

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 408
3031236

BETWEEN	BERNARD GAVIN MCINTYRE Applicant
A N D	FAR NORTH SCAFFOLDING LIMITED Respondent

Member of Authority: T G Tetitaha

Representatives: B McIntyre in person
C J Eggleston, Counsel for Respondent

Investigation Meeting: 24 October 2018 at Paihia

Submissions Received: 5 and 9 November from both parties

Date of Determination: 20 December 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Bernard McIntyre was not unjustifiably dismissed.**
- B. Bernard McIntyre was unjustifiably disadvantaged by a breach of the implied term of his employment to provide a safe workplace free from violence.**
- C. Far North Scaffolding is ordered to pay Bernard McIntyre by 31 January 2019 the sum of \$5,000 for hurt and humiliation. This includes a reduction of 50% for contributory behaviour.**
- D. There is no order for costs because Mr McIntyre was self-represented.**

Employment Relationship Problem

[1] Bernard McIntyre alleges he was unjustifiably dismissed and/or disadvantaged by Far North Scaffolding Limited (FNS).

Relevant Facts

[2] FNS is a scaffolding hire company based in Haruru Falls, Northland. Peter McGilp was a director of FNS and friend of Bernard McIntyre. They had previously worked together in a scaffolding business. Mr McIntyre returned from working in Australia in or about 2016. At 62 years of age he was planning to retire to Northland and take on less work. Mr McIntyre also suffered from osteoarthritis. This prevented him from sitting for long periods of time.

[3] Mr McGilp was suffering from sclerosis of the liver and in declining health. He was taking substantial medication and this was notably affecting his management of the business. He wanted Bernie to assist him with managing the business and offered him employment.

[4] Mr McIntyre started working for FNS on 31 January 2017 under an oral employment agreement. He was paid \$20 per hour for a 40 hour week. He was appointed a scaffolding supervisor. This involved supervising worksites and human resources work such as dealing with staff personal grievances. He was also paid an additional 2.5 hours per week for opening the yard at 7am.

[5] FNS also employed a family member of Mr McGilp whom I will call A. A is one of the current owners of FNS. A did not appear at hearing.

A's behaviour

[6] At the end of October 2017 a FNS manager, Renata Marino suffered a personal bereavement. Mr McIntyre and Mr McGilp discussed Mr Marino's bereavement leave. Mr McIntyre then assisted Mr McGilp to draft Mr Marino a "letter of concern" on 2 November. This was left on Mr Marino's desk.

[7] The letter of concern referred to a lack of communication from Mr Marino during the bereavement and previous time off he had taken for a bereavement. Mr McIntyre had omitted to tell Mr McGilp that he had been in daily contact with Mr

Marino during the bereavement. Mr Marino's previous bereavement leave had been approved by Mr McGilp and was taken as leave without pay.

[8] Around the same time Mr McIntyre became aware of A assaulting a member of the public on 30 October 2017. He told Mr McGilp and also referred to Mr Marino telling him he saw A at a local meth house. He sought A's exclusion from the workplace. Mr McIntyre alleges he then received a threatening phone call from A.

[9] At hearing Mr Marino denied that he had told Mr McIntyre he saw A at the alleged address. This is because he was in a different part of Northland at his brother's tangi. He referred to ongoing tension between Mr McIntyre and the other workers, especially A during this time. He also referred to Mr McIntyre's inappropriate language towards current employees and when dealing with staff personal grievances.

[10] Mr Marino returned to work on 3 November. He read the letter and became upset at its content. He blamed Mr McIntyre for not telling Mr McGilp that he had been in constant communication with him. Mr Marino then left and returned with A, to whom he had given the letter.

[11] A became loud and aggressive. He screwed up Mr Marino's letter and threw it at Mr McIntyre. Mr Marino intervened and told A to stop. Mr McIntyre left the office telling Mr Marino that he would be raising a personal grievance over this.

[12] Mr McIntyre went to Mr McGilp. He told him about the argument with A. Mr McIntyre wanted A to be stood down again.

[13] The following day (4 November) Mr McGilp called Mr McIntyre, advising that A had been arrested for assault. Mr McIntyre told Mr McGilp that he had received text messages from A saying "Evil. Cunt. I nw u were up2 sumthn. algud u wnt last jst a woshd up Ozi" and "Lol akd dum lyk always... jst a sad old man." He again wanted A excluded from the workplace.

[14] Mr McGilp called Mr McIntyre on Sunday, 5 November asking him to stay home the following Monday. Mr McGilp was going to speak with A and issue a written warning for his behaviour. Mr McIntyre was granted paid leave.

[15] On Tuesday, 7 November Mr McGilp issued A with two final written warnings. The first one was for the assault on a member of the public, and the second one was for his behaviour towards Mr McIntyre.

[16] Mr McIntyre was unhappy with this response. He went to see Mr McGilp and told him he couldn't continue as supervisor while, in his view, A's behaviour was not being addressed.

Further workplace tension

[17] In November Mr McIntyre was supervising a worksite in Dargaville. There were inadequate materials for the scaffolders to complete the job.

[18] Mr Marino spoke to Mr McIntyre about the job and asked why he did not go to a local timber merchant to obtain the necessary materials. Mr McIntyre says he told Mr Marino he was not supervising anyone anymore and Mr Marino became upset and started swearing. Mr Marino accepted he at one stage told him he was not supervising anymore but denied he was upset. Further he stated it was Mr McIntyre who became upset and was swearing.

[19] Mr McIntyre asked A and two other employees to clean and refuel a truck on 30 November because it was going in for an inspection and certification. He alleges A said "F**k off, leave it alone, it's time wasting". At hearing Mr Marino stated Mr McIntyre would often reply to him with similar language so he was unsurprised at the type of language used.

[20] By this stage I understand Mr McIntyre was no longer supervising A as well. His pay rate was considered by the other employees to be too high for occasional truck driving creating further tension. Mr Marino did not believe FNS required a fulltime truck driver. He also had performance concerns with Mr McIntyre remaining in the truck and not assisting at all at worksites.

[21] On 4 December Mr McGilp accompanied Mr McIntyre on a drive to Waipapa. During the drive Mr McGilp received calls from A wanting him to stop traveling with Mr McIntyre. A believed Mr McIntyre was trying to unfairly influence Mr McGilp. A then picked up Mr McGilp. Mr McIntyre became frustrated and does not return to work for that week.

Personal Grievance

[22] On 19 December Mr McIntyre spoke to Mr Marino about A's behaviour. He told Mr Marino that he wished to raise a personal grievance. Mr Marino says Mr McIntyre had become agitated about A for no apparent reason and wanted him sacked. Mr Marino asked to wait until A came to work to sit down and speak about this.

[23] Mr Marino arranged a meeting with A and Mr McIntyre. Mr McIntyre blamed A for being overly aggressive. Mr Marino believed Mr McIntyre was equally aggressive, calling A a "meth freak" then storming off yelling he was "putting a PG on you c**ts and youse are going down, f**k Peter". At hearing Mr McIntyre admitted he had called A a "f**ken c**t" but did not do this all of the time.

[24] Mr McIntyre then sent an email of a notice of intention to file a personal grievance. The email states "Just to confirm the events from this morning and to give notice of intention to file a personal grievance with FNS". He then states "For obvious reasons" he would not be available for work but "will return (as agreed) on Monday 15th January 2018".

Stand down

[25] On 22 December 2017 Mr McIntyre received an emailed letter from Mr McGilp stating:

Dear Bernie,
All staff have received a letter from me with regards to work on 8th (or 15th) January 2018.

I am hereby giving you notice to stand down as from 22 December for two weeks. This of course ties in with the Christmas shutdown.

Prior to the 15th January 2018 I will contact you with regard to your return to work start date with a provision that the attached contract is signed.

However, dependent upon workload in the new year we may advise you that your services will no longer be required.

We are hopeful that all employees will be re-instated, however in times of unsure sales and turnover, we need to be vigilant on the companies behalf to ensure it continues as a viable business.

...

[26] Attached to the emailed letter was a “Driver and Yard Man Casual” employment contract. This was a contract Mr McIntyre had arranged to be drafted for FNS employees.

[27] It is difficult to ascertain why Mr McGilp sent the casual contract because he is now deceased. It appears from both parties evidence that this may have been in response to Mr McIntyre no longer wanting to act as a full time supervisor and there being no full time truck driving role.

[28] By 15 January 2018 Mr McIntyre had not returned to work. He met another FNS employee, Ms McCabe at a shop in the local area. He told her he had had a nasty turn and did not think he would return to work. He then emailed a medical certificate with a return to work date of 19 January 2018. Ms McCabe arranged to use his accrued sick leave to pay for 15 and 16 January. She emailed again on 22, 23 and 25 January asking if he was returning to work. Both Ms McCabe and Mr Marino phoned Mr McIntyre seeking information on his return to work and the return of work keys in the interim.

[29] On 31 January 2018 Mr McIntyre texted Ms McCabe. He told her he would not be returning to work at FNS at all. Mr McGilp dictated a letter accepting Mr McIntyre’s resignation and asking if he still intended raising a personal grievance and to contact him to discuss this. The letter was never sent because Mr McIntyre then sent a personal grievance alleging the stand down was a constructive dismissal.

[30] By 14 February 2018 FNS had instructed its lawyers. A detailed response to the grievance was provided and a suggestion he meet with Mr Marino and the FNS lawyer to discuss his grievance and a possible way to return to work.

[31] An offer was made for him to return to work but he needed to take up labouring duties. This is because they had no need for a full time truck driver. Mr McIntyre refused the offer and the meeting.

[32] Instead, on 26 March 2018, he emailed a detailed personal grievance. The parties have been unable to resolve their matters.

[33] On 18 June 2018 Mr McIntyre filed a statement of problem.

Issues

[34] The issues for determination at hearing were:

- (a) Was Mr McIntyre unjustifiably dismissed on or about 22 December 2017?
- (b) Alternatively, was Mr McIntyre unjustifiably disadvantaged by FNS's failure to deal with his concerns about A's behaviour from 3 November 2017?
- (c) Was Mr McIntyre unjustifiably disadvantaged because of the change to his duties from a truck driver to a labourer that occurred on or about 14 February 2018?

Was Mr McIntyre unjustifiably dismissed on 22 December 2017?

[35] Mr McIntyre alleged the letter purporting to stand him down was a dismissal. From the evidence of Ms McNab she prepared the same letter to all of the employees to confirm their Christmas shutdown until 8 January 2018. She thought the wording Mr McGilp used was odd but did not think to question it. She understood Mr McGilp never contacted the employees and they simply turned up for work after 8 January. Mr Marino stated the letters weren't sent to the employees at the time because he spoke to them about the shutdown and start date for work instead.

[36] The stand down letter is badly worded. However this employer does not have any internal HR resources. FNS relied upon the managers verbal exchanges with workers to confirm their return to work. Ms McNab and Mr Marino's subsequent behaviour showed FNS was actively trying to get Mr McIntyre to return to work from 15 January 2018. Further, there was evidence from Mr McIntyre that he understood he was to return to work after 15 January 2018 on 19 December. Even with the badly worded stand down letter, there was no basis by 31 January 2018 for Mr McIntyre to believe he had been dismissed.

[37] His text message on 31 January 2018 stating he would not return to work was therefore a resignation. Bernard McIntyre was not unjustifiably dismissed.

Was Mr McIntyre disadvantaged by the employer's failure to deal with his concerns about the behaviour of A from 3 November 2017 onwards?

[38] There is an implied term of every employee's contract that employers shall maintain a safe workplace. There was little disagreement about A's unacceptable behaviour towards not only Mr McIntyre, but also members of the public generally.

[39] Warnings were insufficient to deal with Mr McIntyre's concerns. While Mr McIntyre's behaviour may not have been exemplary, it did not justify the employer taking such low level action about A's behaviour. A remaining in the workplace created a risk to the safety of others. The evidence showed his behaviour was escalating. There were allegations he had assaulted at least two members of the public by July 2018. I am told A was subsequently stood down and may have addressed his behaviour by the date of hearing. This is small comfort to Mr McIntyre.

[40] Mr McIntyre felt he was being undermined by A's behaviour. He refused to continue in his role as supervisor, preferring to be a truck driver because of A's behaviour. His last interaction with A on 19 December 2017 caused Mr McIntyre to raise a personal grievance. This was not addressed at all before his employment was terminated.

[41] Bernard McIntyre was unjustifiably disadvantaged by Far North Scaffolding's breach of the implied term of his employment to provide a safe workplace free from violence.

Was Mr McIntyre unjustifiably disadvantaged because of the change to his duties from a truck driver to a labourer that occurred on or about 14 February 2018?

[42] He cannot have been disadvantaged by this action because it occurred after he had resigned. This personal grievance is dismissed.

Remedies

[43] Mr McIntyre has a personal grievance of unjustified disadvantage. Therefore he is entitled to seek remedies of lost remuneration and compensation.

[44] There is no award of lost remuneration because this disadvantage did not cause Mr McIntyre's resignation and he remained paid throughout his employment. He also has not sought any further employment since termination.

[45] The assault was low level (hit with a balled up piece of paper) and aggressive verbal exchanges between A and Mr McIntyre. There was evidence it caused Mr McIntyre harm but it appeared low level.

[46] The Authority has awarded \$10,000 (reduced by 50% to \$5,000 for contributory behaviour) in similar circumstances.¹

[47] There was evidence Mr McIntyre contributed to the situation by being overly aggressive and angry at times. There was also evidence he was seeking specific outcomes (A's exclusion from the workplace) and when it did not occur he became angry escalating matters. I accept at times he sought to influence Mr McGilp to the detriment of employees such as Mr Marino. He also played down his role in the tension within the workplace. His behaviour escalated the tension within the workplace. In my view overall Mr McIntyre's behaviour was causative and blameworthy. A reduction in his remedies is required. I intend reducing his remedy from a \$10,000 starting point by 50% for contributory conduct.

[48] Far North Scaffolding is ordered to pay Bernard McIntyre by 31 January 2019 the sum of \$5,000 for hurt and humiliation. This includes a reduction of 50% for contributory behaviour.

[49] There is no order for costs because Mr McIntyre was self-represented.

T G Tetitaha
Member of the Employment Relations Authority

¹ *Clark v Eastern Bay Motors Limited* [2018] NZERA Auckland 369.