

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 58
5521239

BETWEEN SCOTT WILLIAMS
Applicant

A N D FLETCHER CONSTRUCTION
COMPANY LIMITED FOR THE
EARTHQUAKE RECOVERY
PROJECT
Respondent

Member of Authority: Helen Doyle

Representatives: Naoimh McSparron, Counsel for the Applicant
Sarah Townsend, Counsel for the Respondent

Investigation Meeting: 31 March 2015 at Christchurch

Submissions Received: On the day

Date of Determination: 11 May 2015

DETERMINATION OF THE AUTHORITY

- A Scott Williams was justifiably dismissed from his employment with Fletcher Construction Company Limited for the Earthquake Recovery Project.**
- B Costs are reserved and failing agreement a timetable has been set.**

Employment relationship problem

[1] Scott Williams was employed by Fletcher Construction Company Limited for the Earthquake Recovery Project (Fletcher EQR) from 13 December 2010, initially as

a Contract Supervisor and then as Works Manager for the drainage, urgent works and liquefaction team.

[2] Fletcher EQR is a business unit of Fletcher Construction Company Limited and was set up to repair homes damaged by the earthquake as agent to the Earthquake Commission.

[3] In 2014 the Claims Review Team at EQC carried out an audit of claims completed by Fletchers EQR to date. A number of contractors were spoken to during that process. One of the contractors suggested that Mr Williams had accepted payment in 2011 for helping him prepare quotes for Fletcher EQR repairs. That matter and some other matters concerning Mr Williams were raised with Fletcher EQR in June 2014 and EQC advised that they considered the matters needed to be investigated.

[4] An investigation and a disciplinary process followed after which Fletcher EQR concluded that it could no longer have trust and confidence in Mr Williams and he was dismissed on 21 August 2014 with payment of one month's salary in lieu of notice.

[5] Mr Williams says that the dismissal was both substantively and procedurally unjustified. He seeks reimbursement of lost wages, compensation and costs. It was confirmed on behalf of Mr Williams that a penalty was no longer claimed in relation to an allegation that there had been unfair bargaining.

[6] Whilst accepting Mr Williams was dismissed, Fletcher EQC denies that Mr Williams was unjustifiably dismissed.

The issues

[7] The issues for the Authority to determine are as follows:

- a. Was there a full and fair investigation undertaken by Fletcher EQR at the conclusion of which it could be found by a fair and reasonable employer that serious misconduct was disclosed on the part of Mr Williams;
- b. Was the decision of Fletcher EQR to dismiss Mr Williams with payment of one month's salary in lieu of wages justified;

- c. If it was an unjustified dismissal then what remedies is Mr Williams entitled to and are there issues of mitigation and contribution.

Application of the test in s 103A of the Employment Relations Act 2000 (the Act)

[8] The Authority is required under the justification test in s 103A of the Act to determine on an objective basis whether the dismissal and the process were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[9] There are in s 103A of the Act, four procedural fairness factors that the Authority must consider. The Authority is not to determine a dismissal unjustifiable solely because of minor defects in the process that did not result in the employee being treated unfairly. A fair and reasonable employer is expected to comply with good faith statutory obligations.

Was there a full and fair investigation undertaken by Fletcher EQR at the conclusion of which it could be found by a fair and reasonable employer that serious misconduct was disclosed on the part of Mr Williams?

The reason for the dismissal

[10] The reason for Mr Williams' dismissal was that he accepted \$150 for assisting RB with his quotes for Fletcher EQR in his own time and did not declare to his employer receiving that money. The conduct was not denied.

[11] It was concluded that his actions and conduct breached the Fletcher EQR Code of Conduct and his individual employment agreement. Fletcher EQR says Mr Williams duties of good faith, trust and confidence prevented him from accepting payments for duties concerned with his employment with Fletcher EQR from contractors and his employment agreement also expressly prohibited this conduct. It says that the conduct of accepting a secret commission or kickbacks/backhanders is serious misconduct.

[12] I accept that such conduct can amount to serious misconduct but whether it does in this case is disputed.

[13] Mr Williams does not accept that his conduct on this occasion was serious misconduct but says rather he made an innocent genuine mistake that he was entitled

to accept payment for assisting a contractor in his own time and he did not believe that there would be any issue about the matter. He says that this explanation was not considered.

Fletcher EQR process for engaging contractors and allocating them work

[14] It is useful to set out the process for Fletcher EQR engaging contractors to repair houses as it was in 2011 when the material events occurred.

[15] Contractors engaged by Fletcher EQR to carry out repair work to houses damaged in the earthquakes have to complete a Fletcher EQR accreditation process to ensure they are properly qualified and able to undertake work to the required building and industry standards. Once they have completed that process they are called *accredited contractors*.

[16] Originally Fletcher EQR operated from a number of Hubs around Christchurch and Canterbury although as work was completed the Hubs have been rationalised. Mr Williams in 2011 was working in his role as Contract Supervisor in the Rolleston Hub and he reported to the Hub Manager who was at that time Richard Vance.

[17] EQC undertook a rapid assessment of the damaged properties when a property owner submitted a claim. The process in 2011 which I understand changed to a more formal process from in or about 2012 was that Mr Williams as contract supervisor and an accredited contractor would visit a house needing repairs together and do a revision of and/or verify the original EQC scope of works. Mr Williams had responsibility for allocating the work to the accredited contractor before this visit based on the contractor's capabilities.

[18] The accredited contractor, having with Mr Williams revised or verified the original EQC scope of work and with an understanding of the nature of the work required, would then submit a quote to the Fletcher EQR Hub quantity surveying team for consideration. If the quote met certain criteria and was within the pricing parameters agreed between EQR and EQC then a works order is issued. The quantity surveying teams and the contract supervisors particularly when there would have been some uncertainty at the start of the repair work following the earthquakes provided guidance to accredited contractors in the Hub on the presentation of quotes and formatting.

[19] If the accredited contractors quote was accepted and a work order issued then the accredited contractor undertook the work. As well as having responsibility for allocating work to accredited contractors Mr Williams was responsible for overseeing the work of a number of accredited contractors.

Concerns about Mr Williams coming to the attention of Fletcher EQR

[20] A director of one of the accredited contracting companies was interviewed by the EQC claims review team and the interview was recorded. There is a transcript of that interview. I shall call the director RB and the company RSL. RSL were not having their quotes accepted by Fletcher EQR. Mr Williams in his written evidence stated that *the quotes which RB submitted on behalf of RSL were so badly set out and organised that it got to the point where the quantity surveyors did not even want to speak with RB.*

[21] RB stated in the interview that Mr Williams had in his own time prepared some quotes, about five or six for him and charged him \$30 per quote. It was common ground that this was during 2011 after 1 July 2011. There were some other concerns during the interview with RB about the possible use and disclosure of EQC-EQR rates and ceiling data and that Mr Williams did not always attend sign offs for completed repairs.

[22] In June 2014 EQC passed a copy of the interview transcript with RB to Fletcher EQR whose code of conduct requires a preliminary investigation to be carried out when there are concerns about an employee's conduct before deciding whether a full disciplinary investigation is required.

Investigation process

[23] Lisa Duston is employed by Fletcher EQR in the position of Human Resource Advisor. On 4 August 2014 she assisted Fletcher EQR's Risk Manager, Bruce Houghton, in preparing a letter to Mr Williams inviting him to an investigation meeting on 6 August 2014 to discuss the concerns. The full transcript of the interview between the Claims Review Team and RB was provided with the letter to Mr Williams. The letter also explained to Mr Williams that the meeting was not a disciplinary meeting. Mr Williams was encouraged to bring a support person which could include a legal representative or anyone else he was comfortable with to the meeting.

[24] Mr Williams did not bring a support person or representative to the investigation meeting. The meeting was recorded and the Authority has been provided with a transcript from that meeting. Ms Duston attended the meeting with Mr Houghton.

[25] Mr Williams accepted that he had not attended some sign-offs personally due to his heavy workload. Mr Williams said that the ceiling rates were well known among contractors and that anyone wanting to know what they were could find out in the pub. He accepted he had helped RB with preparing quotes because RB's quotes were constantly rejected by Fletcher EQR. Mr Williams explained he took five or six quotes home for him on a weekend and re-wrote them and that RB submitted those quotes to Fletcher EQR and was then successful in having his quotes accepted. In relation to the money, Mr Williams said that about two weeks after completing the quotes for RB, RB handed him \$150 cash for his help. He denied ever asking for the money and denied that he charged RB \$30 per quote as RB had said when interviewed.

Disciplinary Process

[26] Following the investigation meeting it was decided by Mr Houghton that a full investigation and disciplinary process should be undertaken. Mr Williams' direct line manager Kevin Duignan was involved at the disciplinary stage.

[27] On 11 August 2014 Mr Duignan handed Mr Williams a letter inviting him to a disciplinary meeting on 14 August 2014. The alleged behaviour was set out in the letter and included Mr Williams' responses from the investigation meeting he attended with Mr Houghton and Ms Duston. The letter set out that if the behaviour was proven to be correct then Mr Williams may be in breach of the EQR code of conduct and three examples of serious misconduct in the code were set out including *engaging in any conduct which causes the company to lose trust and confidence in you as an employee*. Mr Williams was advised in the letter that he would at the meeting have an opportunity to provide an explanation which would be taken into account and an outcome may be disciplinary action up to and including dismissal. He was again encouraged to have a support person with him which could include a legal representative and further advised that Mr Duignan would attend the meeting with Ms Duston.

[28] Mr Williams said in his evidence that when Mr Duignan gave him this letter Mr Duignan suggested that he should consider resigning or looking for another job and that this demonstrated pre-determination on his part. Mr Duignan denied that and said that any discussion at that time was limited to telling Mr Williams to take the disciplinary investigation seriously and look after himself. He said that the reason he told him this was because of the casual attitude Mr Williams had taken in June during an investigation process.

[29] In determining this dispute about the evidence I have placed some emphasis on the fact that the first time this allegation was raised was after dismissal in the letter raising the personal grievance. It was not raised at a meeting on 20 August 2014 at which Mr Williams was represented by the solicitor who then raised the grievance and at this time it was known that a preliminary view had been reached that the disciplinary outcome was dismissal.

[30] I cannot rule out the possibility that Mr Williams at a later time following dismissal reflected back on the conversation with Mr Duignan and misconstrued and/or reconstructed what had been said in light of the later events. I am not satisfied that there was evidence to support pre-determination in this case. As will become apparent Mr Williams' explanations on two of the three allegations were accepted which is consistent with an open minded approach.

[31] A disciplinary meeting was held on 14 August 2014. Mr Duignan attended the meeting with Ms Duston and Mr Williams attended with a colleague Todd Butts as his support person.

Mr Williams' explanation

[32] At the disciplinary meeting Mr Williams provided an explanation to the three matters of concern. Mr Williams gave similar explanations to matters as given at the preliminary investigation meeting. Mr Williams explained that from his perspective regarding the quotes it was *just a mate helping a mate* with some work and that he had not asked for payment but it had been offered.

[33] Mr Williams said that he was not at the time he accepted money from RB aware of the provision in his employment agreement in clause 13 headed Commissions that provided; *you must not receive any payment, fee, gratuity, commission or other benefit (i.e. incentive or gift) other than from the Company in*

payment for any matter or thing connected with your duties, except with the prior written consent of the Company. There was some discussion as to why Mr Williams had not brought RB into the Hub to have a meeting with the quantity surveying team about his quotes. Mr Williams said that they would have nothing to do with RB. There was discussion about a conflict of interest situation as the quotes were for Fletcher EQR work.

[34] Mr Duignan said that he remained concerned about the situation involving Mr Williams taking the quotes home and undertaking them for the contractor and then receiving money for doing so, which he did not declare. He was not satisfied that Mr Williams did not appreciate accepting cash from RB to help him get Fletcher EQR jobs and not telling anyone was wrong.

[35] Mr Williams' explanations in relation to the failure to attend sign offs and the ceiling rates however were accepted and those matters were not taken any further.

[36] Ms McSparron does not accept that the conduct admitted by Mr Williams is the sort that would substantively justify a dismissal because amongst other reasons Mr Williams innocently assisted the contractor and made a genuine mistake in believing there was no difficulty in accepting money. She submitted that his explanation of an innocent mistake should have been treated by Fletcher EQR with credibility. I'll turn to consider that now.

[37] The Court of Appeal has held that a failure to establish wilfulness does not always create a presumption that the conduct is not serious misconduct in *Chief Executive of Department of Inland Revenue v Buchanan (No 2)*¹. The Court of Appeal said that what should be evaluated is the nature of the obligation imposed on the employee by the employment [agreement], the nature of the breach that has occurred and the circumstances of the breach². It was accepted that there will be some circumstances where an employee could not be expected to know of a particular obligation.

[38] Mr Williams accepted money from a contractor for undertaking work connected to his duties. I find Ms Townsend's submission persuasive that the assistance Mr Williams provided to the contractor went beyond what was normally

¹ [2005] ERNZ 767 at 777

² At 777

given at that time to get contractors up to speed. Assistance was provided on five or six quotes rejected by Fletcher EQR rather than on one quote and although Mr Williams said that his assistance was restricted entirely to formatting the quotes he accepted that he had checked the quotes against EQC's original scopes and had corrected errors in RB's measurements and quantities. Mr Williams then re-wrote the quotes in a way which he knew would be acceptable to Fletcher EQR. The evidence supports in all likelihood the quotes were submitted in Mr Williams' handwriting to Fletcher EQR but I accept that Mr Williams had in all likelihood asked RB to produce the quotes himself. Mr Duignan said in his oral evidence that he did not know any other supervisor who went to the extent Mr Williams did to assist contractors with preparing quotes and formatting.

[39] There was no evidence to support that there was a culture where this sort of conduct occurred at the Hub where Mr Williams was based at the material time. Mr Williams agreed at the investigation meeting with Mr Houghton and Ms Duston that he was not aware of anyone else accepting any money for work like he had and that he had not heard of anyone doing it³. It is relevant I find that Mr Williams was a mature employee with considerable experience in the building trade and a fair and reasonable employer could take that into account. Mr Williams could have talked to his manager about whether he should keep the money or looked in his employment agreement for guidance. Instead Mr Williams did not tell anyone else that he had received payment for assisting with the quotes.

[40] At the time of assisting with the quotes and accepting payment Mr Williams was in a position to decide who should be allocated work as long as the contractors' quotes were accepted by the quantity surveying team. Accepting payment from contractors in those circumstances for assistance with the quotes did create a conflict of interest situation. A fair and reasonable employer could conclude as Mr Duignan did that Mr Williams could have taken other steps to get RB up to speed with his quotes such as arranging or facilitating a meeting with the quantity surveying team and RB. If there was reluctance on the part of that team to assist then Mr Williams could have escalated the matter to his manager.

[41] Objectively measured against the relevant circumstances I find Mr Williams could be expected to know that accepting money from RB in the circumstances was

³ Pg 17 of the transcript

improper even if he had not reviewed clause 13 of his employment agreement. I accept Ms Townsend's submission that a requirement not to accept a payment for something connected with his duties from an accredited contractor without the consent of his employer was not an unusual or unexpected requirement and it should have been obvious in the circumstances.

[42] In assessing the seriousness of the conduct a fair and reasonable employer could take into account that Fletcher EQR had a high public profile and it could and should have been able to expect to have a high level of trust and confidence in contract supervisors and their dealings with contractors.

[43] I have also considered whether the historical nature of the incident reduced its seriousness. There was no evidence to support that the conduct had occurred more than on this one occasion. Some other contractors were contacted at Mr Williams request and they had not had a similar experience. The conduct with RB remained undetected for some time until it was disclosed by RB during the EQC Claims Review. I do not find that the historical nature of the conduct in circumstances where it was not known about impacts on the seriousness of the conduct because when it was discovered it was investigated promptly. It would have been different if Fletcher EQR had known about it for some time and had taken no action but that was not the case.

[44] I find that accepting payment for work done at home for a contractor which was connected to his duties at Fletcher EQR and not declaring it was conduct that a fair and reasonable employer could conclude was serious misconduct in all the circumstances. It was the sort of conduct that could be destructive of the trust and confidence that an employer must have in an employee in an employment relationship.

Preliminary decision

[45] On 18 August 2014 Mr Duignan wrote to Mr Williams and set out his preliminary decision. Mr Duignan said that the actions had seriously impacted on the employment relationship to the extent where he had concerns about his ability to have trust and confidence in Mr Williams in the future and that it was his preliminary decision that the actions were serious enough to justify termination.

[46] Mr Duignan set out that in arriving at the preliminary decision he had taken into account the responses provided at the disciplinary meeting and had regard to a first and final written warning for serious misconduct issued in September 2013 to Mr Williams. He referred in his letter to the standards required in the code of conduct and that Mr Williams was in breach of clause 13 of the employment agreement. Mr Williams was given an opportunity to comment on the proposal to dismiss him either in a meeting or in writing.

[47] Following advice of the preliminary decision in the letter dated 18 August 2014 Mr Williams attended a further meeting on 20 August 2014 at which he was represented at that meeting by solicitor, Charlene Sell. Mr Duignan attended the meeting with Ms Duston.

[48] Three issues were raised at that meeting by Ms Sell on Mr Williams' behalf about the preliminary decision to dismiss. One was the historical nature of the incident as it had occurred in 2011 and that Mr Williams had admitted his conduct and had offered to repay the money received. Ms Sell submitted that the sanction was too harsh in light of the historical nature of the concern and the fact that he had not been involved in similar conduct since that time.

[49] The second was that Mr Duignan had placed some reliance on a final written warning on Mr Williams' records issued in September 2013 for conduct unrelated to the incident in 2011. Further Ms Sell submitted that the warning related to conduct after the events in 2011 and therefore it cannot be taken into account when considering a sanction for events that occurred before the warning was issued.

[50] The third was that there had been unfair bargaining when Mr Williams signed his employment agreement. Mr Williams says that he never received a letter from Fletcher EQR offering him the position of Supervisor dated 5 December 2010. The letter contained the individual employment agreement which Mr Williams did not sign until June 2011. Mr Williams says that he was asked by his manager to sign the agreement on 29 June 2011 and he did that without reviewing the terms of the agreement. Mr Williams said that he did not look again at his employment agreement.

[51] Mr Duignan said that he considered the issues raised by Ms Sell. He concluded that the feedback had not provided any new substantive information,

explanation or reasoning and in a letter dated 21 August 2014 confirmed the decision to terminate Mr Williams' employment with one month's pay in lieu of notice.

[52] In relation to the issue of the first and final warning he wrote that it was explained at the meeting that the warning was a relevant factor to consider when making the decision to terminate or not but not in relation to the finding of serious misconduct. In relation to the historical nature of the allegation he wrote that it had only recently been brought to his attention in a recent complaint and had been correctly investigated and finally that he was unaware of any concerns having been raised about unfair bargaining.

[53] I have considered whether Mr Duignan was able to have regard to the final written warning. Ms McSparron submits that the 2013 warning should not have been taken into account because it post-dated the events in 2011, was given for unrelated conduct and concerned a one-off incident which had not been repeated. Mr Duignan says that the conduct stood on its own and that he would have dismissed Mr Williams even if he did not have a final warning on his records.

[54] The warning I accept was for unrelated conduct and although it post-dated the events in 2011 I am not satisfied that it was taken into account in assessing the seriousness of the conduct that occurred in 2011 which would have been a different matter entirely. I find that Mr Duignan was able to have regard to Mr Williams' work record when making a decision about a disciplinary outcome in relation to the 2011 events. If the record was unblemished, for example, then that was a factor in favour of Mr Williams and should fairly and reasonably be taken into account when making a decision as to a disciplinary outcome. Mr Williams had an opportunity on 20 August 2014 to explain about the circumstances of the warning. I do not find unfairness that there was regard to it in making a decision as to a disciplinary outcome.

[55] Mr Williams explained that he felt pressured to sign his employment agreement without having an opportunity to consider the contents. That matter was considered by Mr Duignan but he did not consider that mitigated the seriousness of the conduct. A fair and reasonable employer could have been expected to have properly considered that matter as a mitigating factor and I am satisfied that Mr Duignan did consider that matter. I note that the employment agreement was signed before the payment was accepted.

[56] I am satisfied that all matters advanced in mitigation were considered.

[57] The letter confirming the dismissal dated 21 August 2014 stated that in recognition of Mr Williams' contribution to Fletcher EQR he was paid one month in lieu of notice, a sum of \$9095.00.

[58] Objectively assessed I find that there was a full and fair investigation into the conduct of Mr Williams that met the requirements of the test in s 103A of the Act. A fair and reasonable employer could conclude the admitted conduct was serious misconduct.

Was the dismissal of Mr Williams what a fair and reasonable employer could have done in all the circumstances at the time?

[59] The full Court of the Employment Court in *Angus v Ports of Auckland Ltd (No 2)*⁴ confirmed the *could* test, in s 103A of the Act allows for (usually) more than one possible justifiable outcome and more than one possible justifiable methodology. What remained unchanged is that the Authority cannot decide justification by substituting its own decision for that of the employer.

[60] Mr Williams was clearly a very popular and hard-working employee at Fletcher EQR and I accept Mr Duignan's evidence that the decision to dismiss was a very difficult one for him as he got on well with Mr Williams. Mr Duignan concluded he was unable to trust Mr Williams as an employee of Fletcher EQR as his actions in accepting money for helping a contractor with writing quotes for Fletcher EQR work was so serious in light of the work that Fletcher EQR carries out.

[61] There were some mitigating factors advanced including that Mr Williams was honest about his conduct and these were considered but Mr Duignan did not conclude they were enough to mitigate the seriousness of the conduct. He did though take Mr Williams' contribution to Fletcher EQR into account in the decision to pay him one month salary in lieu of notice.

[62] Objectively assessed I find that Mr Duignan could fairly and reasonably have reached a conclusion that the conduct was serious enough to warrant Mr Williams' dismissal in all the circumstances.

⁴ [2011] ERNZ

[63] I find that following a full and fair investigation that disclosed serious misconduct a fair and reasonable employer could have dismissed Mr Williams in all the circumstances at the time of the dismissal.

[64] In conclusion I do not find that Mr Williams had made out his personal grievance that he was unjustifiably dismissed and there is nothing further I can do to assist him.

Costs

[65] I reserve the issue of costs. If the parties cannot resolve costs by agreement then Ms Townsend has until 22 May 2015 to lodge and serve submission as to costs and Ms McSparron has until 5 June to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority