

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 198/10

File Number: 5299328

BETWEEN Philip Routhan
Applicant

AND The Plumbers, Gasfitters &
Drainlayers Board
Respondent

Member of Authority: Denis Asher

Representatives: Pheroze Jagose for the applicant
Geoff Davenport for the respondent

Investigation Meeting Wellington 11 November 2010

Submissions Received 26 November 2010

Determination: 14 December 2010

DETERMINATION OF THE AUTHORITY

The Problem

[1] Was Mr Routhan unjustifiably disadvantaged by the respondent (the PGDB/the Board) and was he also unjustifiably dismissed? Did he bring his grievances within the statutory 90-day period? If he was unjustifiably dismissed, should he be reinstated? Should the PGDB be granted damages for legal fees in respect of it obtaining an interim injunction against Mr Routhan?

[2] Each party seeks costs.

The Investigation

[3] During a telephone conference on 23 April 2010 the parties agreed to undertake mediation and subsequent one day investigation in Wellington on 8 July if settlement was not achieved. The parties also agreed timelines for the provision of witness statements and an agreed bundle of documents. All references to page numbers are in respect of the bundle provided by the parties.

[4] I accepted the parties' agreement that the PGDB's counter-claim did not need to be filed separately.

[5] Following a second conference call during July 2010, and because of medical confirmation on the day before the scheduled investigation (8 July) that Mr Routhan was too ill to travel, the parties agreed to adjourn the investigation to 11 November. During the investigation a timetable was agreed for filing submissions.

Background

[6] The PGDB is a statutorily appointed body corporate mandated to fulfil the functions and granted the powers set out in s. 11 of the Plumbers, Gasfitters and Drainlayers Act 1976 (the PGDB Act 1976).

[7] The PGDB runs as small office which currently has 13 employees some of whom are part-time.

[8] From June 2006 until his summary dismissal in December 2009 Mr Routhan was employed by the Board as the Registrar and Chief Executive for its secretariat. Prior to that, from October 2005 the applicant had been the PGDB's Acting Registrar, a position he held concurrently with his pre-existing role of the PGDB's chairman. Mr Routhan held the latter role for a period from October 2002. Before that, from October 2000, he was a member of the PGDB's governance Board. Mr Routhan is also a registered plumber and, before taking up PGDB employment, had a plumbing business on the West Coast of the South Island.

[9] Mr Routhan's terms and conditions of employment were set out in an individual employment agreement dated 8 June 2006.

[10] In 2008 the Minister of Building and Construction appointed new members to the PGDB who subsequently elected one of the new appointees as their chairperson.

[11] By letter dated 3 June 2009 (pages 34 & 35) the Board advised Mr Routhan of its disciplinary investigation into him obtaining a legal opinion. A meeting followed on 3 July and Mr Routhan's counsel then responded with a letter dated 8 July (pages 30-33). Further responses were sought by the PGDB by letter dated 19 August (pages 57-60). A reply was provided dated 28 August (pages 93-94).

[12] As it happened, that investigation was effectively overtaken by fresh concerns held by the Board in respect of separate matters: by letters dated 2 & 3 September (pages 103-104 & 113-114), the Board notified Mr Routhan of its decision to initiate an independent investigation into:

- Whether he had subjected other employees to bullying or other inappropriate conduct;
- Whether he had undermined the health and safety of office staff and, if he had, whether his conduct was in breach of the terms of his employment, and if so how serious that breach was; and
- Whether he failed to brief the Board and Minister on issues of public safety.

[13] A response was sought from the applicant in respect of those matters as well as a proposal to suspend him.

[14] Mr Routhan's counsel replied by letter dated 4 September (pages 121-123). Amongst other things it denied the allegations of bullying and an unsafe work environment and contested the fairness of the respondent's actions to date.

[15] By letter of the same date, the PGDB advised Mr Routhan of its decision to suspend him and to bar him from its premises (pages 125-126).

[16] By replies dated 9 & 10 September Mr Routhan's counsel sought various undertakings from the PGDB (pgs 127-129). At the same time he also "*incidentally*" returned documents obtained, as counsel explained it, for the purpose of providing advice to the applicant in his personal capacity (pg 128).

[17] Hitherto unaware Mr Routhan had possession of any of its documents, the PGDB replied by letters dated 11 & 14 September: amongst other things, and as this was the first advice the applicant had taken its documents, it sought a response from Mr Routhan in respect of his actions on the ground that his conduct was "*potentially very serious*" (pages 130, 226-227).

[18] Another letter followed dated 14 September: the PGDB advised of its grave concern that Mr Routhan's solicitors held copies of files relating to staff members as well as other Board business. It sought an assurance from counsel for Mr Routhan that all documents relating to its personnel and business be returned, and no copies kept (pages 229-230).

[19] By letter dated 15 September the applicant's solicitor rejected the Board's "*intimation that Mr Routhan's removal of material from the Board's premises was improper*" on the grounds his client's possession of the document was consistent with Mr Routhan's employment terms and "*the adoption of flexible working practices to accommodate a balanced home and work life*" (pg 231).

[20] The applicant's defiance was not acceptable to the PGDB and it sought and obtained an interim injunction determination in its favour from the Authority requiring the return of all its documents (see *Plumbers, Gasfitters and Drainlayers PGDB v Routhan and Chapman Tripp*, WA 136/09, 18 September 2009).

[21] By letter dated 21 October (pg 647) the Board provided Mr Routhan with a copy of the investigator's report into allegations against him (pgs 649-728).

[22] The report was completed after extensive interviews and re-interviews with relevant parties including the applicant during which the interviewees were appraised of what others had said, and after the PGDB's independent investigator had earlier provided Mr Routhan with a copy of the report in draft form, along with an opportunity to comment (pg 561).

[23] Conclusions reached by the independent investigator included:

- Mr Routhan's treatment of a senior staff member in respect of several matters was unfair including false accusations and blame and unwarranted and insulting verbal abuse;
- His behaviour to another senior staff member in respect of several matters was unacceptable, and was serious and likely to constitute harassment;
- His behaviour toward a third employee was unacceptable;
- His behaviour toward a fourth employee was likely to constitute bullying under the Board's Harassment Policy;
- Mr Routhan used offensive, racist and malicious statements about staff;
- Mr Routhan created a working environment in which some staff were terrified and there was a blame culture;
- He used abusive and insulting language in the office to describe board members;
- Mr Routhan's attempts to suppress potentially serious health and safety information from the Board, Minister, and various governmental bodies was reckless, inconsistent with his responsibilities and in breach of his obligations to his employer; and

- The unauthorised removal by Mr Routhan of hundreds of Board documents was an egregious breach of confidentiality.

[24] By further correspondence dated 28 October, his responses were sought (pages 729-733).

[25] Issues were then raised on Mr Routhan's behalf in respect of him being able to access various parties and documents so that he might adequately respond to the investigator's report (e.g. pages 734-735 and 745-746).

[26] By letter dated 6 November Ms Armstrong confirmed she would not be involved in any final decision concerning the outcome of the investigation into Mr Routhan's conduct (page 751).

[27] By letter dated 23 November Mr Routhan provided his response to the PGDB's investigation (commencing page 762). Amongst other things, he denied the allegations of bullying, defended his management style, challenged the PGDB's exclusion of him from its meetings and identified the result of the investigation as predetermined. He also said "*Board members have gone to extraordinary lengths to destabilise me in my role*" (pg 775) and alleged the PGDB and its chair had acted towards his participation in its meetings in breach of its policies (above). He also claimed he was instructed by the chair not to advise the Minister of an earlier briefing he had provided the chair. Mr Routhan concluded with the view that the chair and the Board's solicitors "*deliberately overreacted and escalated the documents issue into a further disciplinary matter requiring investigation*" (pg 781).

[28] Mr Routhan and his counsel met with the PGDB on 27 November (pages 817-835).

[29] In a letter dated 3 December the PGDB expressed a preliminary view that Mr Routhan's conduct amounted to serious misconduct and summary dismissal was one of the outcomes open to it. In particular, it found:

- Mr Routhan's decision to remove hundreds of documents including personnel files without the knowledge and approval of the Board

destroyed the trust and confidence essential to the parties' employment relationship;

- From the Board's perspective, Mr Routhan's actions in taking the documents was made worse by his refusal of its several lawful and reasonable directions he return that material;
- Statements made by Mr Routhan about the Board and Board members had destroyed trust and confidence in the employment relationship, including his questioning of the honesty and integrity of the Board and its members (pg 843); and
- He used racist, abusive or threatening language around staff.

[30] The Board found in favour of Mr Routhan's explanations in respect of several matters, including:

- His explanation in one case that he needed time to assess files and that it may not have been necessary to brief the Board; and
- Other matters that it concluded fell into the category of error of judgement rather than serious misconduct.

[31] The applicant's views were sought in respect of the outstanding matters before a final decision was reached (pages 836-850).

[32] Mr Routhan's reply followed in a letter dated 10 December (pages 851-857).

[33] The PGDB's decision to summarily dismiss Mr Routhan effective 15 December was set out in a letter of the same date (pages 858-869).

[34] By email dated 22 December counsel for Mr Routhan said his client viewed his treatment by the Board, including dismissal, as unjustified; remedies sought included reinstatement and compensation for loss and damage (page 870).

[35] By reply email dated 12 January 2010 counsel for the PGDB described the earlier advice as containing “*No detail ... and the Board is therefore not able to respond in any detail*” (page 872).

Discussion and Findings

Unjustified Disadvantage Allegations

[36] The PGDB says Mr Routhan’s alleged unjustified disadvantage claim was not raised within 90 days. I agree for the following reasons:

- a. Despite extensive communications between the parties in 2009 the first express mention of an unjustified disadvantage allegation is that set out in the applicant’s counsel’s email of 22 December 2009 (par 31 above, and par 41 below) where he cryptically advised his client considered his treatment by the Board, including his dismissal, was unjustified: “*The reasons for that are clearly enough set out in previous correspondence*” (pg 870). I do not accept that they are. That is because, from 3 June 2009 when the PGDB put its first ‘please explain’ advice to the applicant (pg 34), and his then-counsel’s response of 8 July (pg 30), until 22 December, at no time did Mr Routhan expressly link his apparent concerns with an articulated personal grievance that he wanted his employer to address (per s 114 of the Employment Relations Act 2000 (the Act)). The Board had no other reasons to understand Mr Routhan was raising a grievance until the non particularised advice of 22 December.
- b. Mr Routhan did not raise before the advice of 22 December those matters of concern that are clearly set out in his witness statement as constituting an unjustified disadvantage. His failure is all the more surprising given his many concerns including the very serious perceptions that the PGDB:
 - Had commenced an “*overt campaign to remove me from my job*” (par 17 applicant’s witness statement and par 5.5 (b) statement of problem);
 - That he had been improperly directed not to speak at Board meetings unless allowed to by its chair; and

- That his exclusion from Board-only meetings was in breach of his contractual entitlement, or that the concerns he raised as to the Board's practices were going unaddressed (see par 17 of his witness statements).
- c. None of the unjustified disadvantage allegations particularised in the statement of problem at par 5.5 were put to the respondent before 22 December, despite his claim of a sustained campaign since July 2008 to undermine him in his role (statement of problem), and despite the opportunity to put his concerns to the Board's independent investigator.
- d. The only time these matters were particularised was in Mr Routhan's statement of problem filed on 17 March 2010, which was well outside the 90-day period in which they were statutorily required to be raised; and
- e. This failure was despite Mr Routhan's advice to the PGDB at a meeting on 27 November that, since 2008, he had "*been collecting documents since the term of the new Board. There have been ongoing issues*" (pg 818).

[37] No claim for exceptional circumstances has been raised (ss 114 (4) & 115 of the Act).

[38] These failings occurred despite Mr Routhan's experience as a senior chief executive and statutory position holder and his being represented throughout 2009 by experienced counsel.

[39] I conclude that these failings, and Mr Routhan's overall conduct (see below), are in breach of the applicant's obligations under s. 4 (1A) of the Act to be "*active and constructive in ... maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative*".

[40] The PGDB knew nothing of Mr Routhan's very serious concerns, and had no opportunity to address them with a view to resolving those matters.

[41] I am also satisfied that Mr Routhan's allegations of unjustified disadvantage are anyway without merit. On a balance of probabilities basis, there is no objectively measurable evidence to support the applicant's claim of a campaign by the PGDB to effect his removal other than when it fairly and reasonably was open to it to do so. Mr Routhan's allegations are simply not made out or are fairly and reasonably accounted for by the respondent. For example, Mr Routhan enjoys no contractual entitlement to be present for each and all Board meetings or to speak without invitation. By statute the PGDB determines its own procedure: ss 9 (6) of the Plumbers, Gasfitters and Drainlayers Act 1976. The provision in Mr Routhan's position description that he attend all Board and committee meetings (pg 15) is not a contractual entitlement supporting his claim to be present, but an expression of his employer's ability to require him to be present as it sees fit. Consistent with contemporary practice, the PGDB saw fit to hold meetings on its own which it was entitled to do: Mr Routhan had no right or entitlement at law to dispute that decision.

[42] Mr Routhan's claims of an overt campaign by the PGDB's chair in particular are also, for the reasons set out above, not made out.

[43] Because of Mr Routhan's failure to properly engage the Board in respect of his concerns, and the delay in him communicating these matters to it, and because the applicant has no evidence with which to support his claim of a campaign and other serious allegations, I reach a conclusion that his claims are unsupported and therefore not credible and – where disputed by the respondent – prefer its version of events.

Unjustified Dismissal Allegation

[44] Because of the extensive communication between the parties, particularly in the weeks preceding Mr Routhan's dismissal, I do not accept the Board's claim that the email communication of 22 December was inadequate advice of the applicant's grievance. That is because of its clear notice:

Mr Routhan considers his treatment by the Board, including his dismissal, is unjustified. The reasons for that are clearly enough set out in previous correspondence. Mr Routhan seeks to be reinstated in his position, and compensated for the loss and damage he has suffered.

[45] I note also that the detailed statement of problem filed on 17 March 2010, just outside of the 90-day period but two months after the advice of 22 December, provided sufficient particularisation.

[46] Other than in respect of the claimed unjustified disadvantage grievance, which I reject as out of time, the PGDB has in no way been disadvantaged by the timeliness and adequacy or otherwise of these communications in respect of Mr Routhan's claimed unjustified dismissal.

[47] Per s. 103A of the Act, the relevant question of whether the dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[48] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances. It is not a question of what the Authority or the Court might apply.

[49] The basis of the PGDB's decision to dismiss Mr Routhan is set out in its letter of 15 December 2009 (from pg 858). The letter runs to 12 pages. It sets out the various separate and serious reasons why the respondent formed the view it could no longer have trust and confidence in Mr Routhan. They include but are not confined to:

- a. Without authority and without the knowledge of the respondent, taking and passing on to his own counsel over 4000 pages of Board documents including confidential personal files of Board employees who had filed complaints against the applicant, and a privileged legal opinion;
- b. Repeatedly refusing to return the same, i.e. refusing lawful and reasonable instructions;

- c. Deliberately refusing to comply with the Board's request he identify the material he had;
- d. Despite clear requests from the PGDB, only gradually identifying the material taken and then not fully until during an Employment Relations Authority injunction investigation;
- e. Returning the material only when the Board, at considerable cost, sought and obtained an injunction from the Authority;
- f. Advising the PGDB at a face to face meeting on 27 November that, "... *my conduct this year has not been wrong – I don't think any of my conduct was wrong at all*" (pg 823);
- g. That, as the respondent's most senior employee, he referred to Board members in offensive and derogatory terms and accepted no responsibility for his actions;
- h. Using language around staff that was racist, abusive or threatening;
- i. Creating a workplace of fear; and, amongst other things,
- j. Dishonest advice to a senior staff member resulting in him formally raising his complaints about the applicant through his lawyer.

[50] The Board concluded that Mr Routhan's deliberately placed his employer in a position of complete uncertainty in respect of what material he had taken and that his actions were entirely destructive of the trust and confidence expected of a very senior employee.

[51] Having regard to the above, the Board summarised Mr Routhan's actions as amounting to:

wilful and deliberate conduct ... in taking thousands of pages of documentation ... including confidential personnel information and legally privileged material ... and

repeatedly refusing to give them back (and his) use of racist ... and abusive and threatening language.

(pg 868)

[52] It concluded that the applicant's conduct fell well outside of what was tenable for it and the damage to the parties' employment relationship was "irreparable" (above).

[53] I note here the decision to dismiss was a unanimous one of all 8 decision-making members which did not include the chair, who had withdrawn herself from the decision making process.

[54] I have no reason to conclude that a fair and reasonable employer, objectively measured, would have arrived at a conclusion different from the Board's. The evidence against Mr Routhan, objectively measured, is overwhelming. Put simply, and for reasons I have no need to speculate about or inquire into, Mr Routhan – the respondent's most senior employee – elected to go to war against his employer. There were no proper grounds for him to do so, and his guerrilla tactics in particular were in profound breach of his express obligations to his employer, including being responsive and communicative. His behaviour was bizarre. Mr Routhan enjoyed no colour of right to take his employer's property, i.e. thousands of pages of documents. They were clearly not taken and withheld by him for genuine work reasons, and he had no basis to defy his employer's reasonable and lawful instruction they be returned to it.

[55] The reasons provided by Mr Routhan for his actions do not withstand scrutiny: they include amongst others worklife balance, a whistle-blowing initiative and, finally, a lack of confidence in the honesty and integrity of the Board and its members and therefore the need to protect the material. The first was clearly a cynical screen if not a lie, the second has been abandoned (oral evidence from the applicant during the Authority's investigation; and for which no supporting evidence can be found in the *Controller and Auditor-General's Inquiry into the Plumbers, Gasfitters, and Drainlayers Board Report of July 2010* – pg 934 B in the bundle), and the third was proffered without supporting evidence.

[56] I note also that the Board had every reason to take account of the applicant's unrepentant advice to it, at the meeting on 27 November, that, in respect of his actions in the preceding months,

I've thought what would I do differently - nothing

(pg 835)

[57] Mr Routhan anyway had recourse to other means of obtaining the documents including, in the context of a grievance, via the discovery processes available to him under the Act, without having to resort, unlawfully, to taking material that did not belong to him, was highly personal to others or was legally privileged.

[58] As stated above, and in respect of the other reasons given for dismissing the applicant – including the allegations of bullying and inappropriate language – because of Mr Routhan's failure to properly engage the Board in respect of his concerns, and the delay in him communicating these matters to it, and because he has no evidence with which to support his claim of a campaign against him and other serious allegations, I reach the conclusion that – as his claims are unsupported and self-serving and therefore not credible and where disputed by the respondent and in particular those who gave evidence to the independent investigator – I prefer their version of events, and thereby accept the basis of the respondent's decision to dismiss.

[59] As for process, an extensive investigation was initiated by the Board, including engaging an independent investigator. Mr Routhan was represented throughout and enjoyed every opportunity to put his concerns to the investigator and, subsequently, to the PGDB. He took full advantage of the latter, meeting and communicating extensively with the Board before its decision to dismiss him. Only pedantic scrutiny would find fault with the respondent's approach. The Authority's investigation established no basis to challenge the Board's process.

[60] As Mr Routhan was justifiably dismissed it follows that there is no basis for his claim for redundancy compensation, following the PGDB's decision to, some months later, disestablish the joint chief executive/registrar position he previously held.

In the Alternative

[61] In the event that Mr Routhan was unjustifiably dismissed, I am satisfied that his contributory fault, including his failures to be communicative in the face of his powerful concerns, the unauthorised taking of his employer's property when disclosure opportunities were readily available in the context of grievance proceedings and his behaviour toward staff are such that – in equity and good conscience – no remedies, including reinstatement, would be open to him.

[62] Mr Routhan's admitted failure to mitigate his losses following his dismissal would also mean no compensation for lost income could be recovered by him.

Damages Counter-Claim

[63] The Board seeks special damages totalling \$66,458 (par 131, closing submissions received on 19 November 2010) arising out the cost to it of the independent investigation it commissioned and the legal costs incurred in relation to the investigation process following (while excluding the costs of) the obtaining of the interim injunction.

[64] The investigator's costs, it says, had nothing to do with court litigation, but were instead a cost that arose directly from Mr Routhan's breach of contract.

[65] The respondent urges me not to regard its claim for special damages as a minor matter or a bolt-on and to make an appropriate award on the basis those costs were foreseeable: *Masonry Design Solutions Ltd v Bettany* unreported, Colgan CJ, 21 Aug 2009, AC 30/09.

[66] I have sympathy for that submission arising as it does out of the applicant repeatedly refusing to follow a lawful and reasonable instruction, i.e. to advise his employer what property of it he had in his possession, and to return it, despite having clear notice to do so, thus necessitating the Board having to seek and obtain an interim injunction. However, other issues relating to Mr Routhan were under investigation at the same time and it is not argued they arose out of a similar and repeated refusal resulting in foreseeable costs.

[67] As the costs of the interim injunction determination in favour of the respondent remain reserved, and as a claim for indemnity costs is the appropriate application to make in respect of the consequences of Mr Routhan's repeated refusal of a fair and reasonable instruction, I decline that part of the application for special damages.

[68] The remainder of the claim for special damages is in respect of the legal costs incurred by the Board in relation to the investigation process following the obtaining of the interim injunction. They totalled of \$33,658. GST is not sought. I am satisfied that special damages in respect of that cost should not be awarded against the applicant as they are costs regrettably but typically incurred by employers when faced by staff issues such as this. They are part of the normal costs of business. Mr Routhan's conduct is instead the basis for a claim for costs to go beyond the Authority's normal tariff-based approach.

Determination

[69] Mr Routhan's application is dismissed.

[70] Costs are reserved.

Denis Asher

Member of the Employment Relations Authority