

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 228
3027871

BETWEEN TRAVIS WHITE
Applicant

A N D DAVERON SCAFFOLDING
LIMITED
Respondent

Member of Authority: Peter van Keulen

Representatives: Chrissy Gordon, advocate for the Applicant
James Pullar and Sam Hider, counsel for the Respondent

Investigation Meeting: 13 November 2018

Submissions Received: 13 November 2018 and 17 December 2018 from the
Applicant
13 November 2018 and 30 November 2018 from the
Respondent

Date of Determination: 16 April 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Daveron Scaffolding Limited employed Travis White for three days. Mr White worked two days and then on the morning of his third day at work, there was an incident in which he was struck by a scaffolding kick board.

[2] Mr White says that when he complained about the incident Daveron dismissed him. Daveron accepts that Mr White complained about the incident but it says that once he had complained he resigned.

[3] Mr White has raised three personal grievances and a breach of contract claim based on these events:

- (a) unjustified action causing disadvantage and breach of contract for failing to provide a safe workplace, with both claims arising out of the incident in which he was struck by a scaffolding board and various events occurring either side of this incident;
- (b) unjustified dismissal arising out of the alleged dismissal; and
- (c) discrimination based on Daveron treating Mr White detrimentally - not protecting him adequately against harm at work - and/or dismissing him, where employees employed in similar roles would not be treated that way.

[4] Daveron denies these claims, stating it did provide a safe work environment for Mr White and it did not dismiss him.

[5] I have investigated these claims, conducting an investigation meeting and hearing evidence from each party. I will now consider and determine each claim.

Unjustified action causing disadvantage and a failure to provide a safe work environment

[6] Mr White complains that:

- (a) A Daveron employee harassed him and then struck him with a scaffolding board.
- (b) The site Foreman did not intervene and take action to assist Mr White.

[7] Mr White says that one employee, David August, harassed him on his third morning at work, 17 January 2018.

[8] Then later that morning whilst Mr White was working in a chain of workers passing scaffolding materials up scaffolding that had already been constructed, Mr White was struck by a scaffolding board. At the time, Mr White was in the middle of a chain of workers and his role was to receive materials passed up from the ground and then pass the materials

upward to the next level of the scaffolding. Mr August was at ground level and responsible for passing materials up to Mr White.

[9] In the course of passing scaffolding materials up through the chain there was an altercation between Mr White and Mr August. Mr August was concerned that Mr White was not paying proper attention to the work he was doing in the chain; he appeared to be distracted and he was wearing sunglasses, which may have affected his ability to see clearly. Mr August told Mr White to take his sunglasses off and to pay attention to his work.

[10] Mr White says that Mr August was aggressive and abusive toward him, threatening him and swearing at him. Mr White took exception to being spoken to in that way and swore at Mr August telling him he did not have to listen to him and he could get fucked. Then he says Mr August took a scaffolding board and deliberately shoved it up at him to hit him, missing at first and then trying a second time and striking Mr White in the abdomen.

[11] Mr White then climbed down from the scaffolding. He says he was terrified and asked to be escorted off the site but he was taken to a work truck. He then says that whilst he was at the truck Mr August had another go at him telling him to get back to work.

[12] Aaron Fraser, the site Foreman, then became aware that something had occurred with Mr White so he came over to find out what was going on. Mr Fraser says he attempted to deescalate the situation and understand what had occurred. He says that when Mr White told him that Mr August had deliberately struck him with a scaffold board he thought that was unlikely and if he had been hit it would have been accidental.

[13] Mr Fraser's view of what occurred came from his observations of Mr White working that morning - Mr Fraser was part of the chain at some stage of work that morning and he saw that Mr White did not appear to be concentrating on his role in the chain. Mr Fraser had also worked with Mr August for a number of years and believed the suggestion that he had been angry, aggressive and then assaulted someone with a scaffold board was out of character and unbelievable.

[14] Mr Fraser's attempt to deescalate the situation was to try and calm Mr White down and rationalise with him over what had occurred. He says Mr White wanted Mr August to apologise to him so Mr Fraser, accepting that Mr White had been struck by a scaffold board, thought Mr August might apologise for at least accidentally causing Mr White to be struck.

[15] Mr August agreed to apologise for the accident and proceeded to do so. However, Mr White says that rather than apologise Mr August was abusive toward him again, approaching him carrying a hammer and threatening him with it.

[16] Mr White then left the site and called Steven Thompson, Daveron's Operations Manager, who was back at Daveron's yard. After speaking to Mr Thompson, Mr White returned to the yard where he had a further conversation with Mr Thompson. It is this conversation that Mr White says ended with him being dismissed. I will return to this evidence when I consider the unjustified dismissal claim.

[17] Mr White's advocate says that based on these events Daveron has breached the obligation it owed to Mr White to provide a safe work environment. And she says this gives rise to a claim for two reasons:

- (a) This amounts to an unjustified action which cause disadvantage to a term or condition of Mr White's employment
- (b) This is a breach of Daveron's contractual obligations – both a specific term of Mr White's employment agreement and an implied term in Mr White's employment agreement based on the Health and Safety at Work Act 2015.

[18] In *FGH v RST* the Employment Court summarised the basis for claims relating to the provision of a safe work environment.¹ The Court concluded that an employer has an obligation to its employees to take all reasonable practical steps to maintain a safe workplace, a workplace that meets health and safety requirements. A failure to provide this may give rise to an unjustified action causing disadvantage grievance and/or a breach of an employment agreement.

[19] The question of what are reasonable practical steps turns on foreseeability and the circumstances prevailing at the time. This has been discussed by the Court of Appeal in *Attorney-General v Gilbert*² and by the Employment Court in *Alan Robinson v Pacific Seals New Zealand Limited*.³ These two decisions indicate that there are two parts to assessing what are reasonably practical steps. First, an employer need only protect employees against risk of harm that is foreseeable. Second, what the employer must do to protect employees against

¹ [2018] NZEmpC 60 at [191] to [195].

² [2002] 1 ERNZ 1

³ [2014] NZEmpC 99

that harm is take steps that are proportionate to the known risk, i.e. do what is reasonably practical in the circumstances.

[20] Then, in *Pacific Seals*, the Employment Court also said the burden of proof is for the employee (plaintiff) to satisfy the Court that the breach has occurred, on the balance of probabilities.

[21] Putting all of this together, this means that in order to succeed in his claim that Daveron failed to provide a safe work environment, Mr White needs to show on the balance of probabilities that Daveron failed to take reasonably practical steps, in the circumstances, to protect him from a foreseeable risk of harm.

[22] The foreseeable risk of harm that Mr White complains of is the harassment by Mr August and being struck by the scaffolding board. So, my first enquiry is to determine whether the actions complained of occurred and this involves assessing the differing accounts of what occurred on 17 January 2018. And this means I must decide whose evidence I prefer or which evidence is more credible.

[23] As I have done in the past when considering conflicting evidence and making a decision on which evidence I prefer, or is more credible, I have relied on the guidance provided by Judge Harding in the District Court in *R v Biddle*⁴ that was cited with approval on appeal to the High Court⁵. This includes considering the following:

- (a) What each witness said – reviewing how each witness expressed his evidence both orally and in writing, considering what was said and how it was said.
- (b) Consistency – looking at whether the witness’s evidence was consistent throughout; and whether the witness’s evidence was consistent with other evidence such as contemporaneous documents or agreed or known facts.
- (c) Reliability – considering whether the witness appears reliable and was accurate in his perceptions and recall of events.
- (d) Concessions – looking at whether the witness made appropriate concessions.

⁴ [2015] NZDC 8992

⁵ *Biddle v R* [2015] NZHC 2673 at [21]

- (e) How plausible – asking, overall, how reasonable, plausible or probable the witness’s evidence was; and whether the witness’s evidence hangs together and has a degree of truth or is persuasive.
- (f) Demeanour – considering the witness’s bearing, appearance and attitude but noting that this is limited as genuine witnesses may be mistaken in their memory and those who do not tell the truth can still be convincing, i.e. looks can be deceiving.

[24] Overall I found Daveron’s evidence to be more credible and I preferred it to Mr White’s. Daveron’s evidence appeared more consistent, both witnesses made appropriate concessions and appeared reliable and overall the evidence was more plausible. In particular, I found Mr August’s account of what occurred to be credible and it withstood scrutiny. Also, whilst I am cautious about placing too much weight on demeanour, reflecting on his evidence and how he presented it, I found Mr August to be genuine and he did not appear to be the type of person who would act as alleged.

[25] Based on my assessment of the evidence and my preference for the Daveron witnesses’ account of what occurred I conclude the following happened on 17 January 2018:

- (a) Mr August did not harass Mr White as alleged.
- (b) There was an incident in the chain of workers on the scaffolding which Mr White was part of. This arose because Mr White was not paying attention and appeared distracted and possibly could not see clearly because of his dark sunglasses. This incident involved an exchange between Mr August and Mr White in which they both swore at each other but Mr August did not threaten Mr White.
- (c) Mr August did pass a scaffold board up to Mr White and accidentally struck him with that board. This was not intentional.
- (d) Mr Fraser did try to deescalate matters when he became aware that Mr White was upset and animated over being struck by the scaffold board.
- (e) Mr August did apologise to Mr White but he did not threaten him.

[26] Therefore, the harm that occurred was Mr White being accidentally struck by a scaffold board whilst working in a chain of workers. And, I accept that there must be a foreseeable risk of this harm occurring. So, my next enquiry is to determine if Daveron failed to take reasonably practicable steps in the circumstances to protect Mr White against being accidentally struck by a scaffold board.

[27] In terms of the steps taken to prevent accidents whilst working on scaffolding Daveron did the following:

- (a) It did not provide specific training to Mr White on scaffolding construction as he was not a scaffolder or undertaking a scaffolder's role. He was a labourer and his tasks involved assisting with moving the necessary equipment for scaffolding construction. In this regard no specific skills were required just instructions on what to do. This occurred with Mr White when he was asked to work in the chain.
- (b) Mr White was placed in best position in chain – it required less thought about what was being moved and less effort to pass scaffold material through the middle level of the chain than at either end where additional work was required to move the equipment.
- (c) Both Mr August and other employees in the chain kept an eye on Mr White and spoke to him about what he was doing in the chain and told him to pay attention and remove his glasses. Ironically, Mr White ignored these instructions and became agitated over Mr August telling him what to do, which may have contributed to the accident.

[28] Daveron accepts that accidents can happen on construction sites in connection with scaffolding. However, it says it takes care to avoid accidents wherever possible by not having labourers constructing scaffolding but just doing labouring tasks, which it did with Mr White. It also says the work Mr White was doing as part of a chain of workers moving scaffold material up existing scaffolding is a safe system of work and one of the best ways to move the required materials.

[29] I accept what Daveron says about its system of work and the steps it had taken with Mr White, as it does with other labourers, to protect against accident and/or injury. I believe

therefore that Daveron had taken reasonably practicable steps in the circumstances to protect Mr White against an accident occurring whilst he was working in the chain passing scaffold materials up to a higher level of the existing scaffolding.

[30] I also accept that Mr Fraser, as site Foreman, did enough to deal with the accident that occurred at the time. He focused on ascertaining what occurred, deescalating the situation, responding to Mr White's request for an apology and then allowing him to return to Daveron's yard rather than staying on site where he was clearly not happy and did not want to be.

[31] In conclusion, Mr White has not satisfied me the on balance of probabilities that Daveron failed to take reasonably practicable steps to prevent a foreseeable risk of harm occurring and Mr White's claims for unjustified action causing disadvantage and breach of contract, for failing to provide a safe work environment, are dismissed.

Unjustified dismissal

[32] The first issue for Mr White's unjustified dismissal claim is did Daveron dismiss Mr White?

[33] If Daveron did dismiss Mr White, then the next issue is, was the dismissal:

- (a) carried out through a fair process, particularly in light of the requirements in ss 4(1A) and 103A of the Employment Relations Act 2000 (the Act); and/or
- (b) substantively justified?

Was Mr White dismissed?

[34] Dismissal is the termination of employment at the initiative of the employer⁶. It requires an unequivocal act, which amounts to an actual dismissal or a constructive dismissal. In the case of an actual dismissal, the unequivocal act will be a statement amounting to a sending away or sending apart⁷.

[35] So, the question is simply was there an unequivocal act by Daveron which was a sending away of Mr White?

⁶ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC).

⁷ *Wellington Clerical Union v Greenwich* [1983] ACJ 965 (AC) at 976.

[36] Mr White says that when he first spoke to Mr Thompson, calling him as he left the site, Mr Thompson played down what may have happened telling him the guys would only be messing around and would not hurt him. Mr Thompson told Mr White to go back to work. Mr White says he told Mr Thompson he did not want to go back to site so Mr Thompson told him to come to the yard.

[37] When Mr White returned to Daveron's yard, he spoke to Mr Thompson again. After a short discussion about what happened on site, Mr Thompson said he would speak to the others and find out what had happened. Mr White told Mr Thompson that he wanted the problem resolved or he would go to the police and lawyers.

[38] Mr White says he thought that Mr Thompson was not taking him very seriously.

[39] Mr Thompson then told him he did not think scaffolding was right for him and it was not going to work out. Mr White says he asked about working in another team but was told that the team he was with was the only one he could work with. Mr Thompson then told him he was letting him go under the 90 day trial period.

[40] Mr Thompson's account of what was discussed was largely the same as Mr White's, except for how it ended. He agrees that before Mr White returned to the yard he had spoken to him on the phone about what had happened. Mr White told him he had been threatened and Mr Thompson reassured Mr White, saying it was probably nothing to worry about as it may just be the guys having a laugh but he would ring Mr Fraser and find out what was going on. Mr Thompson then spoke to Mr Fraser and was told by him that there had been a bit of an incident but it was nothing major and had been sorted out.

[41] Mr Thompson then rang Mr White back and told him that he thought everything would be fine, based on what Mr Fraser had told him. Mr White was still not happy and told him he did not want to stay on site. Mr Thompson agreed that he should come back to the yard.

[42] Mr Thompson also accepts that when Mr White returned to the yard there was a further discussion about what had happened and he did say he would speak to the others to find out what had happened. He also says that Mr White told him he was going to call the police.

[43] Mr Thompson's account of the conversation from this point differs from Mr White. Mr Thompson says it was Mr White who started talking about things not working out. He says Mr White said he had never been passed a 90-day trial period and maybe scaffolding was not for him. He asked about other jobs at Daveron in the yard. When Mr Thompson told Mr White there were no other jobs at Daveron Mr White replied that it would be best if he left under the 90-day trial period. Mr Thompson says it was obvious to him that Mr White had decided scaffolding was not for him and he wanted to leave so he let him resign and thought nothing further of it.

[44] So, the difficult decision I must make is to decide which version of the last part of the conversation between Mr White and Mr Thompson is correct. Did Mr White resign or did Mr Thompson dismiss him?

[45] Supporting Mr White's version, that he was dismissed, is the fact that after the incident on site Mr Fraser said to him that maybe he was not suitable for scaffolding work. Mr Fraser accepts he said something to him along these lines. Also, it appears that after Mr White's second day of work Mr Thompson, in passing, asked Mr Fraser how Mr White was working out and Mr Fraser told him that Mr White was struggling.

[46] I am essentially being invited to infer from this evidence that Mr Thompson had formed a view, after two days of Mr White's work, that he was unsuitable and when the incident arose with Mr August he decided he had had enough and dismissed Mr White – this does not seem plausible to me but it is possible.

[47] The only contemporaneous document that appears to support Mr White's version of events is a text message he sent to Mr Thompson on 22 January 2018 in which he said "... since I was dismissed on Wednesday I was paid for 2 days or is that it?"

[48] Mr Thompson says he let the reference to dismissal in the text go because he believed the text was really just about payment and he responded to that; as far as Mr Thompson was concerned he and Mr White "weren't getting into text bickering" and he just answered the question about payment.

[49] I accept this explanation and accept that the failure to correct the reference to dismissal in the text by Mr Thompson was not an admission by him that he had in fact dismissed Mr White.

[50] In contrast, supporting Mr Thompson's version is the fact that Mr White did not want to work in the scaffolding team with Mr August and it seems by the time he met Mr Thompson he had decided did not want to do labouring work on scaffolding sites but would prefer to do work at the yard and/or driving. I find this to be reasonably persuasive and it gives some credibility to Mr Thompson's version. It seems more likely to me than Mr Thompson having already decided Mr White was not suitable and taking the incident as an opportune moment to dismiss him.

[51] Further, there are contemporaneous documents that appear to support Mr Thompson's version of the conversation.

[52] First, Mr White made a formal complaint to the Police about the 17 January 2018 incident on the day after, 18 January. This included making a detailed statement in which Mr White set out what occurred; that detail included the discussion with Mr Fraser after the incident in which Mr Fraser told him he thought Mr White was not right for the role and that he had met with Mr Thompson back at the yard and discussed what had occurred. Despite this kind of detail, Mr White did not put into his statement that Mr Thompson had dismissed him.

[53] Second, Mr Thompson completed an incident report about the incident on 17 January 2018, shortly after it occurred. In that report, Mr Thompson recorded that Mr White "wished to leave under the 90 day contract".

[54] Overall I find both of these documents to be persuasive, particularly the lack of any reference in Mr White's statement to the Police, to Mr Thompson dismissing him - given the level of detail and the precise accusations Mr White made in his statement about Mr August and what Mr Fraser said, this omission is striking.

[55] The other aspect that supports Mr Thompson's version of events is there was no written notice of termination or resignation. Generally, no written notification of termination or resignation tends to occur more often where an employee decides to leave; employers are more likely to write a notice of termination than not, particularly when relying on a 90-day trial period provision as is alleged here. And, Daveron is a company that has employed many people over a number of years and appears to have a reasonable grasp of its employment obligations. It seems to me to be more likely that had Daveron dismissed Mr White there would have been a letter of termination.

[56] When I weigh up all of the factors listed above and assess the credibility of both witnesses, I conclude that on the balance of probabilities I am not satisfied that Daveron dismissed Mr White, but rather he resigned.

[57] There is however one further aspect of the question of dismissal that I must consider.

[58] Mr White's advocate says that it is clear that Mr White believed Daveron had dismissed him, as this was what he set out in his text message of 22 January 2018. Because of that text message, Daveron knew Mr White believed it had dismissed him but it did not correct that misunderstanding. In those circumstances, even if Daveron had not intended to dismiss Mr White and even if I find it had not dismissed him, because Daveron allowed Mr White to believe he had been dismissed by not correcting his misunderstanding I must treat it as a dismissal.

[59] Mr White's advocate relies on the Employment Court decision of *New Zealand Cards Limited v Colin Ramsay* for this proposition.⁸ In particular she quotes paragraph [51] of that decision which states:

[51] ... Where the communication is equivocal, the employer learns that the employee has misunderstood it as a dismissal contrary to the employer's intention but does nothing within a reasonable time to correct the employee's false impression. In such a case the employer must suffer the adverse consequences of passively standing by and letting the employee think that a dismissal has taken place.

[60] I do not accept that the proposition applies in this case. Two aspects of the proposition are relevant to Mr White's situation. First, there must be an equivocal communication, which the employee misunderstands, at the time, to be a dismissal. And, second, the employment relationship must end because of the actions of the employer.⁹

[61] Neither of these things are present in Mr White's case. I have found that Mr white resigned so there was not an equivocal statement by Daveron capable of being misunderstood and the employment relationship did not end because of an action by Daveron, in not correcting any misunderstanding.

[62] I believe Mr White resigned but subsequently he turned this into a dismissal either because he wanted to bring a claim or because when he reflected on what had occurred and

⁸ *New Zealand Cards Limited v Colin Ramsay* [2012] NZEmpC 51

⁹ *New Zealand Cards Limited v Colin Ramsay* [2012] NZEmpC 51 at [49]

remembered it as a dismissal. It is possible that confirmation bias informed what Mr White remembered, that is he took what Mr Fraser said about him not being suitable for scaffolding work and his discussion with Mr Thompson, and remembered that as Daveron deciding he was not suitable and things were not working out and what followed from that was Mr Thompson dismissed him. Either way there is no dismissal by some misunderstood equivocal communication from Daveron that it did not subsequently correct.

[63] As there was no dismissal, Mr White's claim for unjustified dismissal fails and is dismissed.

Discrimination

[64] Sections 104 – 106 of the Act deal with discrimination and are to be read with the relevant provision of the Human Rights Act 1993.

[65] Section 104 of the Act provides that an employee is discriminated against in their employment if their employer dismisses them or subjects them to any detriment by reason directly or indirectly of their disability.

[66] As I have determined that Daveron did not dismiss Mr White and that it did not fail to provide him with a safe work place it follows that there is no evidential basis for the discrimination claim and that too, must be dismissed.

Orders

[67] This determination, reserved at the conclusion of a one day Investigation Meeting, has been issued outside the statutory period of three months after receiving the last submissions from one of the parties. I record that when I advised the Chief of the Authority that this would likely occur he decided, as he was permitted by s174C(4) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174C(3)(b) of the Act.

[68] Mr White's claims against Daveron are dismissed.

Costs

[69] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[70] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority