

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 77/10
5288547

BETWEEN FRANK SCHOUTEN
 Applicant

AND AMALGAMATED JOINERS
 (1997) LTD
 Respondent

Member of Authority: P R Stapp

Representatives: Frank Schouten in person
 John Gwilliam, Counsel for the Respondent

Investigation Meeting: 31 March 2010 at Wellington

Determination: 26 April 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 9 September 2009 there was an incident involving Mr Schouten, Paul Pepper managing director, and a travelling salesman. The incident was about a comment made by Mr Schouten and an argument over a nail gun and whether or not it needed replacing, or whether oiling it would suffice.

[2] Mr Schouten and Mr Pepper engaged in a conversation that they both have given different evidence about.

[3] Mr Pepper agreed that he told Mr Schouten to leave, and told Mr Schouten that he was *sacked*. Mr Schouten left as he was told to do. Mr Schouten attended work the next day and was informed by Mr Pepper his final pay would be arranged and remaining tools returned.

The employer's position

[4] Mr Pepper says that Mr Schouten was dismissed for abusive and threatening language justifying an instant dismissal on 9 September 2009. This involved an alleged comment made by Mr Schouten along the lines that "*I'll get a crow bar and hit you around the ear with it, you c...*"

[5] Mr Pepper says he was concerned enough about Mr Schouten's behaviour to arrange trespass notices with the Police to prohibit Mr Schouten from entering his work premises and home.

[6] Mr Pepper says he informed Mr Schouten when Mr Schouten returned to work the next day that he had arranged the trespass notices and confirmed the dismissal.

[7] There were previous incidents that Mr Pepper referred to during his evidence. He also referred to his observations of Mr Schouten's personality to support the decision.

Mr Schouten's case

[8] Mr Schouten says that he is honest and hard working.

[9] His personal grievance related to his dismissal, that he was not given a written reference, plus he has objected to the trespass notices taken out against him by Mr Pepper.

[10] He denied Mr Pepper's version of events and Mr Schouten's evidence is:

- (a) That he was having problems with the nail gun and genuinely believed that it needed to be replaced.
- (b) That Mr Pepper initiated the problem by saying he was *dribbling shit* in a discussion at morning tea break.
- (c) That he realised Mr Pepper was in a mood.
- (d) That Mr Pepper told him to put oil in the nail gun;
- (e) That the travelling salesman came in;
- (f) That Mr Pepper and the travelling salesman were disparaging about him personally, and they made objectionable comments. Mr Schouten says he was embarrassed about their personal comments about him.

- (g) That he asked the salesman if he sold staple guns, but got no answer. The salesman left;
- (h) That Mr Pepper responded negatively. He was told to get his things, that he was sacked and to get out;
- (i) That he challenged Mr Pepper about his process and that it was not allowed;
- (j) That Mr Pepper was provocative and looked as if he was *possessed like the devil*.

[11] Mr Schouten denied swearing and he accepted that he did make a comment, but he was speaking figuratively when he said: *“Hey mate you could do with a knock on the head with a crowbar to knock some sense into you, you’re gone crazy man”*

[12] Mr Schouten agreed that he left work on 9 September and returned the next day. He says that he was informed by Mr Pepper that a trespass notice had been taken out against him.

[13] He denied that he acted aggressively and that he was asked to leave because of his behaviour. He says that Mr Pepper was sarcastic and argumentative. He claimed Mr Pepper made a false statement to the Police and that Mr Pepper fabricated and made up the situation to justify dismissing him.

The issues

[14] The issue is straight forward-who said what to whom on 9 September 2009? What was the sequence of the comments made by Messrs Schouten and Pepper in the conversation?

[15] Was Mr Schouten’s *crowbar* comment enough to cause Mr Pepper to feel threatened?

[16] The legal test for an employer to justify a dismissal is s 103A of the Employment Relations Act 2000 that states:

...the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable

employer would have done in all the circumstances at the time the dismissal or action occurred”.

[17] The principles of procedural fairness will, in most circumstances, include an employee being given notice of any specific allegation being relied upon and its likely consequences, having an opportunity to be heard and provide an explanation, and the employer carrying out an investigation (where necessary) with an unbiased consideration of any explanation (see *N Z Food Processing Union v Unilever NZ Limited* [1990] 1 NZILR p35).

[18] However, the law allows an employer to react and not need to conduct an investigation or hold a meeting “...where the opportunity for explanation is not necessary nor desirable or relevant...” and where “...the facts are so obviously apparent to an employer and to the worker concerned, that summary or instant dismissal is justified”, but such an exception will only “...arise generally in situations where the person...is captured ‘in flagrante delicto’ so that there can be no doubt as to what the person has done and little, if any doubt as to the character of that act”: (see *NZ Food Processing Union v Unilever NZ Ltd* [1990]1 NZILR 35, 45, *Finsec v AMP Society* [1992] 1 ERNZ 280 and *Davis Trading v Lewis* [1993] 2ERNZ 276-277). In other words the instances will be exceptional. There needs to be clear evidence available in which the employer can safely rely upon. There needs to be a clear confession and or admission of any fault or misconduct by an employee.

The facts

[19] Frank Schouten started work for Amalgamated Joiners (1997) Ltd on 10 April 2001. The parties signed off an employment agreement, but did not renew it. By agreement Mr Schouten had been working 32 hours per week, instead of 40 under the agreement. He was paid \$23 per hour.

[20] Amalgamated Joiners (1997) Limited is a small family business manufacturing wooden interior and exterior joinery. Mr Pepper works as the owner in the business. Mr Schouten had been employed as a cabinet maker.

[21] On 9 September Mr Schouten and Mr Pepper had an altercation over a nail gun, which Mr Schouten believed needed replacing. Mr Pepper suggested to him instead that he oil it. Mr Schouten claimed that he overheard some mumbling about him from Mr Pepper and the travelling salesman who had called in to the premises.

This led to a comment that Mr Schouten says was a figure of speech, that Mr Pepper *needed a knock on the head with a crowbar to clear his head*, because of what had been going on. Mr Pepper recalls it very differently when he recorded in a statement made to the Police on the same day that Mr Schouten had said “*I’ll get a crow bar and hit you around the ear with it, you c...*” Mr Schouten did not refer to swearing in his evidence. It was common ground that Mr Schouten had become emotionally upset, but he denied making the comment as Mr Pepper recalled it.

[22] Also, it is common ground that Mr Pepper informed Mr Schouten to leave and that he was *sacked*. There is an issue about whether or not the comment was made before or after the crowbar comment from Mr Schouten. Mr Pepper says the treat of violence was enough to sack Mr Schouten on the spot. The reasons for the decision were subsequently provided in writing by Mr Pepper. He has relied on the alleged abusive and threatening language used and a violent threat being made against him by Mr Schouten.

[23] The parties went to mediation and it now falls on the Authority to make a decision.

Determination

[24] This is about credibility. Messrs Schouten and Pepper were the only witnesses. Neither of them called the travelling salesman, and there were no witnesses called who could give evidence on the events and the background.

[25] Therefore I have had to assess Mr Schouten and Mr Pepper and rely on the documentary material that has been produced.

[26] The fact that Mr Schouten was emotionally upset does colour the situation. Mr Schouten was clearly upset, according to his statement and acknowledgement in his evidence, and reference in Mr Pepper’s evidence. The situation that developed had to relate to the nail gun or what Mr Schouten says he overheard Mr Pepper and the salesman mumbling. Since they disagree on the latter, and have not called the salesman, I have had to consider that their moods and attitude towards each other were the cause of the situation. Mr Schouten was upset and Mr Pepper clearly had an issue too about the nail gun and telling Mr Schouten to oil it and Mr Schouten’s interruption with the travelling salesman. It is clear that Mr Schouten believed Mr

Pepper was in a mood that day, but that did not stop him from querying the salesman about the nail gun and responding to Mr Pepper.

[27] Both of them were direct, blunt and intense in their opinions during the Authority's investigation meeting. They both stuck to their stories outlined in their letters, notes and statements. Neither of them was prepared to give any ground on their version of events. This is not about either one or the other lying, but that they both may have come to believe what they are saying where instead the truth lies somewhere between the two versions. This is because there were no witnesses, the time that has elapsed and the emotion involved in the situation at the time.

[28] Mr Pepper may have genuinely felt threatened by Mr Schouten because:

- (a) Mr Schouten did refer in his comment at the time to a crowbar and Mr Pepper needing a knock on the head, or ear. It is possible that Mr Pepper did not understand the inference Mr Schouten says that he was figuratively speaking in making his crowbar comment.
- (b) Mr Pepper straight away went to the Police and made a statement on the same day. He has relied on that statement as the record of his version of the detail.
- (c) The actual Trespass notice was up to the owner/occupier of the premises to make arrangements to serve. The Police have written that the reasons for a person being trespassed can be trifling and spurious. Indeed Mr Schouten has obtained a trespass notice against Mr Pepper when they have not had anything to do with each other except in these proceedings since the dismissal. It appears to be retaliatory. That is not enough to establish that Mr Pepper was being aggressive or nasty given Mr Pepper says he was frightened.
- (d) Mr Schouten made his written statements at later dates.
- (e) There is the possibility that Mr Schouten used the *c...word* considering he accepted that he did swear at other times and could not say for sure that he would not have sworn, and says that so did Mr Pepper (not replied to by Mr Pepper).

(f) Mr Schouten got upset.

[29] Also Mr Pepper may have been in a mood because Mr Schouten intervened when Mr Pepper was dealing with the travelling salesman, he told Mr Schouten to oil the nail gun and then a short time later he dismissed Mr Schouten on the spot.

[30] Mr Schouten has relied on the right to summarily dismiss Mr Schouten on 9 September. That is an instant dismissal. Thus, it lacks any procedure considering that Mr Schouten did not know it was a possibility that Mr Pepper would *sack* him. The employment agreement does not make any provision at all for dismissal (or termination), except that there is a reference for an employee being able to bring a personal grievance. Mr Pepper informed me that he would have told Mr Schouten at the time of his employment in 2001 that any drugs; violence and threatening behaviour would not be tolerated in the work place. He would be right to include those as serious misconduct, but that does not absolve him from making an instant dismissal without some procedure and being tempered by the fact this is a small employer and the owner had been directly involved in the incident without any witnesses to call on. Mr Pepper did not even attempt to get any acknowledgement of an admission of any wrong doing from Mr Schouten. It is not fatal that his belief in regard to including drugs, violence and threatening behaviour as serious misconduct was not put in writing, but a fair and reasonable employer would have had a cooling off period before raising the conduct and would have put Mr Schouten on notice that his employment was in jeopardy. This is especially so when Mr Schouten had been employed since 2001 and had agreed to work less hours during the recession. Also, Mr Pepper had on at least one other occasion sent Mr Schouten home; in an employment relationship that, I hold, had its ups and downs.

[31] Having regarded the above and given the upset and emotionally charged situation in the workplace, without any witnesses and without any physical harm done, Mr Pepper has not satisfied me that the situation he was in came near the extent of the spectrum that the Court has said would justify an instant dismissal. Given that he may have felt threatened that is not the same as actually being threatened because there is a completely different version about the context in which Mr Schouten made the crowbar comment, no physical injury, no admission of any fault and no witnesses.

[32] There is a small amount of evidence that supports some difficulties with Mr Schouten (two complaints) during his employment, even although it was considered

they had been resolved at the time, and that there were no performance management issues and warnings in place. However, that is not enough to even start to suggest that an instantaneous dismissal would be justified on the grounds of what Mr Pepper said during the Authority's investigation: "*that the reason for the dismissal was related to what had gone on before*". This suggests that a fair and reasonable employer would have considered a cooling off period; and even a suspension on full pay if the employment agreement allowed would be another possibility. Calmer reflection may have seen matters assessed more fairly and openly to both Mr Schouten and Mr Pepper.

The remedies and assessment of contribution

[33] It is my decision that Mr Schouten is entitled to claim lost wages, but I have limited any such loss to three months under the Employment Relations Act because he made a decision to turn down work, albeit at less pay and poorer conditions. Of course that is his right, as he said, but in doing so, he cannot then expect his previous employer to pick up the cost for his own decisions and choice. Nevertheless he has looked for alternative work and I accept he has had difficulties getting another job. In the circumstances I have awarded 6 weeks wages because Mr Schouten decided to be picky about what work he was prepared to undertake to mitigate his loss. This amounts to \$4,416.

[34] He is also entitled to compensation for humiliation, loss of dignity and injury to feelings. I have no doubt about the impact the dismissal had on him and his feelings that he has been wronged, especially in the procedure followed by Mr Pepper. His evidence of the impact on him has been on the lower end of the scale and without sufficient supporting evidence and any details. I assess compensation at \$3,000.

[35] Next I must consider contribution under s124 of the Employment Relations Act. As Mr Schouten says he understood that Mr Pepper was in a mood and that Mr Pepper might have been inclined to move on him that day, I hold that Mr Schouten should have backed away and said nothing. The fact that he engaged talking to Mr Pepper to some degree, even thinking his crowbar comment was figuratively speaking, he knew the extent of their relationship and that should have caused him to be wary and act differently. His comment about a crowbar and Mr Pepper's head and or ear, even figuratively speaking leads to an inappropriate comment even if it falls

short of being threatening. His conduct has been partially to blame and I assess this at 25% of the remedies and make a deduction accordingly.

[36] Costs are reserved.

Conclusion and summary of orders

[37] I order Amalgamated Joiners (1997) Limited to pay to Frank Schouten:

- (a) \$3,312 lost wages; and
- (b) \$2,250 compensation for humiliation, hurt and injury to feelings.

[38] Since Mr Schouten represented himself and has been successful I would award him the \$70 filing fee, unless there are no other legal costs or any other outstanding issues on costs. This can be taken as a confirmed order of the Authority if there is no application for variation or separate order requested on costs in 28 days of the date hereto.

P R Stapp
Member of the Employment Relations Authority