

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 204/10
5298803

BETWEEN PAUL DALLEY
 Applicant

A N D NORRELL BUILDING
 LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Robert Thompson, Advocate for Applicant
 Penny Shaw, Counsel for Respondent

Investigation Meeting: 19 and 28 October 2010 at Christchurch

Date of Determination: 9 November 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paul Dalley worked for Norrell Building Limited (NBL) from February 2009 until January 2010 when his employment was summarily terminated for alleged serious misconduct. Mr Dalley says that he was unjustifiably dismissed. NBL says that it dismissed Mr Dalley because he pushed a fellow staff member during a heated argument, did not comply with instructions to speak with and apologise to the other staff member, was rude to clients who witnessed the incident and failed to act in the best interests of NBL as its foreman on the particular building site.

[2] There are some disputes in the evidence about precisely what happened on the building site between Mr Dalley and the other staff member, and the exchanges between Mr Dalley and his employer prior to the dismissal. To resolve this problem, I will set out what happened and then apply the legal test for justification of a dismissal. I will start by briefly referring to those involved.

The people involved

[3] Justin Norrell is a principal and the managing director of NBL. NBL had a contract with a housing company (Homes of Distinction) to build a house in Le Bons Bay for clients of the building company (Mr and Mrs Bleasdale). The NBL employees working on this job worked 10 hour days Monday to Thursday and had Friday to Sunday as days off. They lived together in rented accommodation near the work site during the working week but commuted back to Christchurch at the weekends. Mr Norrell did not generally work at the work site but visited occasionally. He was not on the site when the altercation occurred.

[4] Paul Dalley is an able and experienced builder. He was NBL's foreman on this job. Mr Dalley had the altercation with Leigh McIlroy, an apprentice carpenter for NBL who worked on this job. Andrew Hardey and Andrew Ahpene were both carpenters employed by NBL on this job. Brent Hyde is the operations manager for Homes of Distinction.

The altercation

[5] There was an altercation Mr Dalley and Mr McIlroy on Wednesday, 27 January 2010 sometime in the afternoon following afternoon smoko. The precise details are in dispute, but Mr Dalley says that Mr McIlroy objected to instructions about his work assignment; matters escalated to become an angry exchange between the two men; Mr McIlroy unclipped his tool belt and advanced towards Mr Dalley in what he viewed as a very threatening and aggressive manner; Mr Dalley then unclipped his tool belt because of his concern in case he was pushed; he pushed Mr McIlroy out of his personal space; and Mr McIlroy charged him, so he put his hands out to protect himself. Mr Ahpene then stepped in and defused the situation.

[6] At least part of this incident was witnessed by the clients (Mr and Mrs Bleasdale) who were on the site inspecting progress.

[7] Following the incident, Mr McIlroy telephoned Mr Norrell. After speaking to Mr McIlroy, Mr Norrell got him to pass the phone over to Mr Dalley. Mr Dalley's evidence is that he had a quick chat with Mr Norrell who told him to talk to Mr McIlroy about the situation. Mr Dalley gave further evidence when questioned. He said that he told Mr Norrell that there had been a bit of an argument, that Mr McIlroy came at him and that he pushed him away.

[8] Mr Norrell also gave evidence about the telephone discussion. Mr Dalley told him that there had been a verbal altercation and that he shoved Mr McIlroy. Mr Norrell then told him that he was the foreman and had responsibilities, that he could not go touching and shoving staff and that he needed to apologise to Mr McIlroy, smooth things over and sort out their issues. When this was put to Mr Dalley during the investigation meeting, he did not dispute it. Accordingly, I accept Mr Norrell's evidence as an accurate account of the phone discussion between him and Mr Dalley.

Mr Norrell's reaction

[9] As mentioned, Mr Norrell spoke to Mr McIlroy and Mr Dalley by phone almost straight after the incident.

[10] On Thursday, 28 January, Mr Norrell spoke to Mr Ahpene by phone to get his account of the incident. He told Mr Norrell that the two men were arguing, that he saw Mr McIlroy walk towards Mr Dalley until he was standing only inches away from him; that Mr Dalley reacted by pushing Mr McIlroy away so that he appeared to trip on some temporary scaffolding; that Mr McIlroy stood up, took off his tool belt and advanced again towards Mr Dalley; that Mr Dalley also took off his tool belt; and that Mr Ahpene then intervened between the two men, standing between them and telling them that the clients were in sight. That diffused the situation.

[11] Mr Norrell decided to meet with both men so he rang the site to speak to them. Mr McIlroy answered the phone. Mr Norrell told him he wanted to meet him and Mr Dalley on Friday at 10am when they were back in Christchurch. Mr Norrell asked Mr McIlroy to pass that message on to Mr Dalley, which he did. There is a dispute between Mr Dalley and Mr McIlroy about their exchange following this phone call. Mr Dalley says that he told Mr McIlroy that he was unable to make the meeting in time and Mr McIlroy responded saying he could not make it at that time either. Mr McIlroy says that he told Mr Dalley *no point telling me that, you can get hold of Justin and sort it out between the two of you*. Mr McIlroy says that he did not say that he could not meet at the meeting time. I prefer Mr McIlroy's evidence on this point.

[12] On the Friday, Mr Norrell decided to talk to the two men separately. He sent a text to them saying that he wanted to see Mr McIlroy at 10am and Mr Dalley at 10.30am. Mr Dalley replied by text saying that he could not make that meeting time

but should be free on Sunday. Mr Norrell phoned Mr Dalley to speak about this but got no answer. Next he sent another text to Mr Dalley saying *this is not a request Paul, you'll be there this is a serious matter that needs to be sorted.*

[13] Mr Norrell followed this text with another phone call and this time Mr Dalley did answer. During the call, Mr Norrell was insistent on Mr Dalley meeting him at 10.30 that morning while Mr Dalley said that he could not because he had to see his lawyer and the bank about a section purchase to be settled that day. Mr Norrell said that these meetings would not take all day and that Mr Dalley had to make a time to meet him. Mr Dalley repeated that he was not available and was going to be out of town on Saturday but might have time on Sunday. Mr Norrell pressed Mr Dalley for the specific times of his meetings with the lawyer and the bank but got no direct response. There was also some discussion about the incident itself. Mr Dalley said he had the right to push anyone who was in his personal space. Mr Norrell told him he was putting his position as foreman in jeopardy and Mr Dalley said *give it to someone else then.* Referring to Mr Dalley not responding directly about the initial arrangements for the meeting, Mr Norrell told him that he needed to take responsibility for himself and not rely on Mr McIlroy to make phone calls for him. Eventually the two men agreed that Mr Dalley would call Mr Norrell later at midday to make a time to meet that day before 3pm. The call ended.

[14] Mr Norrell met with Mr McIlroy at 10am and heard his account of the incident. Meantime, Mr Dalley rang the building trades union to get advice but the official was not available.

[15] Following the meeting with Mr McIlroy, Mr Norrell decided to dismiss Mr Dalley without meeting with him. He rang Mr Dalley just before 11am. He told Mr Dalley that he had heard Mr McIlroy's side of the story, that he had shoved a fellow workmate, that it was serious and he was dismissed. Mr Norrell also referred to Mr Dalley's dismissive attitude about the incident, his unwillingness to meet and talk about it and his failure to apologise to Mr McIlroy. Mr Dalley asked Mr Norrell to put it in writing and the call ended.

[16] Mr Norrell wrote a letter dated 29 January 2010 which he delivered to Mr Dalley the next day. It reads:

29/01/2010

*Paul Dalley
11 Newport Street
Wainoni
Christchurch*

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 ignore 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 Mr and Mrs Bleasdale and Homes of Distinction)*
- *Not acting in the best interests of Norell Building Limited in a foreman capacity*

We will forward any wages owing to you on receipt of your time sheet 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 items.

Sincerely,

*[signed]
Justin Norrell
Managing Director*

Justification

[17] Justification for the dismissal must be assessed objectively by considering whether the employer's action and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[18] This was a summary dismissal for serious misconduct. In *NZ (with exceptions) Food Processing etc IUOW v. Unilever NZ Ltd* [1990] 1 NZILR 35, the Labour Court said this:

The minimum requirement can be said to be:

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

[19] Mr Norrell fell well short of these minimum standards. He never told Mr Dalley that he was at risk of dismissal before announcing that decision. Mr Dalley did have an opportunity to give an account of the incident with Mr McIlroy but never had put to him the detailed account given by Mr McIlroy shortly before Mr Norrell's decision to dismiss Mr Dalley. In evidence there is a detailed account of the altercation written by Mr McIlroy on 30 January 2010 which has Mr Dalley as the principal aggressor. That no doubt reflects what Mr McIlroy told Mr Norrell shortly before the dismissal. In all fairness that version should have been put to Mr Dalley for his response before Mr Norrell made any decision about Mr Dalley's future. The same is true of Mr Ahpene's account given to Mr Norrell on the Thursday which is less critical of Mr Dalley. The allegations about *blatant disregard for authority* and *rudeness to clients* were never put to Mr Dalley while the point about being the foreman was mentioned obliquely at best. The client complaint seems to have arisen after the dismissal but before the letter was written. Overall, there was no real opportunity for Mr Dalley to either refute the allegations or explain or mitigate his conduct.

[20] Fighting or assault has long been considered grounds for potential serious misconduct but that does not excuse an employer from conducting a fair investigation.

Part of Mr Dalley's grievance is that he felt threatened by Mr McIlroy's abusive language, unclipping his tool belt and aggressive advance towards him. He says he was justified in pushing Mr McIlroy away. I am referred to *Housham v. Juken New Zealand Ltd* [2007] ERNZ 183 and *Murphy v. Steel & Tube New Zealand Ltd* (2007) 4 NZELR 719 as two relevant cases.

[21] In *Juken*, the Chief Judge of the Employment Court held that while assault, physical aggression and fighting might properly be regarded as serious misconduct justifying dismissal, that cannot reasonably extend to every participant in a confrontation. An employee attacked by another or reasonably fearing an imminent attack is entitled to take reasonable steps to avoid the assault. In *Murphy*, the Court affirmed and applied *Juken*. Both cases show that what is required of a fair and reasonable employer is a proper inquiry to adequately establish the facts before any decision can justifiably be made about culpability and the application of any workplace rules about fighting.

[22] It follows that Mr Dalley was unjustifiably dismissed by NBL.

Remedies

[23] There is a claim for lost remuneration from the date of the dismissal until 17 April 2010 when Mr Dalley left New Zealand to move to Australia. Mr Dalley says that he sought alternative employment here by ringing people out of the Yellow Pages and approaching industry contacts. The only work he secured was some casual work helping out at a bowling club for which he received a few hundred dollars.

[24] NBL submits that Mr Dalley failed to mitigate his loss and/or that any loss is not attributable to the grievance because of Mr Dalley's decision to move to Australia. To deal with this, more must be said about what happened.

[25] Mr Dalley phoned Mr Hyde (Homes of Distinction's operations manager) soon after the dismissal and told him about the altercation and the dismissal. During this discussion, Mr Hyde said that Homes of Distinction might well want to engage Mr Dalley directly to complete the building work. In evidence, Mr Hyde was not sure if it was said then or later, but Mr Dalley at some point told him that he had decided to move to Australia to be with his fiancée and would be leaving in a month or so. Following his first discussion with Mr Dalley, Mr Hyde spoke to the clients, Mr Norrell and his own managing director before having a second discussion with

Mr Dalley. The clients gave him an account of the incident which they described as *ridiculous ...not unlike a school playground*. They confirmed that they would be happy for Mr Dalley to continue as foreman on the site. Mr Hyde's evidence, which I prefer, is that Mr Norrell threatened to sue Homes of Distinction if it breached its agreement with NBL. In evidence Mr Hyde was sure that he spoke with his managing director about the prospect of Mr Dalley going to Australia and as a result of that they decided not to proceed with offering Mr Dalley employment as foreman on the project. During the second discussion with Mr Dalley, Mr Hyde told him that they would not employ him given that the project probably still had six months to go until completion. Mr Dalley's evidence about these exchanges differs somewhat but I prefer Mr Hyde's evidence as described above.

[26] What is clear from this evidence is that Mr Dalley promptly made the decision to move to Australia sooner rather than later. That decision resulted in the withdrawal of the opportunity of employment as foreman for Homes of Distinction on the building project. I accept counsel's submission that this broke the chain of causation so that Mr Dalley's lost remuneration is not the result of his personal grievance but rather the result of his decision to move to Australia. It follows that Mr Dalley is not entitled to any compensation for lost remuneration.

[27] There is a claim for compensation for distress and it is submitted that \$10,000 is an appropriate award. I am referred to *Ballylaw Holdings Ltd v. Henderson* [2003] 1 ERNZ 313. In that case, the Employment Court increased a compensation award made by the Employment Tribunal from \$6,000 to \$10,000. The Court said that the Tribunal had given no reasons for the compensation award contrary to its obligation to do so. The Court went on to carefully assess the evidence of distress and concluded that the claim of \$10,000 addressed the proven hurt *quite modestly*.

[28] Here, I am satisfied that Mr Dalley's evidence somewhat exaggerates the effect on him of the unjustified dismissal. For example, he makes something of wanting to have the project on his CV to assist with finding work in Australia but it was his decision about the timing of his move to Australia that prevented that as much as did the dismissal. To support the claim for compensation I only have Mr Dalley's evidence and an unsigned, unsworn statement from his fiancée. I give little weight to Ms Wright's statement. What remains is Mr Dalley's evidence, which I accept, that he was surprised by being dismissed before meeting with Mr Norrell; that he was

concerned about the financial commitments made the same day; that he (and his fiancée) had two loans to service when he had suddenly lost his income; that he was humiliated by being dismissed over the phone; that he experienced loss of sleep and worry about his financial situation; and that his pride and the absence of his fiancée made this hard to deal with. I assess compensation for these proven effects at \$7,000.

[29] I am required to assess the extent to which Mr Dalley contributed in a blameworthy way to the situation giving rise to his grievance and reduce remedies accordingly. That involves making findings about the altercation itself.

[30] Mr Dalley caused the situation to escalate in a way that was inconsistent with his responsibilities as foreman. He accepted in evidence that he said to Mr McIlroy *you can fuck off* just before the matter escalated from what had been a verbal confrontation. There is a dispute in evidence about the sequence of events. I prefer Mr Ahpene's evidence to that of Mr Dalley. Mr McIlroy advanced into Mr Dalley's *personal space*. Mr Dalley retaliated by pushing Mr McIlroy who stumbled backwards, possibly falling. I do not accept Mr Dalley's evidence about self-defence. There was a wooden barrier between the two men and Mr McIlroy was standing on the outside of the building perhaps 200mm below the level of the concrete floor inside where Mr Dalley was standing. Mr Dalley was in the dominant position. There is nothing about the physical characteristics of the two men to detract from that. Mr Ahpene's evidence is that the push from Mr Dalley was retaliatory. Mr Hardey, who was also nearby, did not think that Mr McIlroy was physically threatening Mr Dalley.

[31] I find that Mr Dalley unnecessarily aggravated the situation by shoving Mr McIlroy, who then stumbled backwards. When he recovered, Mr McIlroy unclipped his tool belt shaping for a fight. Mr Dalley did exactly the same. Mr McIlroy advanced towards the barrier again. Mr Ahpene intervened and the situation ended. Mr Dalley knew the clients were present on the site and could have used that to diffuse the argument well before it became so heated. As foreman, his failure to do so is a significant contributory factor to be taken into account.

[32] Mr Dalley contributed to the grievance in two further ways. He should have apologised to Mr McIlroy as directed by Mr Norrell. If he had done so, that quite possibly would have been an end to the matter. Finally, Mr Dalley needed to be more communicative and responsive to Mr Norrell's attempts to organise a meeting to

discuss the matter, although this is a minor point since they eventually agreed to arrange a meeting.

[33] I am urged to assess Mr Dalley's contribution at the level of 100%. Mr Norrell's evidence in support is that nothing has emerged during the course of the Authority's investigation that would have resulted in a different decision. I do not accept that evidence. The incident occurred on the Wednesday afternoon and ended almost as soon as it had started. It was not an impediment to them working the remainder of that day or the next day or sharing the accommodation that evening. What lay behind the dispute was Mr McIlroy's view that he was not being given sufficient opportunity to learn the trade. There had already been some dialogue between Mr Norrell and Mr Dalley about that but the underlying tension could have been resolved by a change in approach from Mr Dalley. If Mr Dalley had been given a proper opportunity to respond to others' versions of the altercation there would also have been an opportunity for Mr Norrell to give Mr Dalley further direction about his responsibilities to foster the apprenticeship. There was a good prospect that the working relationship between Mr Dalley and Mr McIlroy could have been restored and a reasonable prospect that the relationship between Mr Dalley and Mr Norrell could have been repaired over the longer term.

[34] Overall, I consider that Mr Dalley's contribution is in the order of two-thirds responsibility. Mr Norrell must take responsibility for cutting short a proper investigation into the altercation and its consequences for Mr Dalley's employment. The effect of the finding about contribution is to reduce the compensation award to \$2,300.00 (rounded down).

Penalty

[35] In the statement of problem there is a claim for a penalty for the company's *failure to provide a written employment agreement*. As directed the parties lodged and served their statements of evidence at the same time. Surprisingly, Mr Dalley gave no evidence about the company's failure to provide him with a written employment agreement. However Mr Norrell gave evidence explaining the absence of a written employment by reference to the competing demands on his time and saying that *the employment agreements remained a work in progress*.

[36] I do not intend to impose any penalty. The claim should have been properly set out and supported by evidence from Mr Dalley. The statutory obligations are in s.63A(2) of the Act and ss.(3) then provides that every employer who fails to comply with those obligations is liable to a penalty. I am left to infer from Mr Norrell's evidence about *work in progress* that no written employment agreement was provided to Mr Dalley. But for the Authority's direction requiring contemporaneous evidence statements there would have been no evidence about this claim. It would be unfair for the company to be held liable simply because it properly complied with the Authority's administrative direction. The absence of a written agreement has not contributed to this problem. Lastly, Mr Norrell has given evidence which I accept about the company's poor financial circumstances.

Orders

[37] To remedy Mr Dalley's grievance of unjustified dismissal Norrell Building Limited must pay Mr Dalley \$2,300.00 compensation pursuant to s.123(1)(c)(i) of the Act.

[38] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority