IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 93
5391559

	BETWEEN	CRAIG HALL Applicant
	AND	A STEP UP JOINERY LIMITED Respondent

Member of Authority:	Christine Hickey
Representatives:	No appearance by Applicant Sarah O'Brien, Counsel for Respondent
Investigation Meeting:	8 April 2014 in Dunedin
Submissions:	None from the Applicant From the Respondent at the investigation meeting
Determination:	1 July 2014

DETERMINATION OF THE AUTHORITY

A. Craig Hall's claims are dismissed.

B. Craig Hall must pay A Step Up Joinery Limited a contribution of $1,000.00 towards its legal costs.

Employment relationship problem

[1] Mr Hall was employed by A Step Up Joinery Limited in July 2010 as a joiner. On 28 June 2013 Mr Hall was dismissed for serious misconduct, specifically for refusal to wear personal protective equipment and for offensive, abusive and threatening language towards Neil Rutherford, his supervisor and the director of A Step Up Joinery Limited (A Step Up).

[2] Mr Hall claims that he was unjustifiably disadvantaged by *intimidation within the workplace in front of other coworkers* and unjustifiably dismissed. By way of remedy he claims lost wages of $4,000 and $20,000 compensation for *jeopardising* his career, *due to the size of the community and joinery trade within Dunedin*, and the humiliation of the dismissal.

[3] The respondent denies Mr Hall's claims and says he was justifiably dismissed for serious misconduct being refusal to wear personal protective equipment and for using offensive, abusive and threatening language towards Mr Rutherford.

[4] On 21 February 2014 Mr Hall participated in a telephone directions conference at which the investigation meeting date of 8 April 2014 was set.

[5] Dates were also set for an exchange of evidence. Mr Hall was unrepresented and the 'evidence' he filed with the Authority was not a witness statement but a document that had been prepared for the purposes of mediation by his former counsel. By consent of the respondent the section of the document setting out the chronology of events as Mr Hall saw them and his view of what had happened was accepted as being his witness statement for the purposes of the Authority's proceedings[1]. The rest of the document was excluded under s.148 of the Employment Relations Act 2000 (the Act).

[6] The respondent's two witness statements, including a detailed one from Mr Rutherford and one from a current employee of A Step Up were filed on Wednesday, 26 March 2014 and after some initial difficulty sending the statements to Mr Hall's email address they were sent to him on Friday, 28 March 2014.

[7] The respondent's lawyer sent a query to the Authority's support officer about whether the member would have any questions for A Step Up's current employee as the witness was reluctant to attend in person in the light of Mr Hall's behaviour while still employed. Mr Hall was asked by email if he had any questions for the witness as the Authority proposed accepting the witness evidence by way of affidavit and not asking any questions at the investigation meeting.

[1] Under s.148(1) of the Employment Relations Act 2000

[8] The last contact the Authority had from Mr Hall was by email to the Authority's support officer sent on Sunday, 6 April 2014 at 6.53pm stating that he thought that all witnesses for A Step Up should attend the investigation meeting.

[9] The Notice of Direction and Notice of Investigation Meeting recorded that the meeting would be in Dunedin on Tuesday, 8 April beginning at 9.30am and gave the location of the meeting. I am satisfied that the notices were served on Mr Hall and therefore he would have been advised that:

> *If the Applicant does not attend the investigation meeting the matter may be dismissed and costs may be awarded against the applicant.*
> *…*
> *You are also advised that any legal costs incurred by the other party may be awarded should you not be successful in bringing or defending the claim.*

[10] Mr Hall did not appear at the investigation meeting. A Step Up was represented by Mr Rutherford and its counsel, Ms O'Brien. I waited 15 minutes and then called the Authority's support officer at the Christchurch registry to check if Mr Hall had been in touch and was going to be late or was unable to attend for some reason. He had not been in touch. The support officer telephoned Mr Hall but was only able to leave a message for him on his voicemail asking him to contact the Authority urgently. He did not do so.

[11] The investigation meeting began at 10.15am in Mr Hall's absence; that was 45 minutes after the arranged start time. Under clause 12 of Schedule 2 of the Act I am entitled to proceed in the absence of any party if that party has failed to attend or to be represented without any *good cause shown*. No reason was given for Mr Hall's absence.

[12] The day after the investigation meeting a person identifying herself as Mr Hall's girlfriend rang the Authority's support officer to ask if the investigation meeting had proceeded. She was informed that it had and that a determination would be issued in due course.

[13] I could have dismissed Mr Hall's claims for want of prosecution but have elected to make this determination of his claims based on Mr Rutherford's evidence and supporting documents and the documents I have which put Mr Hall's views. These include the document referred to at paragraph 5 above and the letter raising his personal grievances. The documents together make arguments on behalf of Mr Hall

about why he considers his dismissal was unjustified. I have taken into account that Mr Hall's evidence has not been able to be tested by way of questioning at the investigation meeting, although Mr Rutherford's evidence has been.

Issues

[14] The issues requiring determination are:

(i) Whether Mr Hall was unjustifiably disadvantaged;

(ii) Whether Mr Hall's actions amounted to serious misconduct; and

(iii) Whether dismissal was an action a fair and reasonable employer could have taken in all the circumstances at the time of dismissal. This includes an examination of procedural fairness.

Chronology of events

[15] On 15 May 2012 Mr Rutherford reminded Mr Hall a number of times to wear his safety glasses. Mr Hall refused and told Mr Rutherford he did not see the need to wear them. Mr Rutherford again insisted and Mr Hall told him that they were uncomfortable.

[16] After that Mr Rutherford purchased and gave Mr Hall some new safety glasses with wider arms to cut down on the possibility of discomfort while wearing them.

[17] On 18 May 2012 Mr Rutherford again spoke to Mr Hall and reminded him that the personal protective equipment requirements were mandatory and that he should be wearing the safety glasses. Mr Rutherford told Mr Hall that if the new adjustable glasses were still not comfortable then the company would provide him with another type of safety glasses. He provided Mr Hall with another style of safety glasses with adjustable frames to lessen any fogging or restriction of vision.

[18] On 25 May 2012 Mr Hall was observed by Mr Rutherford operating machinery without wearing safety glasses. Mr Rutherford told Mr Hall that it was mandatory to wear eye protection at all times in the factory. Mr Hall again refused to wear his eye protection. Mr Rutherford advised Mr Hall later that day that wearing safety glasses was *not up for discussion*. Mr Rutherford told Mr Hall that A Step Up could take disciplinary action against him if he did not wear the personal protective

equipment provided. Mr Hall's response to Mr Rutherford was that *well you will have to give me warnings and fire me – I will not wear them*.

[19] Later that same day Mr Rutherford saw Mr Hall using a machine without eye protection and verbally warned him that if he used a machine again without wearing his eye protection there could be a disciplinary consequence.

[20] On 20 June 2012 Mr Rutherford asked Mr Hall to put on his eye protection while he was working at his bench cleaning and putting away tools. Later that same morning, Mr Rutherford told Mr Hall to put on his eye protection before continuing with his work. Mr Hall walked towards Mr Rutherford and yelled *get fucked, you are a fucking cunt and should stop this shit. I am not going to wear them*. Mr Rutherford walked away from Mr Hall and into the office.

[21] When Mr Rutherford later returned to the factory he noticed Mr Hall had been operating the dimension saw without using eye protection and was temporarily away from the saw. Mr Rutherford went to the saw and turned it off. He again advised Mr Hall to put on the eye protection provided, Mr Hall again refused and said *fuck off, I'm not wearing it* and turned on the saw again. Mr Rutherford turned the saw off again. Mr Hall pushed some timber into the saw as it was slowing down and again began verbally abusing Mr Rutherford. Mr Rutherford told Mr Hall to come into the office and discuss the issue. Mr Hall, again, began yelling abusively.

[22] Mr Hall then stood up and started to walk towards the factory saying that he quit. Mr Rutherford told Mr Hall that if he did not wear eye protection while operating machinery then he would have no option than to suspend Mr Hall or terminate his employment. Mr Hall left and went back to his work bench.

[23] A little later Mr Rutherford approached Mr Hall and advised him that he was suspended without pay until Friday, 22 June at 11am, at which time he was invited to come to a meeting to discuss the issue and to bring a support person if he wished to[2]. Mr Hall said *get fucked, I quit, you are a fucken cunt, you're a wanker*. He asked for his final pay to be made up. Mr Rutherford told Mr Hall that he did not accept his resignation and there was a process to be worked through. Mr Hall left.

[2] I understand that the issue of unpaid suspension was resolved between the parties before Mr Hall returned to work on 25 June 2012.

[24] On 22 June 2012 Mr Rutherford met with Mr Hall and his legal representative. Mr Rutherford put two allegations to Mr Hall:

- the refusal to wear safety glasses was serious misconduct in that it breached the respondent's health and safety requirements; and
- he considered that Mr Hall's behaviour on 20 June and attitude towards him using threatening, abusive and insulting language was also serious misconduct.

[25] Mr Rutherford considered the 22 June meeting to be an investigation meeting. He asked Mr Hall a number of questions about why he would not wear the safety glasses.

[26] After that Mr Hall was allowed to return to work, which he did on Monday 25 June 2012. A Step Up provided him with overalls and safety boots and Mr Hall wore his safety glasses that day.

[27] On 23 June 2012 meeting Mr Rutherford sent an email to Mr Hall and his legal representative with his notes of the meeting attached noting the two allegations previously made against Mr Hall and indicating that he considered Mr Hall's behaviour to amount to serious misconduct. He also wrote that Mr Hall had previously damaged a pair of safety glasses by drawing on them with a black marker and wore them in front of other staff.

[28] In the letter Mr Rutherford acknowledged that what he said at the meeting may not have been expressed clearly. He asked for a letter from Mr Hall's legal representative outlining what issues she and Mr Hall believed were discussed at the 22 June meeting. He also asked for a written apology from Mr Hall and an ongoing change of behaviour.

[29] Mr Rutherford advised Mr Hall that he would like to have a disciplinary meeting with him and his support person to discuss the allegations set out in his 23 June 2012 email. A time was set for 28 June 2012.

[30] On 27 June as a result of an inspection of the factory by a labour inspector[3] Mr Rutherford was informed that the staff should not be wearing hats under their ear muffs. Mr Rutherford instructed all staff that they needed to wear their ear muffs

[3] Who had been informed by Mr Hall that there were safety breaches at the factory.

underneath their hats. Mr Hall only did so after he was instructed to do so a third time some hours later than when he was first instructed to do so.

[31] Also on 27 June Mr Rutherford attempted to email Mr Hall's legal representative confirming the meeting time and setting out the allegations of serious misconduct already alleged on 22 June. He also mentioned the initial refusals by Mr Hall to wear his ear muffs as instructed.

[32] Immediately prior to the meeting proposed for 28 June Mr Hall's legal representative advised Mr Rutherford she had not received his emails. Mr Hall however did have a copy of the 23 June email and had arranged for his legal representative to be at the meeting. Mr Rutherford offered to delay the meeting. However Mr Hall's legal representative took time to read the two emails and indicated that the meeting should go ahead. Mr Rutherford explained that when Mr Hall had drawn on the safety glasses and then worn then he believed Mr Hall was making fun of the policy to wear eye protection at all times.

[33] At the meeting Mr Hall offered the following explanations:

- He did not consider his language to be insulting, abusive and threatening and had heard some of that kind of language in workshops before;
- Drawing eyes on the safety glasses was a joke;
- He did not believe he had to wear safety glasses because there were no health and safety issues that could arise from not wearing them;
- The requirement to wear safety glasses at all times was a ridiculous requirement enforced by Mr Rutherford and that no other workshop forces its staff to wear them;
- He believed he was experienced enough to know what he was doing and when he should wear safety glasses;
- He could not wear safety glasses because they caused him pain and migraines and they fogged up and he was afraid of losing a finger;

- His explanation as to why he had initially refused to wear the hearing protection in the way instructed by Mr Rutherford was that *it was cold*.

[34] Mr Rutherford left the meeting to consider Mr Hall's explanations. On reconvening the meeting Mr Rutherford conveyed the decision that Mr Hall was dismissed on the grounds of serious misconduct for his refusal to wear safety glasses and for his offensive, abusive and threatening language.

Determination

[35] Section 103A of the Act provides that when assessing whether an employer's action causing disadvantage or a decision to dismiss was justified the Authority must use the following test and consider on an objective basis:

> *... 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 or action occurred.*

Was Mr Hall unjustifiably disadvantaged?

[36] Mr Hall says he was singled out by Mr Rutherford and intimidated by Mr Rutherford in front of his co-workers for not wearing eye protection.

[37] This claim was put to Mr Rutherford at the investigation meeting whose evidence was that all other staff complied with the requirements to wear eye protection, and other required personal protective equipment at all times. Mr Rutherford says Mr Hall was the only employee to refuse to wear eye protection as opposed to occasionally forgetting to do so. Mr Rutherford denies having intimidated Mr Hall.

[38] Mr Hall was not disadvantaged in his employment by Mr Rutherford's continuing focus aimed at getting Mr Hall to wear personal protective equipment at all times when in the workshop. Mr Rutherford's actions in repeatedly insisting Mr Hall wear safety glasses were actions a fair and reasonable employer could have taken in all the circumstances.

Did Mr Hall's actions amount to serious misconduct?

[39] Mr Hall's employment agreement included a number of clauses which are relevant. Clause 2.1 provided that it was his duty to carry out all reasonable instructions and to undertake any work reasonably required by the employer.

[40] Clause 5 of his employment agreement provided that he would be subject to and should observe and comply with all rules, policies and procedures in force from time to time.

[41] It was the respondent's requirement that all employees and all visitors wore personal protective equipment at all times.

[42] Each machine in the joinery factory had an individual notice attached to it requiring personal protective equipment to be worn at all times. In addition, the entrance door to the factory has a sign on it requiring that eye and hearing protection must be worn in the factory.

[43] Clause 15 of Mr Hall's employment agreement provided that:

> *15.1 The Employee should take all practicable steps to ensure his or her own safety while at work and that no action or inaction by the Employee while at work causes harm to any other person.*
>
> *15.2 The Employee is to ensure safety procedures are followed at all times. The Employee must ensure that they know the Employer's health and safety rules and procedures. If Employees do not comply with the rules and procedures, disciplinary action may be taken.*

[44] Clause 30 of Mr Hall's individual employment agreement provides for a disciplinary process and concludes with:

> *Where misconduct or substandard work performance is considered serious enough either a final warning or a dismissal may be issued without a written warning preceding it.*

[45] Clause 32.5 provides that serious misconduct may give rise to summary dismissal and is defined as including, but not being limited to, a number of things but does not specifically mention a refusal to wear personal protective equipment.

Ongoing refusal to wear safety glasses

[46] Mr Hall says that he had legitimate reasons for not wearing the safety glasses being pain and sight impairment through the glasses fogging up.

[47] Mr Rutherford's evidence was that there was no relevant sight impairment when wearing the glasses. He acknowledged that when the glasses were first put on they might fog but said that was overcome by wiping them and they did not fog up once they had adjusted to a worker's head temperature. He also said that Mr Hall had never previously raised any issue of headaches caused by wearing the safety glasses.

[48] Mr Rutherford provided adjustable glasses for Mr Hall to try and overcome any pain or sight impairment and offered to get yet another kind for Mr Hall.

[49] Mr Rutherford was entitled to weigh Mr Halls' explanations about pain and sight impairment against his assertions that he knew when he needed to wear safety glasses and that there were no health and safety issues in not wearing them. Mr Rutherford was entitled to give more weight to those explanations than the others offered by Mr Hall.

[50] Mr Hall's explanation at the 27 June meeting showed that he had not changed his view and he did not accept that he had to wear safety glasses at all times. His explanations did not give Mr Rutherford any comfort that he would wear safety glasses as required from then on.

[51] Mr Hall's behaviour in repeatedly refusing to wear eye protection was sufficient in itself to amount to a destruction of the trust and confidence Mr Rutherford required of Mr Hall. Mr Hall did not comply with his employer's health and safety policies. He did not carry out his employer's reasonable instructions to wear eye protection when working and he did not take all practicable steps to ensure his own safety.

[52] It was reasonable of Mr Rutherford to consider Mr Hall's continued failure to wear safety glasses to be serious misconduct.

Language and attitude on 20 June 2012

[53] Clause 13.4 of Mr Hall's employment agreement required that he use professional behaviour and attitude in his dealings with his employer.

[54] Assessing Mr Hall's language on 22 June directed at Mr Rutherford objectively it was offensive and abusive. Mr Hall did not demonstrate a professional attitude to resolving the ongoing disagreement between him and Mr Rutherford about whether he needed to wear safety glasses. However, whether or not his spoken language combined with his body language amounted to threatening language is another question. Offensive and abusive language alone is unlikely to amount to serious misconduct justifying summary dismissal.

[55] At the investigation meeting Mr Rutherford described Mr Hall's outburst as threatening. His evidence was that Mr Hall was *up in my face* when he was yelling at him and Mr Rutherford was worried that Mr Hall was going to punch him. Therefore, he walked away quickly and went into the office.

[56] I consider that Mr Hall's first outburst was threatening because of his level of anger and his proximity to Mr Rutherford. Mr Hall's second outburst that day during which he attempted to resign was not threatening although he again used offensive and abusive language.

[57] A fair and reasonable employer could have concluded that Mr Hall's outburst towards Mr Rutherford was offensive, abusive and threatening and amounted to serious misconduct.

Were the minimum procedural requirements under s.103A(3) complied with?

Did A Step Up adequately investigate its allegations against Mr Hall?

[58] Mr Rutherford was involved with Mr Hall directly at all relevant times and as such did not need to separately investigate the incidents. He had made contemporaneous notes. Mr Hall directly told Mr Rutherford that he would not wear the eye protection. In all the circumstances, I consider there was sufficient investigation of the two allegations of repeated failure to wear eye protection and Mr Hall's abusive, offensive and threatening language towards Mr Rutherford.

[59] Mr Rutherford also convened an initial meeting with Mr Hall and his legal representative to investigate the allegations.

Did A Step Up raise its concerns with Mr Hall?

[60] A Step Up convened two meetings at which Mr Hall was legally represented and raised its two principal concerns with Mr Hall at the first meeting and in writing after that meeting and before the next meeting. A Step Up adequately raised its concerns with Mr Hall.

Did A Step Up give Mr Hall a reasonable opportunity to respond to its concerns?

[61] Despite not receiving the emails until just prior to the 28 June meeting Mr Hall's legal representative elected that the meeting continued. A Step Up gave Mr Hall a reasonable opportunity to respond to its concerns by way of explanation during the 28 June meeting.

Did A Step Up genuinely consider Mr Hall's explanation before making the decision to dismiss him?

[62] Mr Hall alleges that Mr Rutherford had pre-determined whether or not his actions amounted to serious misconduct for which he would be dismissed. That is because Mr Rutherford read out his decision.

[63] Having heard from Mr Rutherford I find that he did not predetermine whether or not Mr Hall would be dismissed. He did decide that was one of the possible outcomes but he did not wish to dismiss Mr Hall who was a very experienced joiner for whom he had ongoing work. Mr Rutherford hoped that at the 28 June meeting Mr Hall would show a change in attitude and commit to wearing safety glasses.

[64] I am satisfied A Step Up genuinely considered Mr Hall's explanations before making its decision to dismiss him.

Were there any other procedural defects? If so, were they minor? Did they result in Mr Hall being treated unfairly?

[65] Mr Hall's legal representative wrote that Mr Hall was not made aware before the meeting on 28 June that his dismissal might be an outcome of that meeting and so the dismissal was unfair.

[66] I agree that the emails of 23 and 27 June did not specifically inform Mr Hall that he may be facing dismissal. However, the email of 23 June concluded:

> *The letter of apology and change of behaviour may be taken into consideration.*
>
> *I believe the minimum requirement will be a formal written warning with a reviewable probation period however as I believe this is a case of serious misconduct other action may be required. I will make a determination of this once I have received the advice from experts in this field.*

[67] I appreciate that the email was not seen until the morning of the meeting. However, Mr Hall and his representative elected to proceed on the basis that A Step Up considered the allegations to be serious misconduct and that an action other than a formal written warning might be required.

[68] Ms O'Brien submits that the final paragraph in the 23 June email combined with the verbal warnings given on 25 May and on 20 June were sufficient to put Mr Hall on notice that his employment was in jeopardy because of a refusal to wear eye protection as required.

[69] A Step Up should have made it more clear to Mr Hall once it suspended him and embarked on the disciplinary process that dismissal was a possible outcome. However, Mr Hall was not unaware that dismissal was possible given the ongoing nature of the contacts between him and Mr Rutherford over the issue of eye protection. If there was a procedural defect in not setting out in writing that dismissal was a potential outcome it is a minor one in the context of Mr Hall's knowledge of the situation and did not result in him being treated unfairly.

Was dismissal an action a fair and reasonable employer could have taken in all the circumstances at the time of the dismissal?

[70] Mr Hall's statement says that after he returned to work from his suspension on 25 June he wore his safety glasses and that while on 27 June after being informed he was required to wear his earmuffs under his hat he initially *expressed initial reluctance* he complied after being instructed to do so again. The implication is that he had shown that he was going to comply after that and therefore he should not have been dismissed.

[71] However, Mr Hall repeatedly failed and refused to wear safety glasses in contravention of his employer's instructions. He then refused twice to wear his ear protection in the manner instructed by his employer, even when he knew that way of wearing ear protection had been recommended by the labour inspector. At the 28

June meeting he described the safety glasses requirement as *ridiculous* and continued to maintain that he did not have to wear them all the time he was in the workshop although he knew that was required of him.

[72] Dismissal was a decision a fair and reasonable employer could have made in all the circumstances at the time Mr Rutherford made his decision.

[73] Even if any procedural defects meant that Mr Hall was unjustifiably dismissed that does not mean that Mr Hall would have been awarded any remedies. I consider Mr Hall's actions to have been blameworthy and had I found him to have been unjustifiably dismissed I would have reduced any remedies by 100% to reflect his contribution.

Costs

[74] A Step Up was legally represented. It faced legal costs because of Mr Hall's claims. It was reasonable for A Step Up to be represented and to expect Mr Hall to attend the investigation meeting to progress his claims.

[75] It is usual for the losing party to make a reasonable contribution towards the successful party's legal costs. The usual amount awarded for a full day of hearing in the Authority is $3,500. If Mr Hall had attended I expect that the matter would have taken perhaps a morning for which the usual contribution to costs would be $1,750. As it was with time spent waiting for Mr Hall and the shortened time to hear from only one party I consider it reasonable that Mr Hall should contribute $1,000 to A Step Up's legal costs.

Christine Hickey
Member of the Employment Relations Authority