

[2] Mr Williams says that he did not lie to his employer and that his dismissal was unjustified. He has requested that, in compensation for his unjustified dismissal, he be paid lost wages from the time of his dismissal until the time of the Authority's investigation meeting and compensation for the hurt and humiliation caused to him by that dismissal.

The issues for determination

[3] In determining whether or not Mr William's dismissal was justified it is necessary to consider, in terms of section 103A of the Employment Relations Act (the Act), whether Allphase's actions and how Allphase acted, *were what a fair and reasonable employer would have done in all the circumstances at the time the dismissaloccurred*. If Mr William's dismissal was not justified then it is necessary to consider what remedies if any he is entitled to receive.

The events leading to Mr William's dismissal

[4] The Managing Director of Allphase, Mr Martin Carr says that about July 2008 he became aware of Mr Williams' lack of attendance at night school and incomplete assignments and assessments. He says that he discussed this with Mr Williams at the time and during the third term (ending early September 2008) Mr Williams attendance at classes was approximately 55%. In early September Mr Carr said he spoke to Mr Williams again and also contacted Mr William's father, Les, in an effort to reinforce with Mr Williams that he should make every effort to attend classes and apply himself. On 21 October Mr Carr says he received a letter from the training organisation (ETCO) advising him that Mr Williams had left a night class early. Following discussions with Mr Williams regarding his non attendance Mr Carr wrote to Mr Williams on 22 October saying:

...I wish to record my concerns and make it clear as to the consequences if you do not attain the standards required, so there can be no misunderstanding.

Firstly, your attendance at night classes this year has been abysmal.... this is totally unsatisfactory and although there has been an improvement in the current term there is still room to improve.

Also of concern is the non-achievement of unit standards required. You have failed to attain three unit standards at night class this year. This is totally unacceptable. You have been given the opportunity to make up these by attending special classes on the weekends. It is of great concern that you failed to turn up on Saturday 11 October and did not notify your tutor who had given up his time on Saturday as a special arrangement to help you. This is totally unacceptable.

...

I hope that you recognise the gravity of the situation and take the necessary steps to reach the required standards. This matter will be reviewed in December and a decision will then be made. If, in the meantime you wish to discuss any aspect of this letter, your apprenticeship employment or your training please do not hesitate to see me.

[5] On 17 November 2008 Mr Carr says that there had been a number of aspects of Mr Williams performance that he had some concern with and he formally requested Mr Williams to attend a meeting to discuss these. Mr Williams says that he does not recall seeing this letter at the time and that his recollection was that the meeting was simply a team meeting. I do not accept Mr Williams evidence in this regard. I am satisfied that Mr Williams did see the letter and that it was clear from that letter that this was to be a formal meeting to discuss Mr Williams performance. The letter listed three areas of concern that Mr Carr wished to discuss:

- a. failure to follow instructions correctly.*
- b. Blame of others when questioned about the above*
- c. Achievement of assessments and assignments for tech classes.*

It confirmed that Mr Williams would be represented at the meeting by his brother, Gavin, and went on to say:

Legal process requires me to advise you that if the allegation of unsatisfactory performance is established, disciplinary action may be taken against you and if the matter is regarded as serious your continued employment with this company may be in jeopardy.

[6] As arranged the meeting took place on 17 November. Mr Carr says that he again outlined his concerns to Mr Williams and at the end of the meeting indicated that he would *think about Mr Williams employment with Allphase* and would have further discussions with him the following week. As it happens the events which led to Mr William's dismissal intervened and the further discussions did not take place.

[7] The bare facts surrounding the events that occurred on the 26th and 27th of November 2008 are not in dispute. However Mr Carr and Mr Williams have a completely different perspective and interpretation of those events.

Mr Carr's perspective

[8] Mr Carr says that on 26 November he received a text from Mr Williams advising that he was sick and that he might not be at work the next day. The next morning Mr Williams rang to inform him that he was too ill to attend work and that he had eaten Indian food the day before and perhaps that had caused his illness. The next morning Mr Carr says he approached Mr Williams and asked what he had been doing the day before. Mr Williams advised him that he had slept and studied. Mr Carr says he pressed Mr Williams who repeatedly said that he had not left the house. However after further questioning Mr Williams eventually admitted that he had resat an exam the night before. Mr Carr said he then asked Mr Williams when he had arranged to sit the exam and Mr Williams indicated that this had been "a while ago" and in particular "when we had the last meeting". Mr Carr says then he indicated to Mr Williams that he had spoken to his tutor who had advised him that Mr Williams had rung him to make the appointment only the morning before. Later that day at a meeting arranged to discuss the matter Mr Carr says he asked Mr Williams if he had any further explanation. Mr Williams replied that he had misunderstood Mr Carr's question regarding when he had made the arrangement to resit the exam. Mr Carr said he thought Mr Williams excuses "sounded ridiculous" and that Mr Williams was once again not prepared to accept responsibility for his actions. Mr Carr says that despite further discussion Mr Williams appeared not to accept any responsibility or express any remorse.

[9] Three paragraphs in Mr Carr's evidence summarise why he believed it was necessary to dismiss Mr Williams.

I have had been faced with several very difficult decisions during (Mr Williams) employment and it became apparent to me on 28 November 2008 that (Mr Williams) was not, at least in the near future, likely to take responsibility for his actions. No matter how hard I try to help him. (Mr Williams) is ultimately the only person who can help (Mr Williams). Consequently I terminated (his) employment.

Allphase has a reputation as having a high standard of training and work standards. This is something that I have worked unrelentingly to establish as a culture within Allphase. I believe if something is worth doing it is worth doing with 100% commitment and focus.

I believe that the actions I took were what a fair and reasonable employer would have taken in the same circumstances. There is no doubt in my mind that (Mr Williams) decided to take the Thursday off. He lied to me about his sickness and lied to me in covering up his absence. He continued to lie and mislead in the subsequent discussions and meetings. This resulted in a total loss of confidence and trust in him.

Mr Williams perspective

[10] Mr Williams says that on the evening of Wednesday, 26 November 2009 he was ill with a stomach illness and advised Mr Carr by text that he was feeling unwell and might not be at work the following day. On the morning of Thursday 27 he says he woke feeling ill and rang Mr Carr about 6:45 am to tell him he would not come to work. He says that it was his understanding that he had only until that evening to resit his exam and had left it until that day to give himself the maximum amount of time to study. He also understood that it be made clear to him by Mr Carr that if he did not pass his exams he could be dismissed. He therefore decided to do the exam even though he was sick. At around 9.30 that morning he called the night school instructor to check whether he could still set the exam that evening. He then spent most of the day sleeping but did a small amount of study and attended the exam at 6 pm when, he says, he was feeling better.

[11] Mr Williams says that when he returned to work the following morning he was asked by Mr Carr what he had done the day before and he responded that, apart from sleep and study, he hadn't done anything. He says that it was not until Mr Carr pressed the point that he realised that he might be referring to the evening of that day and he immediately advised Mr Carr that he had sat his exam.

[12] It is necessary to clarify one aspect of Mr Williams evidence which appears to be in dispute. Mr Williams had previously receive an e-mail from his tutor suggesting that the timeframe for sitting his exam was Monday to Friday 24 to 28 November between 10 am and 4 pm or in the evenings of that week between 6 and 8 pm. Mr Williams says that he felt he had no option but to sit his exam on the evening of the 27th or miss the opportunity and face dismissal. Mr Carr says that Mr Williams was well aware that other employees (including his brother, Gavin) had been given time off to sit exams and that Mr Williams had simply to request time off (for example on Friday). Mr Carr says that it was not the fact are that Mr Williams sat the exam that was at issue but that he was not open and honest with him that he had done so.

The dismissal process

[13] Although the exact discussion at the meeting on Friday 28 November is not entirely agreed a number of salient points are clear. Mr Carr asked Mr Williams to attend a meeting. It appears he did not specifically or formally tell Mr Williams that this meeting was to consider his future employment or that he faced dismissal. In notes made immediately after the meeting Mr Carr says:

I called a meeting.... I went through for Gavin's benefit, the chain of events... and Jamie agreed that that is how it happened and I said "well you know it's just (the) kind of trust that I need to be able to send you to a job and trust that you're going to go there and not blame the client or make up a story to fabricate and cover yourself for not actually attending a job" I said "it's totally unsatisfactory" and then I terminated his employment.

What would a fair and reasonable employer have done?

[14] A full bench of the Employment Court in the recent decision in *New Zealand v. V* [AC15/09, 3 June 2009, unpublished] reviewed its previous judgements in respect to the interpretation of section 103A and said:

We conclude that the plain meaning of the words of s.103A encompasses not just the employer's enquiry and decision about whether misconduct has occurred and its seriousness, but also an enquiry into the employer's ultimate decision in the light of that finding.

The meaning of the text of s.103A is clear on its face and in the light of it's common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, it requires the Authority or the Court to objectively review all of the actions of an employer up to and including the decision to dismiss.

To précis the Act and the Court: The Authority must consider the enquiry Mr Carr (Allphase) made and the decision he made in the light of those enquires. I must then weigh these against the objective test of what a fair and reasonable employer would have done in all the circumstances.

[15] I have a good deal of sympathy for Mr Carr's decision to dismiss Mr Williams. He had invested a good deal of time and effort in ensuring that Mr Williams was aware of his obligations to actively pursue his studies and pass the necessary exams. Mr Carr also made it very clear not just to Mr Williams but to all his staff that honesty and integrity are of fundamental importance to him and his business. He was faced with what he perceived to be Mr Williams' dishonesty and apparent inability to grasp the fundamental principle that he should accept responsibility for his own behaviour and mistakes.

[16] As I will outline later Mr Williams apparent failure to grasp these principles directly contributed to his dismissal. However in answer to the question *what would a fair and reasonable employer have done at the time the dismissal occurred* Mr Carr failed at one crucial step to meet the required standard. Mr Carr believed that Mr Williams had lied to him and that this dishonesty was simply another manifestation of

Mr Williams' inability to accept responsibility for his own actions. Unfortunately Mr Carr did not, before making his final decision, confront Mr Williams with this belief and seek, with an open mind, Mr Williams' explanation. A fair and reasonable employer would have advised Mr Williams that he believed that Mr Williams had lied to him, provided Mr Williams with all the information he had received from such people as the polytech tutor, and advised him that his behaviour, if proven could be considered to be serious misconduct and could lead to his dismissal. A fair and reasonable employer would then have invited Mr Williams to offer a full explanation and having heard that explanation taken the time to consider it before taking the drastic step of dismissal.

[17] The Court has on several occasions indicated that section 103A does not require that the process adopted by an employer must be pedantically perfect. Where there is clear substantive justification for dismissal it is appropriate to overlook minor deficiencies in what would otherwise be considered to be a fair process. However on this occasion the deficiencies in the process followed by Mr Carr are more than minor. Before he held his meeting with Mr Williams he had clearly come to the conclusion that Mr Williams had lied to him and should be dismissed. Whatever explanation Mr Williams may have had it is doubtful that Mr Carr would have changed his mind. Under these circumstances I am forced to the conclusion that Mr Carr's actions were not *what fair and reasonable employer would have done in all circumstances* and that Mr Williams' dismissal was unjustified. **Mr Williams has a personal grievance against his former employer, Allphase Electrical Ltd**

Remedies

Contribution

[18] For the reasons set out above I have found that Mr Williams has a personal grievance. However before I turn to the question of what remedies are appropriate it is necessary to consider, in terms of s.124 of the Act, the extent to which Mr Williams actions contributed to the situation that gave rise to his personal grievance and what, if any, reduction should be made to those remedies if Mr Williams did contribute to the situation.

[19] It is very clear that Mr Williams made a major contribution to his own dismissal. Despite his denials he had been told both verbally and in writing that his performance, in particular in respect to apprenticeship studies, was inadequate. He had been told in very clear terms that he should be up front when he made mistakes and not try and blame other staff. While he may have been ill and may not have intended to mislead Mr Carr, at the very least he was secretive and frugal with the truth. I am satisfied that if he had been more transparent in his communication with Mr Carr he would not have been dismissed. On the other hand Mr Carr, despite his frustration should have given Mr Williams a proper opportunity to fully explain what had occurred. Under the circumstances I find that Mr Williams contributed 75% towards his dismissal and the remedies set out below reflect that level of contribution.

Reimbursement of lost wages

[20] Mr Williams has produced evidence of a number of attempts to find new employment and there is no doubt that the proximity of the Christmas holiday break and the concurrent downturn in the New Zealand economy made the situation more difficult. However Allphase did not contribute to these background circumstances. Taking into account Mr Williams' 75% contribution **Allphase is ordered to pay Mr Williams 3 weeks wages less tax at the appropriate rate in reimbursement for wages lost as a result of his dismissal.**

Compensation for his humiliation

[21] Mr Williams gave evidence that being without a job was very embarrassing and that his dismissal has made it very difficult for him to find another job. I have no doubt that Mr Williams dismissal did cause him humiliation and he is entitled to some recompense. On the other hand, even without the 75% contribution I have already attributed to Mr Williams in this matter, the level of that compensation would be at the lower end of that usually awarded by the Authority. In terms of section 123(1)(c)(i), and after taking into account Mr Williams' contribution to the situation that gave rise to his dismissal, **Allphase is ordered to pay Mr Williams \$500, without deduction of tax, in compensation for the humiliation his dismissal has caused him.**

Costs

[22] Mr Williams was very ably represented by his father. He did not therefore incur any legal costs in bringing his case to the Authority. He is however entitled to receive a reimbursement of the \$70 filing fee. **Allphase is ordered to pay Mr Williams \$70 being reimbursement of his filing fee.**

James Wilson

Member of the Employment Relations Authority