

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 313
3022532

BETWEEN IAN DAVIS
Applicant

A N D ON ALL FLOORS (2016)
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Geoff Martin, Advocate for Applicant
Russell Drake, Advocate for Respondent

Investigation Meeting: 20 September, 11, 12 December 2018 at Hamilton. 21
March 2019 by video conference.

Submissions Received: 01 April 2019 from Applicant
09 April 2019 from Respondent

Date of Determination: 28 May 2019

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The written warning issued by On All Floors (2016) Limited (On All Floors) to Mr Davis amounted to an unjustifiable disadvantage.**
- B. On All Floors must, within 21 days of the date of this determination, settle Mr Davis' personal grievance by paying him the sum of \$5,000 compensation for the hurt, humiliation and injury to his feelings.**
- C. Mr Davis was unjustifiably dismissed by On All Floors.**

D. On All Floors must, within 21 days of the date of this determination, settle Mr Davis' personal grievance of unjustified dismissal by paying him the sum of \$20,000 compensation for the hurt, humiliation and injury to his feelings.

E. Costs are reserved.

Employment Relationship Problem

On All Floors (2016) Limited

[1] On All Floors (2016) Limited (On All Floors) is a flooring retailer, providing flooring products to customers. Services include measuring carpet and arranging installation for clients. Mr Doug Robertson and his wife Mrs Katrina Robertson are the directors and shareholders of On All Floors.

Mr Davis' employment by On All Floors

[2] Mr Davis was employed from early 2014 by the previous owners of the business, Mr and Mrs Waterhouse trading as On All Floors. On 1 September 2016, Mr Davis was offered and accepted employment by On All Floors (2016) Limited a new company established by Mr and Mrs Robertson which had purchased the business of On All Floors.

Unjustified disadvantage claims – written warning and discrimination

[3] On 14 November 2016, Mr Davis was issued with a first written warning by Mr and Mrs Robertson. The written warning was in respect of Mr Davis' conduct, which the Robertsons considered amounted to serious misconduct. Mr Davis says the warning was not deserved and amounted to an unjustified disadvantage.

[4] Mr Davis also alleges discrimination on the grounds of his age. Mr Davis says Mr Robertson often referred to his age and his ability to do the role. For example, Mr Robertson did not consider that as a measurer he could also do installation and the laying of carpet work. He says Mr Robertson considered this work to be too heavy and he did not think Mr Davis could do the work because he was "too old". Mr Davis

considered this to amount to discrimination in his employment. He says the statements by Mr Robertson were unjustified and hurtful.

Unjustified dismissal claim – disestablishment of Mr Davis’ role

[5] On 21 February 2017, Mr Davis’ employment was terminated for redundancy. The Robertsons say the business did not justify having a dedicated measurer. They say the carpet layers were able to absorb measuring work into their duties. Accordingly, they made a decision to disestablish Mr Davis’ role. They say there was a legitimate restructure of the business which resulted in the genuine redundancy of Mr Davis’ role.

[6] Mr Davis claims the redundancy was not genuine. He says it was a sham designed to remove him and that a few months after his dismissal a measurer was employed. Mr Davis says he was unjustifiably dismissed by On All Floors. He seeks remedies accordingly.

The investigation meeting

[7] The investigation meeting was adjourned on more than one occasion. The first occasion was because the Authority became aware from witnesses giving evidence during the investigation meeting that there was critical relevant information which had not been provided to it by the representatives of the parties. The investigation meeting was adjourned to enable this information to be provided to the Authority. The second adjournment of the investigation meeting in December 2018 was because one of the witnesses who was due to attend to give evidence failed to do so. The investigation meeting was reconvened in March 2019 by video conferencing link to enable this witness to give her evidence.

[8] Mr Davis, his wife Mrs Linda Davis and Ms Faye Skeet a former employee of On All Floors each filed witness statements.

[9] For On All Floors, Mr Doug Robertson, Mr Robert Brewerton, Mr Joshua Shirley, Mr Alex Giesen, Ms Helen Lee, Ms Carolyn Wilford, Ms Serra Fisher and Ms Melissa Morris each filed witness statements. Mrs Katrina Robertson did not file a witness statement but was at the Authority’s investigation meeting and answered questions.

[10] Each of the witnesses giving evidence before the Authority affirmed that their evidence was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[11] As permitted under s 174 of the Act, this determination does not set out all the evidence and submissions received. The determination states finding of fact and law, and makes conclusions on issues necessary to dispose of the matter.

Issues

[12] The issues for determination by the Authority are as follows:

- (a) Did the issuing of a first written warning to Mr Davis by On All Floors amount to an unjustifiable disadvantage?
- (b) Was Mr Davis discriminated against on the grounds of age and if so did this amount to an unjustifiable disadvantage?
- (c) Was Mr Davis unjustifiably dismissed by On All Floors?
- (d) If Mr Davis was unjustifiably disadvantaged and or dismissed, what remedies are available to him?
- (e) If the answer to any of the questions in (a) to (c) is Yes, and remedies are available, did Mr Davis contribute towards the situation giving rise to the personal grievance concerned?

First Issue

Did the issuing of a first written warning to Mr Davis by On All Floors amount to an unjustifiable disadvantage?

Mr Davis' experience in the floor covering industry

[13] Mr Davis is skilled and highly experienced in the floor covering industry. Mr Davis has been employed in the floor covering industry for 42 years and is trained in carpet and vinyl installation, measuring and quantifying, and has held management positions. Prior to his employment at On All Floors in early 2014, Mr Davis was the manager at Hills Flooring in both Auckland and Hamilton for approximately 25 years.

Events leading up to the purchase of On All Floors – 1 September 2016

[14] Prior to purchasing On All Floors, Mr Robertson owned and operated Emblems NZ, for 12 years. Emblems NZ is a business specialising in engraving design and digital printing. Mrs Robertson had been a natural health practitioner for 18 years. The Robertsons had no experience in the floor covering industry.

[15] Mrs Robertson says prior to the purchase of the business she and Mr Robertson went to a flooring conference to learn more about the business. They also did a road trip meeting with owners of flooring businesses in places such as Fielding, Silverdale, Whangamata to learn more about their businesses. They came to understand that there were different options available and not all the businesses had a dedicated measurer. They also met with Mr Rob Brewerton, a senior installer who had been at On All Floors and its predecessor for approximately 16 years. They saw Rob as a key player. There were some discussions at this early stage about whether the business needed a dedicated measurer or whether the installers could also measure.

[16] Mr Davis says he met with Mr and Mrs Robertson following their purchase of the business. Mr Davis says they told him they saw him as a key member of staff as they did not have any industry experience. Mr Davis understood from the discussion that he would be the manager of the business in the future while they took a less hands on role.

Purchase of On All Floors – 1 September 2016

[17] On 1 September 2016, Mr and Mrs Waterhouse trading as On All Floors, sold the business to Mr and Mrs Robertson's new company On All Floors (2016) Limited (On All Floors). Mr Davis was offered and accepted employment by On All Floors as a measurer.

[18] Mr Davis says in the first month following their purchase of the business, the Robertsons increased his hourly rate and told him they were very happy with his work. Mr Davis says he was told by the Robertsons that they saw him as an integral part of the business and "would likely move [him] into a management role with further wage increases."¹

¹ Davis witness statement.

[19] Mr Davis says he was extremely busy with his workload which had increased. He was responsible for measuring, quoting and drawing up plans. Mr Davis says he spent much of each day calling into people's homes or businesses to measure for flooring and discuss options. Upon returning to the office at the end of the day, Mr Davis quantified the jobs.

[20] During the first few months of purchasing the business Mr Robertson was not well and was not engaged much with the business, this was left to Mrs Robertson.

Employment of Mrs Linda Davis by On All Floors

[21] In late September 2016, Mr Davis says that Mr and Mrs Robertson asked him whether his wife, Mrs Linda Davis, who had a flooring background, would be interested in working part time as the office administrator. The job would be to prepare costing spreadsheets and submit quotes to customers. