

Sharon Cotterill operated the partnership at the time. Mr Morgan believed he had a good working relationship with Mr Cotterill.

[4] There were changes in the structure of the business after Mr Morgan's departure. Security Fencing was incorporated in 2004, with Steve and Sharon Cotterill as the director and shareholders respectively. In 2006 the Cotterills resigned their directorships and left their employment with the company although they retained a shareholding. Paul Owen and his then-partner, Lesley-Anne Adams, became the directors and acquired shares. Both also worked for the company. In or about early 2007 Mr Owen's and Ms Adams' relationship ended. Mr Owen was removed as a director and his employment ended. Mr Cotterill resumed a directorship for a brief period after that.

[5] Ms Adams became the managing director. However she had no experience in the fencing industry. She had become involved in the business because of her relationship with Mr Owen, who did have experience. Mr and Mrs Cotterill still retained their shareholding, and returned to assist as employees in March 2007.

[6] Mr Cotterill also asked Mr Morgan to work for the company again. Mr Morgan agreed to do so, and began his employment in March 2007. He was employed initially as a welder, but was subsequently promoted to operations manager. He worked closely with Mr Cotterill, who had the role of project manager.

[7] Mr Cotterill had extensive experience and detailed specialist knowledge. He negotiated contracts, carried out the pricing and planning of the work, prepared drawings and specifications, and assisted as necessary with installation.

[8] Mr Morgan was based in the workshop. He would receive plans from Mr Cotterill. On the basis of those would prepare the component parts of the fences, mainly wire fences, and gates. He also carried out some installations, together with Mr Cotterill.

[9] Unfortunately the attempt to stabilise the business did not achieve that result. Ms Adams made Mrs Cotterill's office position redundant in or about October 2007.

Mr Cotterill resigned from his employment on 6 November 2007. The loss of his skills and experience had significant implications for the business. Not only that, commercial disputes remain between Mr Cotterill and Ms Adams.

[10] Meanwhile in May 2007 Ms Adams had employed Darren Byford as a fencer, assisting Messrs Cotterill and Morgan. Mr Byford had extensive experience in farm fencing but none in security fencing and gates. By November Mr Byford was planning to leave. He handed Ms Adams a letter dated 20 November 2007 giving one week's notice of his intention to end his employment.

[11] Mr Morgan's concerns about where all of this left the business were such that he reduced them to writing in a letter dated 25 November 2007. In the letter he expressed the view that the company did not have the staff qualified to carry out its work, with particular reference to two current contracts. These were significant contracts, which Mr Cotterill had negotiated at a time when there was at least some expectation that he would be available to oversee or carry them out. In his letter Mr Morgan made suggestions about how the skill shortage could be addressed, and referred at the end to the effect on him of the loss of Mr Cotterill's skills and experience.

[12] For her part Ms Adams had been attempting to address the skill shortage by entering into business arrangements with Gallagher Security Management Systems (or "Gallagher Security"). On 19 November 2007 she signed a dealership agreement which came into force when signed by Gallagher Security on 26 November 2007. She had also arranged for a contact at Gallagher Security to provide support to Mr Morgan if he needed it. Mr Morgan found this unsatisfactory and did not accept it was adequate. He believed Ms Adams was not listening to his concerns.

[13] Ms Adams believed she was listening to the concerns but did not accept Mr Morgan was as lacking in skills and experience as he said he was, or that he needed support of the kind he was saying he received from Mr Cotterill. She considered the arrangement with Gallagher Security was adequate.

[14] This disagreement was a principal factor in Mr Morgan's decision to write the 25 November letter.

[15] The letter was moderate in tone and expressed valid concerns in a fair way. Ms Adams said she found the letter negative and intimidating. She felt Mr Morgan was showing little faith in her and read in it a suggestion she was not up to her job. Indeed she made much in her evidence of her feelings of being intimidated, and in effect of not being trusted or respected. She also relied heavily on the fact that she suffers from a depressive condition for which she is receiving medication.

[16] I do not accept the letter was negative or intimidating, although the tone belies a wider underlying problem between the parties. It was sensible to attempt to formalise the concerns and move to address them in a structured way.

[17] On the day after Mr Morgan handed the 25 November letter to Ms Adams, Ms Adams asked him if he wanted to resign. As Ms Adams put it, she probably said 'I suppose you want to resign.' Mr Morgan told her he did not. He said in evidence that he presumed Ms Adams did not want him as an employee any more, and told her if that was the case she would have to sack him. Her reply was simply that if she dismissed Mr Morgan, he would take her to court. The exchange is symptomatic of the state of the parties' relationship, but is not evidence that Ms Adams intended to dismiss Mr Morgan.

[18] There were additional incidents in mid-late November, and on which Mr Morgan relied in support of his view that Ms Adams was intending to dismiss him. He referred to a conversation with Ms Adams on 18 November in which each party was testing the other's knowledge of Mr Byford's plan to resign. There was an element of cat and mouse in that conversation, but I do not accept the content as evidence of Ms Adams' intention to dismiss Mr Morgan. Again I regard the conversation as a reflection of the parties' mutual distrust. Mr Morgan said he felt Ms Adams was not being open and honest, while Ms Adams had concerns about Mr Morgan's attitude to her ability to run the business.

[19] Mr Morgan also felt he had been excluded from a training course which Gallagher Security was to run, and that this was indicative of Ms Adams' intention to dismiss him. There had been general discussion during November that the course would be available, but the date was not confirmed until late on 28 November. The training was to occur on 10 and 11 December. I would accept that it was then open to Ms Adams to confirm Mr Morgan's attendance with him on or after 29 November. She did not do so then, or at any other time. However I am not prepared to conclude that Ms Adams was deliberately excluding Mr Morgan from the course, and that she was doing so because of her intention to dismiss him.

[20] Finally, Mr Morgan referred to advertisements which appeared in the local newspaper on 28 November and 1 December 2007. Both stated that positions were available at Security Fencing for 'experienced welder' and 'experienced security fencer'. Both stated there were advantages in having knowledge of power fencing, a HT Class 2 Licence, and a forklift licence. The reference to a position for a welder in particular had caught Mr Morgan's attention, because he was a welder and as at 28 November his employment was continuing.

[21] Ms Adams said the advertisements were placed because she had recognised and was acting on Mr Morgan's fears about the lack of qualified staff. Indeed there was an obvious lack of qualified staff. The advertisements were broad enough to address that lack, and too broad to amount to advertisements for Mr Morgan's position. In those circumstances Ms Adams' explanation was reasonable. I am not persuaded that the reference to a welding position, and even less to the 'advantages' listed in the advertisement, support the conclusion that Ms Adams was intending to terminate Mr Morgan's employment.

[22] A meeting at which Ms Adams intended to address Mr Morgan's 25 November letter was to occur on 30 November, although there does not appear to have been any formality in its organisation. On the morning of 30 November Mr Morgan was about to complete some drilling when Ms Adams advised that she sought a meeting. Mr Morgan said that, at that point, he knew Ms Adams was going to fire him.

[23] The meeting began soon afterwards, when Mr Morgan had finished the drilling. Ms Adams' partner Jason was present and Ms Adams advised that he would be speaking for her. Ms Adams sought Jason's participation because of her feelings of intimidation. The references to intimidation were not references to any threatening conduct on Mr Morgan's part, rather to what probably were expressions of frustration or disagreement and to Ms Adams' own feelings of lack of control.

[24] Mr Morgan considered Jason's involvement was inappropriate and told Jason to 'fuck off'. He said this was because he thought Jason had resigned from the business, and he also considered it was not appropriate for a junior employee like Jason to be conducting a disciplinary investigation. As to the latter, Jason had worked in the company as an unskilled assistant on what appeared to have been a casual or ad hoc basis. While Mr Morgan's view of the role of a junior employee is fair in a general sense, it is not an accurate reflection of the nature of the meeting or of Jason's role in it.

[25] The meeting was not intended to be a disciplinary meeting and Mr Morgan was not told it was to be a disciplinary meeting. Ms Adams was entitled to seek assistance from a spokesperson. It was not open to Mr Morgan to regard Jason dismissively as no more than a junior employee, or as someone no longer connected with the business and not entitled to speak. Mr Morgan knew Jason was Ms Adams' partner. In that capacity Jason was, if not the best choice of spokesperson, at least an acceptable choice for a person with Ms Adams' limited resources.

[26] Mr Morgan's evidence was that, in response to his swearing at Jason, Jason produced the 25 November letter and said it was good enough reason for instant dismissal. If that was said it was an unhelpful response but does not go as far as saying 'you are dismissed because you wrote this letter'. Ms Adams' evidence was that Jason told Mr Morgan he would like to discuss the letter.

[27] Mr Morgan told Jason to 'get fucked' and became very angry.

[28] At that point Ms Adams told Mr Morgan he was fired. She said she did so because Mr Morgan was swearing and cursing at someone who was speaking on her

behalf, and because it was clear Mr Morgan was not prepared to discuss the letter. She did not inform Mr Morgan of this or any reason at the time, although she informed Mr Morgan's solicitor of the reason in the course of an exchange in December 2007. The writing of the letter of 25 November was not the reason for the dismissal, and Ms Adams has never cited it as the reason.

[29] Mr Morgan left the premises immediately and his employment ended.

Determination

[30] I set out the background to this matter in some detail because it places in context the events of 30 November. In particular this was not simply a matter of a dismissal because the employer's representative was sworn at in a meeting. The meeting was the flashpoint for simmering concerns and difficulties on the part of both parties.

[31] Ms Adams was not able to manage Mr Morgan. She was not able to gain his trust and she was not able to establish her authority. If her unreliable conduct regarding this investigation is an indicator, and I consider it likely that it is, Mr Morgan had reason to be frustrated with her. His frustration was exacerbated by his conclusions that Ms Adams would not listen to him. Even so, he was not justified in concluding at the start of the meeting on 30 December that he was about to be dismissed. Inevitably that view tainted his approach to the meeting in a way that was far from constructive.

[32] Mr Morgan's conduct on 30 November was the reason for the dismissal, and prompted the decision to dismiss.

[33] There have been limited occasions when an employee's conduct during a meeting was such that the employment relationship could not continue, and a decision to terminate it was made as a result of the conduct. Although the relationship here was fragile, I do not believe matters had reached a point where Ms Adams was justified in moving immediately to dismiss Mr Morgan as she did. Ms Adams could at least have warned Mr Morgan that she stood by her selection of Jason as her

spokesperson, that Jason's role was to speak for her in addressing the 25 November concerns, that Mr Morgan was required to observe that role, and that a refusal to accept that was the case or a refusal to engage in discussion about the concerns might place Mr Morgan's employment at risk. Failing to take action of that kind is not adequately answered by reference to a depressive condition or sense of being intimidated.

[34] For that reason I conclude that dismissal was not the action a fair and reasonable employer would have taken. The dismissal was not justified.

Remedies

[35] Mr Morgan seeks reimbursement of remuneration lost as a result of his personal grievance. He said he worked an average of 52 hours per week. He obtained full time employment after 7 weeks, and had temporary employment during that 7 week period. His loss was calculated as (52 hours per week x \$25 per hour x 7 weeks) – \$2767 in earnings from temporary position = \$6,333.

[36] Ms Adams undertook to provide records indicating whether Mr Morgan's stated average working week was correct. She has provided records for the month of November 2007 only. The average for that month was 49.4 hours. The incomplete nature of the records was unsatisfactory, but on the other hand the only support Mr Morgan provided for his assessment was a single payslip showing he had worked 52 hours in the week to which the payslip related. I apply the average of 49.4 hours. The loss is \$5878.

[37] In setting remedies I take into account whether and to what extent Mr Morgan contributed to the circumstances of his personal grievance. He was not entitled to refuse to accept Jason's role in the 30 November meeting, and his abusive response was unacceptable. This conduct was influenced by an assumption that was not well-founded. Accordingly Mr Morgan's actions contributed to the circumstances of his dismissal in a blameworthy way.

[38] I therefore reduce the award reimbursing him for loss of remuneration to the sum of \$2,939.

[39] Mr Morgan is also entitled to an award compensating him for injury to his feelings resulting from his personal grievance. He was angry that he had been dismissed, and worried about the financial implications of being without a job over the upcoming Christmas period.

[40] Taking into account the evidence of injury, as well as Mr Morgan's contributory conduct, I order Security Fencing to compensate Mr Morgan in the sum of \$3,000.

Additional matters

1. Overpayment of tax

[41] Mr Morgan included in his statement of evidence a claim that too much PAYE tax was deducted from Mr Morgan's final pay, and seeking reimbursement of the overpaid amount. It is not appropriate to incorporate a new claim in a statement of evidence in that way. In any event, if Mr Morgan has in effect paid more tax than he was liable to pay, the matter should be taken up with the IRD.

2. Return of personal property

[42] Mr Morgan also included in his statement of evidence a request for an order for the return of his tools. The tools he identified were:

- . an engineer's combination square
- . a metal scriber gauge
- . a mig welding lead
- . a modified heavy work hammer
- . a double magnetic square
- . 2 steel framed chairs

[43] At the investigation meeting Ms Adams was able to say three of those items were at Security Fencing's premises, but she was uncertain of whether she could identify the other three. The agreement made between the parties, and before the Authority, was that these items could be collected from Security Fencing after the investigation meeting.

[44] Ms Adams did not observe that agreement. Nor did she observe a further agreement in the terms discussed during a conference call with the Authority. Her conduct was unacceptable. She is directed to observe her agreement to make available to Mr Morgan for collection the remainder of his tools.

Summary of orders

[45] Security Fencing is ordered to pay to Mr Morgan:

- (a) \$2,939 as reimbursement of remuneration lost as a result of his personal grievance; and
- (b) \$3,000 as compensation for injury to feelings.

Costs

[46] Costs are reserved.

[47] If either party seeks a determination from the Authority there shall be 28 days from the date of this determination in which to file and serve a statement of position on the matter. The other party shall have a further 14 days from the date of receipt of the relevant statement in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority

