whilst he recorded the conversation with Mr McIntyre he did not produce his recording at the Authority investigation meeting. I understand his evidence was that there was nothing significant about it.

[28] The Court of Appeal has confirmed that the clear words of the justification test in s103A of the Employment Relations Act 2000 (the Act) requires the Authority to determine on an objective basis whether the employer's actions and how it acted were what a fair and reasonable employer could have done. The importance of addressing the genuineness of a redundancy decision was emphasised by the Court of Appeal.¹

[29] Ms Oberndorfer submits that Ceres embarked on a course of conduct with the intention of ending the employment relationship and the redundancy was a sham and not genuine.

Mixed reasons for the restructure

[30] Ms Oberndorfer raises a concern that Ceres, in the proposal to make Mr Allison redundant, referred to the review being partly as the result of the recent investigation into the work environment and partly the result of a downturn in business. She submits that the reference to organisational issues was misleading and not an appropriate basis in any event for a restructure and redundancy. Mr McIntyre in his evidence said that the investigators report about staff issues and conflict was the trigger for a review but the reason for the restructuring was the need to cut costs and the downturn in work.

¹ *Grace Team Accounting Limited v Judith Brake* [2014] NZCA 541 at [84]

[31] The letter of 19 September does refer to the investigation into the work environment and there is detail in the letter about Ceres sustaining a financial loss and current work forecasts not suggesting uplift in work. There is reference to three projects in Christchurch being scheduled to be completed by the end of October 2018 and that the company has not been successful in winning big projects. There are specific references to the role undertaken by Mr Allison in relation to these matters.

[32] I am satisfied from the evidence that the financial difficulties facing Ceres together with the current work and forecast work flows in 2018 were sufficient to support a justifiable reason for a review of the business separate to and independent of any review of the work environment. The changed structure recommendations were focussed predominantly on those in more senior roles than Mr Allison. The evidence does not establish on the balance of probabilities that the investigation into the work environment and anything in the investigation report was the reason for the proposal to disestablish the welder/boilermaker position. To the extent that the reference to the work environment could create some initial confusion the balance of the letter makes the reason for the restructuring clear.

Impact of reduction in work on role of welder/boilermaker

[33] In his role Mr Allison was required to undertake the responsibilities listed in schedule 3 of his employment agreement. He was involved in carrying out repairs to machinery, attachments and maintenance work on machinery Ceres used on the demolition/operations side of the business.

[34] I accept Ms Townsend's submission that the evidence supported the demolition work was decreasing in 2018 and correspondingly there was less repair and welding work required on Ceres machinery. Mr Allison in answer to a question about the welding/boilermaking work said that he was "not doing much in 2018." He referred to doing repairs on the Rock crusher and "bits/pieces." Mr McIntyre knew that from time to time Mr Allison performed work under the supervision of the then Ceres Manager of Property Bernie de Vere. Mr McIntyre did not take issue with that because he said the demolition side of the business was slowing however that was not Mr Allison's central role.

[35] There was evidence to support a decrease and fluctuations in the work requirements for the welder/boilermaker role.

[36] Project Manager Sam Brown's evidence was that after Mr Allison's role was terminated the welding work required by Ceres has been contracted out on an "on demand" basis and the welding work required to be undertaken fluctuates. Mr Allison's role has not been replaced.

Sham and personal motives

[37] A number of matters were put forward by Mr Allison to say that the redundancy was a sham and personally motivated.

[38] Ms Townsend is correct in her evidence that some of these matters surfaced for the first time at the Authority investigation meeting and I accept they were not raised during the restructuring process when it was alleged that it was a scam. At that time there was only mention of the events of 31 August 2018 and the meeting of 7 September 2018.

[39] Mr Allison for example had difficulty with his previous manager however his reporting line changed to Mr Brown in mid-2017 because of these issues which was some time before September 2018.

[40] The Authority heard evidence from Mr de Vere with whom Mr Allison had a good relationship at Ceres. Mr de Vere is no longer an employee of Ceres. Mr McIntyre in his written evidence described Mr de Vere as not credible for reasons that I do not set out save as to say that he considered there an element of vindictiveness against the company from Mr de Vere's evidence.

[41] In his written evidence Mr de Vere said that in June 2018 Mr McIntyre told him that he was going to "get rid" of some employees including Mr Allison and that the same was said on 15 March 2018 and he recorded that conversation in notes that he took each day.² There was a file note dated 15 March 2018 with an entry that "was to be let go Mr Allison."

[42] In contrast to that evidence Mr McIntyre said in his evidence that when Mr Allison had two job offers in Australia and New Zealand in late April 2018 he did not encourage him to take them up. Further when advised again in June 2018 that Mr Allison was threatening to leave he approved a pay increase to Mr Allison to \$38 per hour. He said that while work was decreasing in New Zealand there was work in the United States and he planned to use Mr

² Statement of evidence of Bernie De Vere at [20],[21] and [27]

Allison's skills there. The evidence supported that Mr McIntyre valued Mr Allison's skills. Mr Allison said that the relationship he had with Mr McIntyre was one of "mutual respect." Both the pay increase and the proposed work in the United States is supported by an email from Mr Brown to Mr Allison dated 21 June 2018. Mr Allison was refused a visa for entry into the United States and the option for work in the USA was not possible. Those matters I find are inconsistent with Mr de Vere's note made in March 2018 and recollection of a conversation in June 2018 of a desire to "get rid" of or "let go" Mr Allison. I find Mr de Vere's evidence on those aspects less reliable.

[43] Mr de Vere also had limited knowledge of the operations side of Ceres that dealt with demolition and welding work. Whilst he may have views on matters relating to Mr Allison's redundancy they are not views formed from an understanding of any depth about that area.

[44] Mr de Vere said in his evidence that Mr Allison at or about the material time did not have a lot of welding work to do and that he therefore assisted Mr de Vere on the property side of Ceres. Mr de Vere was aware that some major demolition projects in Christchurch were slowing down at the material time and he was aware of the loss of the West Coast job. His evidence was that he did not think Ceres tendered for that job. I prefer the evidence of Mr McIntyre and Mr Brown that the job was tendered for unsuccessfully.

[45] The events of 31 August 2018 do not satisfy me that they were part of a course of conduct to dismiss Mr Allison. This event will be examined in more detail when I turn to the disadvantage grievance alleged. For present purposes there was a belief that Mr Allison had resigned. A text message from Mr Brown to Mr Allison of 31 August 2018 confirms his understanding Mr Allison had "quit." Mr Allison did not respond to that message. The locks were changed in all likelihood to secure the site on which expensive equipment was stored. When Mr Brown saw Mr Allison the following day and established that he had not resigned Mr Allison was immediately provided with a new set of keys. In assessing this matter I have placed weight on the fact that Mr Brown without question accepted Mr Allison's explanation that he had not in fact resigned.

Other employees made redundant

[46] Mr McIntyre confirmed that two other employees had been made redundant and departing employees were not replaced. Mr McIntyre in his oral evidence stated he had had

reduced staff by 30% in the operations area through redundancy and attrition within the months following Mr Allison's redundancy.

[47] In all the circumstances I prefer that evidence and Mr Brown's about the continued fluctuating demand for welding since Mr Allison's redundancy and the need to reduce costs to Mr de Vere's general statement in his evidence that he did not know why Mr Allison was made redundant.

Conclusion on genuineness

[48] Ceres was advised that Mr Allison considered the proposed restructuring a sham because of the events of 31 August 2018 and further because of a meeting he had had with Mr McIntyre on 7 September 2018. Mr Alison did not provide the recording of the meeting to the Authority and I can therefore place little weight on that.

[49] I am satisfied for financial and current and forecast work reasons that the redundancy was genuine within the definition provided by clause 13.1 of the employment agreement of a redundancy situation. I do not find that the redundancy was for an ulterior motive.

Did Ceres follow a fair and reasonable process in making Mr Allison redundant?

[50] There was information provided in the letter of 19 September 2018 that enabled Mr Allison to respond to the proposal in writing or in person that his position be disestablished. Mr Allison confirmed in his evidence that he was aware of financial difficulties facing Ceres although not the extent of these and he understood current work was coming to an end and new work had not been secured on the West Coast. An extension of time was requested by his representative to respond to the proposal and this was granted. There was adequate time permitted for consultation.

[51] The response was limited to a view that the process was a sham. Ms Oberndorfer submits that it would have been known Mr Allison undertook additional work and this was never taken into account. The welder/boilermaker position was the role that Mr Allison was employed to undertake with Ceres. Mr Allison did not raise issues about any other work he undertook during the consultation period or when he was asked for his views on redeployment options.

[52] Ceres income for 2018 and its combined income for 2018 and the two previous years (negative amounts) was provided in the letter of 12 October 2018 that set out the restructure outcome. Ms Oberndorfer says that was too late.

[53] This was not a situation where financial figures alone were the reason for the proposed restructuring of the welder/boiler position or that advice about the financial state of Ceres came as a great shock and surprise. There was also a reduction in available work. The financial records that the Authority saw and figures provided to Mr Allison simply confirmed the extent of the financial difficulties already known about. I agree with Ms Townsend's submission that whilst Mr Allison could decide not to engage further beyond maintaining the process was a sham there was opportunity to discuss any issues or clarify any matters he was unsure about.

[54] Mr McIntyre did address each to the elements put forward to suggest that the process was a sham. Redeployment options were considered and Mr Allison was asked if he was interested in the contractor welder role. He was paid notice in lieu in accordance with his employment agreement and the option of carrying out welding work as a contractor when required was again made at the time notice was given.

[55] I find that the process adopted was that which a fair and reasonable employer could have undertaken in all the circumstances at the time of termination of Mr Allison's employment.

[56] Mr Allison has not made out his grievance that he was unjustifiably dismissed.

Was Mr Allison unjustifiably removed from accessing his place of work in a manner that caused him disadvantage?

[57] Mr Allison left the site on Friday 31 August 2018 unexpectedly about mid-afternoon. He said that he had heart palpitations and felt stressed. At the time he was living in a caravan/campervan next door to the site and he returned there initially. He then said that he drove from the site. He was unclear where he drove but did recall making a doctor's appointment for Monday.

[58] An issue arises about what was said by Mr Allison at the time he left the site and to whom. The only person the Authority heard evidence about regarding that matter was a

contractor on site at that time who I shall call Don. I heard evidence from Don by telephone in the presence of Ms Oberndorfer and Ms Townsend on 17 March 2020. Understandably given the passage of time since 31 August 2018 Don could not recall a lot. He did recall that Mr Allison left the site and he thought he was not well. He could not recall making contact with anyone from Ceres about Mr Allison's departure but said he may have spoken to Mr Brown about securing the site. He said that he could have said Mr Allison's gone "for whatever reason." He could not recall telling Mr Brown that Mr Allison had "lost the plot" or words like that.

[59] Mr Brown said that it was reported to him by Don that Mr Allison had left the site in a "rage" and from what was said to him he concluded that Mr Allison had "quit." Mr Brown said that he tried calling Mr Allison several times on his work and personal cell phones but there was no answer and Mr Allison did not try to call him back. Mr Allison agreed that Mr Brown called him that day after he had left the site but he did not answer or return his calls as he was in no state to do so.

[60] Mr Brown was concerned and drove to the workshop. He said that he found the front gate open, nobody on site and some containers left open. He could not see Mr Allison's vehicle or tools. Mr Allison said that he left his tools behind and denied removing any from site. Mr Brown said that he knocked on the door of the campervan and there was no answer. He then said that he contacted Don again who confirmed what he had said previously about the angry state Mr Allison had left in.

[61] Mr Brown then sent a text message at 5.33pm on 31 August 2018 to Mr Allison as follows:

Hi Dave,

I've been trying to call you. Your other phone is off and if [sic] just been out to Belfast. Don called me and told me you quit? Is that true?

[62] Mr Allison did not respond. He said in his evidence that Mr Brown was one of the "stressors."

[63] Mr Brown contracted Mr McIntyre about securing the site which he said had equipment on it worth hundreds of thousands of dollars. Mr McIntyre instructed Mr Brown to change the locks and he attended to this. Mr Brown said that he was there until about 6pm

that night changing the padlocks and organising the lock on the buildings to be replaced. He did not see Mr Allison in that time.

[64] Mr Brown returned to the site the following day which was Saturday to complete the lock change and whilst there he saw Mr Allison arrive in his vehicle about 1pm. Mr Brown asked Mr Allison about the previous day. Mr Alison confirmed he had been on stress leave and had not resigned from his role. Mr Brown explained that he had changed the locks to secure the site and he gave Mr Allison a new set of keys.

[65] The evidence is clear that Mr Brown believed from what he had been told Mr Allison had resigned and he attempted to clarify that several times with Mr Allison before changing the locks. Ms Oberndorfer in her submission is critical of Ceres for not simply locking up using the existing locks rather than getting them replaced. It is though for Ceres to choose how to secure their site. The issue for the Authority is whether Mr Allison was removed from accessing his work place because of the changed locks.

[66] Changing the locks was not an unjustified action on the part of Ceres. There was uncertainty about Mr Allison's intentions in leaving the site, there were attempts to clarify his intentions with him unsuccessfully and there was expensive equipment stored on the site. Further the evidence established that he did not return to work until a few days after he had been given the new keys because he was unwell. I do not therefore conclude Mr Allison was actually removed from or prevented from accessing his place of work or his tools. He was not locked out from his campervan. There was no disadvantage to Mr Allison in those circumstances

[67] I do not find that this unjustified disadvantage claim is made out.

Was the suspension an unjustified action that caused disadvantage?

[68] On 1 October 2018 Mr Allison was advised in a letter from Mr McIntyre that he was suspended on pay. The incident that Ceres was investigating was referred to as one that occurred that day. Issues of concern were stated to have arisen in relation to Mr Allison's behaviour to Ceres employees and suppliers. It was written that Mr Allison was engaged in volatile and irrational behaviour, making negative comments about the company towards staff and suppliers and unprofessional behaviour. Further that it had come to the attention of

Ceres that over the past few weeks Mr Allison had been engaged in unprovoked aggressive behaviour.

[69] The letter referred to two dates of significance. That there was to be a disciplinary meeting on 4 October 2018 and that there needed to be a response to the suspension proposal by 10.00 am 2 October 2018.

[70] There was no response within that timeframe and Mr McIntyre said in his evidence that he made the decision to suspend Mr Allison on full pay until the investigation was carried out.

[71] A response was sent in a letter dated 3 October 2018 from Mr Allison's then representative Ms Archer to Mr McIntyre. In the letter she referred to the suspension being a breach of clause 23.4 of the employment agreement. She advised that Mr Allison was not clear what the allegations referred to and that it was part of a "witch hunt" and a "sham". It was written that this was the third attempt to terminate Mr Allison's employment with reference to the changed locks and the restructuring proposal.

[72] The evidence did not support that there was a meeting on 4 October but rather Mr Allison remained suspended until 9 October 2018.

[73] Mr McIntyre wrote a letter to Mr Allison on 9 October 2018 lifting the paid suspension and advising that there had been a decision not to proceed with disciplinary action. In the letter there was reference to a specific interaction between Mr Allison and another employee on 1 October 2018 and statements were attached.

[74] The first statement attached to the letter was dated 1 October 2018. It referred to an incident on 1 October where Mr Allison was agitated and complaining, that at one stage Mr Allison became very angry and physically threatening and was shouting. It was written that prior to the incident this employee had been approached by a supplier who was having trouble with Mr Allison and finding it hard to work with him and that he had been badmouthing the company. There was reference to similar stories from other contractors. There was another statement dated 3 October in which the same employee wrote that on his return to the workshop after making his complaint Mr Allison apologised for his behaviour and it seemed sincere and he accepted the apology and they continued their work.

[75] Clause 23 of the employment agreement refers to suspension. It provides for both suspensions with and without pay. Clause 23.4 provides:

The Employer's right of suspension may be exercised only after the Employer has informed the Employee of the matters of concern (including the Employer's reason for considering suspension) and had given the Employee opportunity to respond on the issue of suspension and any terms proposed to be attached to it.

[76] Clause 23.5 provides

Notwithstanding clause 23.4, the Employer may suspend the Employee in circumstances of urgency or where compliance is impracticable for reason outside the Employer's control. In such event, the Employer will use its best efforts to comply with clause 23.4 as soon as possible.

[77] Ms Oberndorfer submits that Mr Allison should have been consulted by Ceres on the day of the incident before suspension under clause 23.4 of the employment agreement. Mr McIntyre in his evidence said that the verbal complaint from the employee about Mr Allison on 1 October 2018 was that he had been angry and was shouting and accusing the employee of stealing his job and that he had threatened to punch the employee. The employee reported that he felt unsafe and afraid to be around Mr Allison.

[78] I accept Ms Townsend's submission that the circumstances were such that they could be said to be urgent within clause 23.5 because of potential health and safety issues. What clause 23.5 does require are best efforts to comply with clause 23.4 as soon as possible after suspension.

[79] Ms Oberndorfer submits that the time for Mr Allison to respond to the proposal was too short because having received written notification of the suspension about 5.15pm on 1 October he only had until 10am the following day to respond. Mr de Vere's handwritten notes of 1 October support that he spoke to Mr Allison earlier and told him he was not to go near the workshop.³ I conclude from those notes that Mr Allison was aware that the focus was on what occurred that day.

[80] I am strengthened in that because the letter of 1 October also confirms the incident to be investigated as one that occurred that day. There is I accept a degree of vagueness about the allegations which had the matter proceeded without those being clarified that may have been significant.

³ See document N bundle of documents.

[81] The reasons for suspension are however set out reasonably clearly:

From information we have received we are concerned about your actions on site, which caused unnecessary burden on our staff, have exposed the business to risk of claims from those affected parties and put the safety of yourself and others at risk.

[82] I accept that the timeframe to respond was short however it usually is with a suspension. Ms Oberndorfer submits that had Ceres spoken to Mr Allison in the first instance then they would have understood that he had apologised to the other employee. Mr Allison had an opportunity to say that he had apologised on 2 October 2018 with an understanding the focus was on what had occurred that day or if he needed more time to respond he could have asked for that. He was represented at that time.

[83] The only matter that I have paused on is whether the period of suspension was longer than it needed to be. 1 October 2018 was a Monday. The investigation seemed to be concluded by 3 October when all the statements that the Authority saw had been provided. It was not until the following Tuesday 9 October, that the paid suspension was lifted and Mr Allison advised that no further action was to be taken in respect of the incident. I have stood back and objectively looked at this in the round. I have allowed a day or so as not unreasonable for Ceres to consider whether to proceed with investigation and findings about the allegations. There is then an intervening weekend. I could not be satisfied that the period after 3 October was such a significant period to be unjustified and not the action a fair and reasonable employer could have taken.

[84] In conclusion a serious allegation was made about the actions of Mr Allison on 1 October 2018. The other employee reported concerns for his safety and felt physically threatened. A fair and reasonable employer could have suspended Mr Allison in reliance on clause 23.5 in the circumstances and then complied with the requirements of clause 23.4. Ceres provided an opportunity for Mr Allison to respond to the suspension which was formally advised out of business hours on 1 October. He did not do so within the timeframe and no extension was sought. I have weighed that Ms Archer was representing Mr Allison at that time with the restructuring issue. The allegations were somewhat vague but it was clear that the focus was on the incident of 1 October by the wording in the first sentence and the reasons for considering suspension were set out as clause 23.4 required. The suspension was lifted some three working days after the investigation appeared to have concluded. Objectively assessed in the round the period of time between 3 October and 9 October with

an intervening weekend was not such an extensive period to conclude the delay was unjustified. I have weighed that it was suspension with full pay.

[85] I do not conclude that this unjustified disadvantage claim is made out.

Was an unfair and unreasonable disciplinary process pursued against Mr Allison?

[86] The timing of the incident on 1 October 2018 was unfortunate as it fell within a restructuring process that Mr Allison regarded as a sham. I accept that Mr Allison felt under considerable stress at that time and was clearly upset. There was however an incident involving him and the other employee and a complaint was made. Mr Allison in his evidence did not regard it as a significant event however he did apologise.

[87] I do not conclude a fair and reasonable employer could not have raised concerns about the incident with Mr Allison including a potential disciplinary outcome and undertake some investigation. Ceres also had obligations towards its other employees. As it transpired no disciplinary or other action was taken and no findings were made.

[88] I do not find that this unjustified disadvantage claim is made out.

Did Ceres embark on a course of conduct with motivation to end Mr Allison's employment in breach of the duty of good faith?

[89] Mr Allison believed that there were steps taken by Ceres on three occasions with the deliberate intention to terminate his employment. Three events took place within a reasonably short period of time. The reason for the termination of the employment relationship has been found assessed objectively to be a genuine redundancy within the meaning of the employment agreement.

[90] The other two events arose independently of this. I agree with Ms Townsend that neither of them take away from the genuine need to restructure and the outcome to that restructuring.

[91] This claim is not made out.

Costs

[92] I reserve the issue of costs. I encourage agreement about costs. Failing that Ms Townsend has until 17 July to lodge and serve submissions as to costs and Ms Oberndorfer has until 31 July 2020 to lodge and serve submission as to costs in reply.

Helen Doyle
Member of the Employment Relations Authority