

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2016] NZERA Christchurch 169  
5587585

BETWEEN            PAUL WILLIAM BRAY  
Applicant

A N D                JAMES SCOTT  
CONSTRUCTION LIMITED  
Respondent

Member of Authority:    Helen Doyle

Representatives:        Michael McDonald, Advocate for Applicant  
Tara Smith, Advocate for Respondent

Investigation Meeting:    29 July 2016 at Christchurch

Submissions Received:    4 August 2016, from the Applicant  
26 August 2016, from the Respondent

Date of Determination:    23 September 2016

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**DETERMINATION OF THE AUTHORITY**

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**A    Paul William Bray was unjustifiably dismissed from his employment with James Scott Construction Limited.**

**B    James Scott Construction Limited is ordered to pay to Paul William Bray:**

- (i)    The sum of \$3308.11 gross being reimbursement of lost wages under s 123 (1)(b) of the Employment Relations Act 2000.**
- (ii)   The sum of \$6300 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.**

**C Costs are reserved and failing agreement a timetable has been set for submissions.**

**Identity of respondent**

[1] The employment relationship problem was lodged against a company called James Scott Interior Construction Limited. There is no company by that name. The name of the respondent is James Scott Construction Limited and is accordingly amended by consent. I shall refer to the company as James Scott or the company from here on.

**Employment relationship problem**

[2] Paul Bray commenced employment with James Scott in early May 2015 as a joiner. The sole director and owner of James Scott is Stephen Smith. Tara Smith is Mr Smith's daughter and an active shareholder in James Scott.

[3] There was an exchange between Mr Bray and Mr Smith on 8 September 2015.

[4] Mr Bray left the workplace after the exchange and drove home. He said that he expected Mr Smith to contact him by telephone and that the exchange would blow over like it had in the past.

[5] Mr Smith said that he knew Mr Bray needed some time so did not contact Mr Bray believing he would return to work in the next day or so once he had sorted his issues. Mr Smith and Mr Bray did not talk directly again.

[6] On Thursday, 10 September 2015 Mr Bray returned to the workplace and spoke to another employee, Phillip. Mr Smith was not present. Mr Bray formed a view that he had been dismissed because his workstation was cleared of work and the tools belonging to James Scott had been removed from his tool bag.

[7] Mr Bray says that his view he had been dismissed from his employment came to the attention of Mr Smith and Ms Smith but there was no attempt to advise him that was not the case.

[8] James Scott says that Mr Bray was not dismissed from its employment but resigned, choosing to seek other employment. Mr Smith says that this was made clear to other staff members and on that basis Mr Bray was paid out his entitlements.

[9] There was reference in the statement of problem to both an alleged dismissal and unjustified disadvantage. It is clear, however from final submissions that the only matter pursued by Mr Bray is whether or not he was unjustifiably dismissed. Mr McDonald confirmed that although there was a claim for a penalty for failing to provide an individual employment agreement, that claim was withdrawn and a penalty was no longer sought. Mr Bray seeks reimbursement of four weeks' lost wages, compensation and costs.

### **The issues**

[10] The Authority is required to consider the following issues in determining how the relationship ended:

- (a) What was the nature of the exchange between the parties on Tuesday, 8 September 2015;
- (b) What did Mr Bray and Mr Smith conclude the effect of the exchange was on the employment relationship;
- (c) Did Mr Smith know that Mr Bray believed he had been dismissed or had Mr Bray, as Mr Smith heard from other employees, found other employment and resigned;
- (d) What date did the relationship end?
- (e) How did the relationship end?
- (f) If Mr Bray was dismissed, then was that dismissal unjustifiable?
- (g) If the dismissal was unjustifiable then what remedies should be granted and are there issues of mitigation and contribution?

**What was the nature of the exchange between the parties on Tuesday, 8 September 2015?**

[11] There is some dispute about exactly what was said and done on 8 September 2015. I will set out Mr Smith's and Mr Bray's evidence about the event.

[12] Mr Smith said that he observed Mr Bray operating a two handed sander and checking his mobile phone at the same time and told Mr Bray not to text in work time but in lunchtime or to go home and sort it out. He did not agree that he yelled at Mr Bray.

