

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Rory Hamilton (Applicant)

AND B&D Doors Limited, previously known as Dominator International Limited (First Respondent)
Gary Foster (Second Respondent)
Michael Fisher (Third Respondent)

REPRESENTATIVES Frank Wall, Advocate for the Applicant
Tim McGinn, Counsel for the First, Second and Third Respondents

MEMBER OF AUTHORITY James Crichton

INVESTIGATION MEETING Christchurch, 8 and 9 November 2006

SUBMISSIONS RECEIVED 29 November and 19 December 2006

DATE OF DETERMINATION 24 January 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In my earlier determination on this matter dated 5 July 2006, I set out the chronology that applied in respect of the various filings in this matter.

[2] The earlier determination I have just referred to concerned itself entirely with an application to strike-out the applicant's proceedings lodged by the first respondent. I rejected that application and the present hearing is the result.

[3] The applicant (Mr Hamilton), raised two principal personal grievances, one in respect of an allegation that he was unjustifiably disadvantaged when he was demoted from a managerial position to a shop level position; and the second when he was allegedly unjustifiably dismissed from his employment by the first respondent (Dominator).

[4] Mr Hamilton also alleges that the second and third respondents, respectively Mr Gary Foster and Mr Michael Fisher, are guilty of inciting breaches of Mr Hamilton's employment agreement with Dominator and thus fall within the terms of the provisions of s.134(2) of the Employment Relations Act 2000. In respect of those two individuals, Mr Hamilton seeks a penalty against each.

[5] Mr Hamilton also claims subsidiary personal grievances for:

- (a) The failure of the employer to provide Mr Hamilton with a written employment agreement;

- (b) The setting of production targets without consultation.

[6] Mr Hamilton also claims a penalty for breach either of the Employment Relations Act 2000 or of the employment agreement in the following respects:

- (a) The failure of the employer to provide Mr Hamilton with a written employment agreement;
- (b) The alleged demotion of Mr Hamilton by Dominator;
- (c) An alleged lockout by Dominator of Mr Hamilton when Mr Hamilton was suspended from his employment.

[7] Mr Hamilton joined Dominator around mid-October 2002. He was recruited to head up the section of the employer's business which was to make wooden roller doors for garages. This involved new skills and new technology. Mr Hamilton was attractive to Dominator because he was a joiner by trade.

[8] Mr Hamilton expressed some surprise in giving his evidence that he was appointed manager of the new section. He told me that he had expressed to Dominator the fact that he had very limited management experience. For its part, Dominator does not recall receiving that information during the interview of Mr Hamilton.

[9] Mr Hamilton thought he was more likely to be appointed to a foreman position which he says was being advertised at the same time and to work in the same section of the factory, but Dominator denies that there was ever a foreman vacancy at that time. Indeed, Dominator's evidence at the investigation meeting was that the company did not have any foremen in its factory at all.

[10] In any event, Mr Hamilton commenced his duties and was initially responsible for recruiting the staff who would work with him in this new undertaking. There was some argument at the investigation meeting as to the quality of those staff and also as to the number of orders received for the new wooden roller door product that Dominator was endeavouring to produce but in my view, nothing turns on either of those issues.

[11] What is relevant is that Dominator became anxious about Mr Hamilton's ability to produce a sufficient quality and quantity of the new roller doors and there was a meeting on 26 August 2003 (less than a year after Mr Hamilton's commencement) at which the employer endeavoured to set targets for this particular section. Mr Hamilton says that the employer did this in a unilateral way and that he regarded the relationship as *souring* from this meeting onwards.

[12] The person who set the goals for Mr Hamilton was Mr Gary Foster who was then the manufacturing manager of Dominator. Mr Foster impressed me as an honest and straightforward witness and in his evidence, he indicated to me that the division being run by Mr Hamilton *never really got going* and that by the middle of 2003, *there were accumulating concerns over poor productivity and a lack of a cohesive team operating the plant.*

[13] Mr Foster seemed to be genuinely concerned to assist Mr Hamilton in his work and was also concerned when it appeared that Mr Hamilton was developing a health problem which was manifesting itself in the workplace. In about August of 2003, Mr Foster said that he put another manager, Mr Brian Haslett, into the section being run by Mr Hamilton with a view to trying to improve output. This approach was not entirely successful and accordingly Mr Foster determined to meet with Mr Hamilton and that meeting is the meeting that I have referred to on 26 August 2003.

[14] Mr Foster agrees that at that meeting, he took the lead and indicated to Mr Hamilton what was required. He does say that Mr Hamilton did not quarrel with any of the targets that were set and he alleged that Mr Hamilton had admitted that there were inadequacies in Mr Hamilton's management style and that he would work with the employer to improve his position.

[15] Mr Foster reviewed the performance of Mr Hamilton's section at the end of September 2003 to see if the targets that he and Mr Hamilton had spoken about on 26 August had in fact been met. Unfortunately, the production was about half what was required and Mr Foster felt he was under considerable pressure from the owner of the business to achieve a turnaround in Mr Hamilton's section or face the prospect that the section would be completely closed down because it was unprofitable.

[16] Mr Hamilton's evidence is that the imposition of these new production standards was unrealistic and created additional pressure on him which he could well have done without. For its part, Dominator took the view that the production standards were not only necessary but also achievable and it resists Mr Hamilton's claim that these standards were unrealistic. It notes that after Mr Hamilton's departure, the standards imposed were regularly exceeded.

[17] Mr Foster then decided to implement a new plan. Essentially, the plan involved a person taking over the management role from Mr Hamilton. The person who Mr Foster wished to use in this capacity was Mr Michael Fisher, who was a university graduate who had been employed by Dominator doing other work and who was now available to assist in working with Mr Hamilton.

[18] Mr Foster spoke with Mr Hamilton on 10 October 2003 and Mr Foster's evidence is that Mr Hamilton *accepted my plan, the reasons for it and the temporary modification to his role while remaining on the same salary.*

[19] For his part, Mr Hamilton understood that this proposal simply had Mr Fisher working alongside him; Mr Hamilton's evidence was very clear that he did not understand that Mr Fisher was effectively going to take charge.

[20] This is the explanation for Mr Hamilton's memorandum to Mr Foster dated 17 October 2003 wherein Mr Hamilton seeks to understand why he *no longer had managerial responsibilities for the running of the cedar garage door division.*

[21] Mr Foster replied to that memorandum by a memorandum of his own dated 20 October 2003 in which he said he was *a little confused* and continued further to this effect: *To this end I also stated (in the meeting on 10 October 2003) that I would move Michael Fisher over from the sectional doors to manage the division [he means the cedar garage doors division previously managed by Mr Hamilton] till Christmas, which was effective immediately. On completion of this period, I would evaluate your position as to whether you are offered the production to control again. This would be base [sic] on Michael's recommendation. I said that your salary would not be affected till Christmas, and would have to be reviewed if another position was offered to you.*

[22] While Mr Foster indicated in his written evidence that Mr Hamilton had accepted this demotion, in answer to questions from me when he was giving his oral evidence, Mr Foster admitted that Mr Hamilton was *very shocked and reserved* at the 10 October meeting. Mr Foster could not recall if Mr Hamilton had made any comments on the proposal so it may well put it too strongly to say that Mr Hamilton had accepted the proposal, as Mr Foster's written evidence claimed.

[23] There was a further meeting between Mr Foster and Mr Hamilton on 18 November 2003 at which progress on this alleged agreement was discussed. Mr Foster described this meeting as *positive* in tone.

[24] The following day, 19 November 2003, Mr Foster had reported to him that a machine in the workshop known as a *four sider* had had its settings altered such that it was incapable of producing the work that it would normally produce.

[25] On 24 November 2003, Mr Foster received a report that another machine known as a *beam saw* had also had its settings substantially altered, in fact from 4mm to 564mm. The beam saw was the machine that Mr Hamilton normally operated after his alleged demotion by Mr Foster.

[26] On Mr Foster's instructions, the beam saw was not altered back to its correct setting and when Mr Hamilton next came to operate the machine, he seemed to be able to operate it normally and he made no comments to anybody about it being changed.

[27] Not surprisingly, Mr Foster took the view that this evidence apparently directed against Mr Hamilton was at best *circumstantial* and accordingly he instructed Mr Fisher to maintain a close watch over Mr Hamilton to just monitor Mr Hamilton's behaviour on the basis that the evidence which Mr Foster clearly thought was *circumstantial* tended to suggest that Mr Hamilton may have been responsible for the changes to the machine.

[28] On 25 November 2003, there was a further report to Mr Foster of Mr Hamilton changing the settings on the four sider machine.

[29] Mr Foster decided to seek legal advice on what he knew and, as a consequence of that, he met with Mr Hamilton in Mr Hamilton's office on 26 November 2003 and indicated to Mr Hamilton that he would be suspended on pay to enable a more detailed investigation to be conducted into the alleged incidents.

[30] Mr Foster says that he gave Mr Hamilton the opportunity to comment on the proposed suspension and Mr Hamilton had nothing to say. Mr Hamilton, for his part, denies that he had nothing to say and said that he protested about the suspension but that he was ignored.

[31] A disciplinary meeting was held on 28 November 2003 at which Mr Hamilton was presented with the allegations made against him. There is some dispute as to whether Mr Hamilton received statements that the employer, Dominator, relied upon from two witnesses. Mr Hamilton's position is that he received no such statements and that the first occasion on which he read them was when the proceedings were filed in the Authority and an exchange of documents was required. Mr Foster was sure that copies of the two witness statements were provided at the hearing.

[32] Mr Hamilton denied any wrongdoing. He agreed that the settings on the beam saw were wrong and that he had changed them to the correct settings but he denied having tampered with that machine or indeed with the four sider in the first place.

[33] As to the allegation that Mr Hamilton was seen by Mr Fisher alongside the four sider machine in circumstances where Mr Fisher formed the view that Mr Hamilton was tampering with the machine's settings, Mr Hamilton said that he was in fact accessing allen keys which were kept alongside the four sider machine to release bearings on a wheel of his child's bike.

[34] There was also a claim by Mr Hamilton that the four sider machine had to be altered from time to time. That view was subsequently supported by evidence before the Authority given by a Mr Rawlings who was previously (before his retirement) a salesman dealing with the sale, installation and maintenance of wood cutting and wood forming machinery.

[35] Mr Foster, having received the explanation tendered by Mr Hamilton and having had the exchange that he thought appropriate with Mr Hamilton and Mr Hamilton's advocate, adjourned the meeting in order that he could consider his position and make a decision.

[36] In the result, Mr Foster reached the conclusion that on the issue of tampering with the four sider machine and on the issue of tampering with the beam saw, applying the balance of probabilities test, it was more likely than not that Mr Hamilton was responsible for the changes to both machines, that that constituted *very* serious misconduct and accordingly that Mr Hamilton ought to be summarily dismissed.

Issues

[37] The first issue that needs to be dealt with is the alleged demotion of Mr Hamilton and as a subset of that issue, the question of Mr Hamilton's suspension from duty.

[38] Then, I need to consider the circumstances surrounding the unjustified dismissal and the robustness of the employer's investigation into the facts on which that dismissal was based.

[39] Finally, I need to review the various subsidiary claims being the penalty actions and the secondary personal grievance claims.

The demotion

[40] It is common ground that Mr Hamilton had no written employment agreement. There is then no basis whatever on which Dominator can rest its decision to demote Mr Hamilton. There is no general legal power to unilaterally change an employee's terms and conditions of employment and that is I find, what Dominator did on this occasion.

[41] When I asked Mr Foster on what basis he thought that he could take that decision, he said by way of response: *What else could I do?* He agreed with my categorisation of his action as being in effect a counsel of necessity.

[42] The fact remains that there was no legal basis on which it was available to the employer to arbitrarily remove from Mr Hamilton his managerial authority and responsibilities. The fact that he remained in receipt of his full managerial salary is neither here nor there; he was deprived of the duties which he had previously undertaken to perform and was relegated to operating one of the machines. In the absence of a proper performance review which gave Mr Hamilton the opportunity to improve his managerial achievements within a suitable timeframe, there was no basis whatever on which the demotion could be contemplated, particularly when it seems the emphasis Dominator placed was turning the division around, rather than giving Mr Hamilton the chance to do that.

[43] Dominator's counsel invites me to conclude that Dominator had no choice but to act to address the decline in the division's fortunes and thus that the demotion was *justified*. For the reasons just advanced, I do not accept this proposition.

[44] Dominator also contends that Mr Hamilton accepted the *demotion*. I do not accept that contention either. Mr Hamilton says he protested the demotion by writing his memo to Mr Foster dated 17 October 2003; Mr Hamilton also said that initially he understood that Mr Fisher was simply to work alongside him and he would have accepted that. However, when it became clear Mr Fisher had effectively taken over, he protested with his memo to Mr Foster.

[45] It follows that the demotion cannot stand and that Mr Hamilton does in fact have a personal grievance as a consequence of the unjustifiable action of Dominator which has plainly caused him disadvantage.

[46] I reach a similar conclusion in respect of the question of suspension. Again, there is no general legal right to suspend; it is not uncommon, however, for written employment agreements to contain provisions which allow an employer, in certain circumstances, to suspend workers.

[47] It is common ground in the present factual situation that Mr Hamilton had no written employment agreement and it follows that there is no provision on which the employer may rely to suspend him.

[48] Accordingly, I have no hesitation in finding that Mr Hamilton has suffered a disadvantage as a consequence of the unjustifiable action of Dominator in suspending him without a lawful basis for that suspension.

The dismissal

[49] This is a dismissal which was effected on 28 November 2003. As a consequence, the dismissal predates the new test for justification in s.103A of the Employment Relations Act 2000. It follows that the relevant test is that contained in *W&H Newspapers v. Oram* [2000] 2 ERNZ 448; [2001] 3 NZLR 29.

[50] For the sake of clarity, I formulate the applicable test in the following way: *Dominator New Zealand Limited, the employer, having conducted a proper investigation is justified in dismissing Mr Hamilton for misconduct if the Authority finds that a fair and reasonable employer could have dismissed Mr Hamilton in the particular circumstances of this case.*

[51] I consider first the nature and quality of the investigation which Dominator conducted. The first point I note is that Mr Foster himself in his written brief of evidence referred to the evidence against Mr Hamilton in relation to the alteration to the bench saw as being *a bit too circumstantial*. In essence, that evidence which was subsequently one of the bases on which Mr Hamilton was summarily dismissed was that the bench saw, which Mr Hamilton operated, was found to have had its cutting settings altered over a weekend, the assumption being that the alteration had been made last thing on Friday night, and yet Mr Hamilton made no complaint about the matter and was quickly able to have the machine working again on Monday morning.

[52] I must say that I agree with Mr Foster's statement in his brief of evidence that the nature of the evidence against Mr Hamilton in this particular regard is indeed *a bit too circumstantial*. I do not think that the evidence is robust enough to partially ground a dismissal.

[53] As I think Mr Foster was expressing when he drafted his brief, there are a number of possible explanations for the beam saw being adjusted or altered in the way that it was and only one of those explanations is sinister. Fundamentally, my anxiety about the reliance placed on this issue is that the only tangible link between the alteration to the beam saw and Mr Hamilton is that this was the machine that Mr Hamilton had primarily operated after his demotion.

[54] Further, I am anxious about the reliance on this episode because the reliance seems predicated on the basis that the alteration to the machine was somehow malicious. Evidence was produced at the hearing, the effect of which was that this machine and the other machine which is also implicated in Mr Hamilton's dismissal, required to be adjusted from time to time. There was argument and disputation about how often those adjustments needed to be made, but it seems to have been accepted that some alteration to the settings of the machine from time to time was not altogether unusual.

[55] It may be that Mr Hamilton made the alteration that is complained about to this particular machine and he may have made it for reasons which are not in any way sinister; certainly, he did

not claim to have made the alteration in question although he certainly admitted that the machine needed to be changed when he got to work on the Monday morning.

[56] In all the circumstances, I am simply not persuaded that there is the evidence of a sinister intent in relation to this particular machine or indeed that there is evidence sufficient to link Mr Hamilton to the matters complained of.

[57] It follows that I do not think that this particular matter is robust enough to partially ground a summary dismissal.

[58] I have the same view in relation to the allegation that Mr Hamilton altered the settings on the four sider machine. The evidence from Mr Foster's investigation suggests that Mr Hamilton was observed during a lunch hour crouching down beside the four sider machine near the controls with one or more hands allegedly on the controls.

[59] The evidence for this view of Mr Hamilton comes from Mr Fisher who gave evidence at the Authority's investigation meeting as well as to Mr Foster during the disciplinary process. Mr Fisher told me that he had been 50-60 metres away when he saw Mr Hamilton allegedly altering the settings on the machine. The first point I note is that this is in itself a considerable distance.

[60] Two matters, however, trouble me more than the distance that Mr Fisher would have had to observe Mr Hamilton from. The first is that evidence was given during the investigation meeting that in order to make a change to the settings of the machine, it was necessary to use an item called a crank handle which is similar to the crank handle that was used to start old motor cars but somewhat smaller.

[61] Mr Foster, who as I indicated earlier impressed me as an honest and straightforward witness, told me in his evidence in answer to a question from me: *I would have assumed it* [he means the settings on the machine] *was manually moved*. Mr Foster accepted that there was no crank handle referred to in the evidence before him at the time of dismissal.

[62] There was no consensus about whether a crank handle was required to alter the machine's settings or not. I physically attended at the factory and looked at the relevant machines. The parties' representatives were keen to try to show me that the machine either could be moved without the crank handle or could not be. I think there is sufficient doubt about the issue to create uncertainty.

[63] I am also troubled by Mr Fisher's evidence at the investigation meeting where he frankly confirmed that he had observed Mr Hamilton at the relevant time for a period of five to six seconds. In my opinion, that is an extraordinarily short period of time from a distance, by his own admission, 50-60 metres, to discern what it is that an individual is actually doing.

[64] Those two factors are sufficient in my mind to create real doubt about the efficacy of the employer's investigation. Having said that, I do not want to in any way impugn the integrity or the motives of either Mr Foster or Mr Fisher. I do not accept Mr Hamilton's contention that they were either of the motivated by malice or bad faith. I believe, on the evidence before me, that they endeavoured to do a thorough and workmanlike job and in the result my assessment is that that investigation came up short.

[65] It follows that I am not persuaded that the investigation into the facts on which the ultimate dismissal of Mr Hamilton relied was sufficiently robust to ground any dismissal, let alone a summary one, and accordingly I consider that the dismissal is unsafe and that in consequence Mr Hamilton has made out his claim that he has been unjustifiably dismissed.

The penalty claims against Mr Foster and Mr Fisher

[66] Mr Hamilton claims a penalty against both Mr Foster and Mr Fisher alleging that both of those individuals breached s.134(2) of the Employment Relations Act 2000.

[67] That subsection provides, generally, that persons inciting, instigating, aiding or abetting any breach of an employment agreement are liable to a penalty imposed by the Authority.

[68] The awarding of a penalty in circumstances where a breach is proved is, of course, a discretionary remedy. I also note for the sake of completeness that the amendment to the Act requiring an action for recovery of a penalty to be commenced within 12 months of the cause of action does not apply in the instant case because that amendment was not enacted at the time the matters complained of took place.

[69] However, while the matter is able to be considered, I am not minded to grant the remedies sought. I am not persuaded on the evidence before me that Mr Foster or Mr Fisher were doing anything other than fulfilling their obligations to their employer to act faithfully and dutifully in the pursuit of the employer's business which must include the unpleasant task of investigating a colleague who is seen to have potentially committed wrongs against their common employer.

[70] I have already made clear my view that Mr Foster, as the employer's decision-maker, gave honest and straightforward evidence and he seemed to me to be an honourable and decent man who did his best to deal with the matter professionally and fairly. While I accept that the facts disclose that Mr Hamilton's employment agreement was indeed breached by the acts complained of (certainly on the findings I have made that is the position), it does not seem to me that there is any evidence whatever that either Mr Foster or Mr Fisher incited, instigated, aided or abetted that breach.

[71] Mr Foster acted for his employer, Dominator, in making inquiry into a serious allegation against Mr Hamilton. Mr Fisher simply gave evidence of what he had seen to Mr Foster and Mr Foster, as the decision-maker, reflected on that evidence and subsequently made his decision. That in my opinion does not constitute a breach in terms of the clear words in s.134(2) of the Act.

The subsidiary claims

[72] Mr Hamilton claims a personal grievance and a breach of the Act in the failure of the employer to provide a written employment agreement.

[73] Dominator readily concedes that there was no written employment agreement. I am not satisfied that anything particularly turns on the absence of the written agreement. I consider the awards I make on the significant grievances compensate Mr Hamilton adequately. Applying *Xu v. McIntosh* [2004] 2 ERNZ 448, I see no basis for any additional award for the breach of the statute: there is no additional harm, there is no need for deterrence (the breach, on the evidence, was a one-off) and there is no particular culpability.

[74] Next Mr Hamilton claims a personal grievance on the ground that Dominator set production targets without consultation. I do not think the evidence supports the contention that these targets were set without consultation and, in any event, given the commercial requirement for Dominator to endeavour to run a successful business, I see nothing wrong with production targets being formulated, particularly when it is clear Mr Hamilton's successor had no difficulty in meeting them.

[75] Mr Hamilton also seeks a penalty against Dominator for its alleged demotion of him. I have dealt with this matter by way of personal grievance and I do not consider the factual matrix

discloses anything additional which needs to be dealt with by way of penalty: *Xu v. McIntosh* applied.

[76] Finally, Mr Hamilton claims a lockout in respect to his suspension. There is no doubt there was a suspension and, I have found, an unlawful one. There is equally no doubt there was no lockout. Dominator's counsel is correct in identifying that for a lockout to be present, the employer party must have the appropriate motive as set out in s.82(1)(b) of the Act. In the absence of the motive required by the statute, there can be no lockout.

Determination

[77] I have found that Mr Hamilton has personal grievances in relation first to the unlawful demotion, then to the unlawful suspension and finally to the unjustified dismissal. The breaches are serious and I am satisfied from the evidence I have heard that they had a significant effect on Mr Hamilton's equanimity and wellbeing.

[78] I award Mr Hamilton the sum of \$1,000 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in respect of the *demotion* grievance; a further \$1,000 compensation in respect of the *suspension* grievance; and a further \$5,000 compensation in respect of the unjustified dismissal.

[79] Mr Hamilton has also lost wages as a consequence of the unjustified dismissal. He was out of work for approximately three months after the unjustified dismissal and the salary that he enjoyed on dismissal was \$45,000 per annum. It follows that he is entitled to be compensated by Dominator for lost wages for that three month period which I calculate at \$11,250 gross.

[80] Before making these awards, I had reflected on Mr Hamilton's contribution to the matters complained of as I am required to do under s.124 of the Act. None of the evidence I have heard gives any credence to the view that Mr Hamilton has in any way contributed to the personal grievances that he has suffered.

Costs

[81] Costs are reserved.

James Crichton
Member of Employment Relations Authority