[13] Mr Bray agreed that he was operating a sander, although described it as a one handed sander. He said that he decided to check the text when he was alerted to it as he was dealing with issues including insurance following a house fire. He and his family were staying with friends. He said that Mr Smith yelled at him that if he wanted to text he could "piss off home". He told Mr Smith he was reading a text not sending one and Mr Smith said "the offer still stands".

[14] Mr Smith was outside the workshop when Mr Bray left in his car and he observed Mr Bray doing a wheel spin or there was some loss of traction when he left. Ms Smith also heard a noise at this time consistent with a wheel spin.

**What did Mr Bray and Mr Smith conclude the effect of the exchange was on the relationship?**

[15] I do not find after 8 September 2015 either party considered the employment relationship between them to be at an end. Mr Bray thought that Mr Smith would call him later that day about the next day's work and that any issue between them would just blow over like it had in the past. Mr Smith concluded that Mr Bray needed some time and would return to work in the next couple of days when he had sorted his personal issues out.

[16] As it transpired Mr Smith did not call Mr Bray and Mr Bray did not call Mr Smith.

**Further communication by Mr Bray with Phillip and Trudy**

[17] Mr Bray became concerned that he had been dismissed when he had not heard from Mr Smith by Thursday 10 September 2015. He decided to go to work at the usual time around 8am to talk to Mr Smith to see if he still had a job. When Mr Bray arrived at the workshop Mr Smith was not in the factory. Mr Bray asked another employee, Phillip whether he still had a job. Phillip responded that he was not sure whether Mr Bray had a job or not and Mr Bray would have to talk to Mr Smith or Ms Smith. Mr Bray was not able to contact Ms Smith and said he was told by Phillip that Mr Smith had left his cell phone at home that day.

[18] Mr Bray said that he then decided that he would just get on with his work but noticed his work station had been cleared of all work and his tool bag emptied of the respondent's tools leaving only his personal tools in the bag. Phillip did recall Mr Bray mentioning that James Scott tools had been removed from his bag. Mr Bray said at this stage he considered what had happened over the previous days and decided he had been dismissed. Mr Bray collected items that he had in the workplace and did not hear further from Mr Smith.

[19] Phillip said he was pretty certain that Mr Bray told him he already had new employment although agreed that it was also possible that Mr Bray said that was all right because he could get employment elsewhere. Phillip told Mr Smith that Mr Bray had come into the workshop. The evidence supported that there was some discussion about Mr Bray's view that he thought he no longer had a job. I find it likely that Mr Smith concluded that Mr Bray had another job and he decided to not contact Mr Bray.

[20] The evidence supported that Mr Bray was usually paid weekly on a Friday however on Friday 11 September 2015 he found he had not been paid his wages. He called the office and I find in all likelihood asked for Mr Smith or Ms Smith. Mr Smith was unavailable and Ms Smith did not work on Fridays. Mr Bray did speak to Trudy who worked part-time at James Scott undertaking administration and payroll. Trudy confirmed in her evidence that Mr Bray told her that he had "obviously been fired" and was not coming back to work and that he was taking legal action if he was not paid. Trudy advised Mr Bray that she was a company employee and he would need to talk things through with Mr and Ms Smith.

[21] Trudy called Ms Smith after her conversation with Mr Bray to confirm whether she could process Mr Bray's pay. Ms Smith advised that Mr Bray had to return his work key before payment of his wages was made. Mr Bray said that as he was desperate to be paid he took the work key down to work immediately and Trudy processed his pay that night but advised that his holiday pay would come through on the next pay cycle which was the following Friday.

[22] The evidence from Ms Smith supported that she understood Mr Bray was under the impression he had been fired or sacked but she was confident that he had another job and would not come back to work.

[23] I find that Mr and Ms Smith were aware that Mr Bray believed he had been dismissed but they understood that he had obtained another role and no steps were taken to contact Mr Bray and advise him he was not dismissed.

#### **What date did the relationship end?**

[24] I find that Mr Bray considered he had been dismissed on 10 September 2015 and that was reinforced by the request the next day, 11 September 2015, to return his key before he received his pay. The relationship could still though have been successfully restored at that point.

[25] There were some text exchanges on 18 September 2015 between Mr Bray and Ms Smith when he did not receive his holiday pay. Viewed objectively overall the text messages from Mr Bray confirm his belief that he had been fired. He says in his text message that Mr Smith had told him to "piss off" and that he would not be paid until he had handed his keys in. Ms Smith responded during the chain of text messages that she did not accept that Mr Bray had been fired and although she agreed he had been asked to hand his key in before payment that was because he found another job. Mr Bray responded by text that he had to because when he came back to work his tool bag had been cleaned out of work tools.

#### **How did the relationship end?**

[26] Mr Bray says that he was dismissed and James Scott says he resigned from his employment to undertake employment elsewhere. Neither party considered the relationship at an end after the 8 September 2015 exchange. I do not find what was said or done on that date constitutes a resignation by Mr Bray and I do not find that

Mr Bray intended to resign. I also do not find that there was an intention on the part of Mr Smith to dismiss Mr Bray at that time. Instead both thought the other would make some contact or simply return to work.

[27] Both Mr and Ms Smith came to understand after 8 September 2015 that Mr Bray considered he had been dismissed but reached a view from other employees that Mr Bray had found another role. The evidence I heard did not establish that was in fact the case at that point in time.

[28] Mr Smith says that there were explanations for the tools being removed and the workstation however as there was no direct communication those explanations could not be discussed with Mr Bray. Mr Bray I find did try unsuccessfully on 10 September 2015 to contact Ms Smith because he understood Mr Smith did not have his cell phone with him.

[29] *Taylor v Milburn Lime Limited*<sup>1</sup> is a judgment of the Employment Court where there was an issue about whether there was a resignation or dismissal. In that case Judge Couch accepted that Mr Taylor did not intend to resign and stated at [29] amongst other matters:

...Since the 2004 amendments to the Employment Relations Act 2000, the obligation of good faith specifically “requires the parties to an employment relationship problem to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative”. Guided by the test of justifiability in s 103A, employers must now ensure that, in taking any step which may disadvantage an employee, they do what a fair and reasonable employer would do in all the circumstances.

[30] The test of justification in s 103A against which this matter must be determined on an objective basis is different to that considered in *Taylor* and is what a fair and reasonable employer could have done in all the circumstances at the time.

[31] In *New Zealand Cards Limited v Ramsey*<sup>2</sup> Judge Couch considered two scenarios. The first is where an employee is against his or her will treated by an employer as having resigned and does nothing within a reasonable time to correct the employer’s false impressions. The second is where an employer learns that the employee has misunderstood communications as a dismissal contrary to its intention but does nothing within a reasonable time to correct that false impression.

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<sup>1</sup> [2011] NZEmpC 164 (2011) 9 NZELR 275

<sup>2</sup> [2012] NZEmpC 51 CRC 6/10

[32] In the first scenario the employee must suffer the adverse consequence of passively standing by and letting the employer think that a resignation has taken place and in the second scenario, which I find is similar to this matter, the employer must suffer the adverse consequence of passively standing by and letting the employee think that a dismissal has taken place.

[33] A fair and reasonable employer in the circumstances Mr and Ms Smith were in could have been expected to have directly communicated with Mr Bray as soon as possible to advise that he was not dismissed. That was consistent with the duty of good faith to be active and constructive in maintaining the employment relationship. Had there been that communication and advice that Mr Bray had not been dismissed by Mr or Ms Smith there is no reason to conclude that Mr Bray would not have returned to work and the employment relationship could have been successfully restored.

[34] Mr Smith and Ms Smith both said that they had assisted Mr Bray during the employment relationship when issues arose for him from time to time outside of the employment relationship. In contrast though with other good faith behaviour on their part towards Mr Bray there was a deliberate decision not to contact Mr Bray after 8 September 2015. It was thought from discussions with Phillip and Trudy that he had found other employment. There was no attempt though to confirm that with Mr Bray directly. Mr Bray had not found other employment as at 11 September 2015. He did look for other work when he concluded he had been dismissed.

[35] I find that Mr and Ms Smith's failure to promptly communicate with Mr Bray after they knew he believed he had been dismissed instead maintaining that he had resigned amounted to a dismissal. I do not find that Mr Bray resigned from his employment.

### **Was the dismissal unjustifiable?**

[36] The test of justification is found in s 103A of the Employment Relations Act 2000 (the Act). It requires the Authority to determine whether a dismissal was justifiable on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[37] Section 103A (3) of the Act provides that the Authority must consider four factors about procedural fairness and s 103A (4) provides that the Authority may consider other factors it thinks appropriate but must not determine a dismissal unjustifiable solely because of defects in the process followed by the employer if they were minor and did not result in the employee being treated unfairly. A fair and reasonable employer will comply with the statutory good faith obligations.

[38] James Scott did not argue that the dismissal was justifiable. It was not suggested that the conduct on 8 September 2015 would have justified dismissal although there may have been a discussion had employment continued about what happened on 8 September 2015. The procedural fairness requirements in s 103A (3) of the Act were not met in this matter. Once it became apparent that Mr Bray thought he had been dismissed Mr and Ms Smith unjustifiably failed to communicate with him within a reasonable time to confirm that was not the case.

[39] I find that Mr Bray was unjustifiably dismissed from his employment with James Scott and is entitled to consideration of remedies.

## **Remedies**

### *Lost wages*

[40] Mr Bray was without employment for a period of four weeks between 11 September 2015 and 12 October 2015. I am satisfied that he attempted to mitigate his lost wages. Mr Bray has assessed his average earnings per week at James Scott as \$962.15 gross but my assessment over the 17 weeks for the same period from the breakdown of hours and wage report provided by James Scott was average earnings of \$918.92 gross per week. I shall use that figure.

[41] Subject to issues of contribution Mr Bray is entitled to reimbursement of lost wages in the sum of \$918.92 multiplied by four which is the sum of \$3675.68 gross.

### *Compensation*

[42] There were matters I accept that caused Mr Bray humiliation, loss of dignity and injury to his feelings. He felt ignored after 8 September, he was concerned to find his tool bag emptied of all the respondent's tools and he was particularly concerned about the delays with his pay. He was very concerned about his financial situation as

he is the main provider for his family and before he secured alternative employment had to resort to food banks. I do take into account that Mr Bray was able to secure employment within a comparatively short period but before doing so Mr Bray said that he could feel himself starting to become depressed. Mr Bray found that work was particularly important for him after an earlier tragic event and being without it even for that short period had a more significant impact on him than it may have for others in a similar situation. His relationship with his partner became strained.

[43] Mr McDonald submits a figure of \$12,000 would be appropriate. He refers the Authority to *Lim v Meadow Mushrooms*<sup>3</sup> in which an award of the Authority for compensation was increased to \$12,000. There are some distinguishing features between the two matters because Mr Lim had been employed for 20 years by Meadow Mushrooms, had undergone a humiliating investigation and it had taken about two months to obtain some temporary employment.

[44] In all the circumstances and subject to any issue of contribution a suitable figure for compensation is \$7000.

#### *Contribution*

[45] Section 124 of the Act requires the Authority when it determines that an employee has a personal grievance in deciding the nature and the extent of the remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and if the actions require reduce the remedies that would have been awarded.

[46] At the heart of this personal grievance is a failure to communicate properly and effectively during and after the incident on 8 September 2015. It led unfortunately to the end of the relationship. The duty of good faith applies to both parties to the relationship. Mr Bray I find did attempt to resume his employment and communicated that he believed he had been dismissed. I do not find any blameworthy conduct at that point. I do though find some blameworthy conduct when Mr Bray read a text whilst sanding. That could have been dangerous and it led to a reaction from Mr Smith which caused Mr Bray to believe he was being asked to go home. It was the start of the unfortunate events that I have found led to the dismissal.

[47] I find a moderate reduction in remedies is called for of 10%.

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<sup>3</sup> [2015] NZEmpC C192

## **Orders**

[48] Applying the contribution to lost wages and compensation set out above I make the following orders:

- (i) James Scott Construction Limited is to pay to Paul Bray the sum of \$3308.11 gross being reimbursement of lost wages under s 123 (1) (b) of the Employment Relations Act 2000.
- (ii) James Scott Construction Limited is to pay to Paul Bray the sum of \$6300 without deduction being compensation for humiliation and loss of dignity under s 123 (1)(c)(i) of the Employment Relations Act 2000.

## **Costs**

[49] I reserve the issue of costs. I would encourage the parties to see if agreement can be reached on costs. If agreement cannot be reached Mr McDonald has until 14 October 2016 to lodge and serve submissions as to costs and Ms Smith has until 28 October 2016 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority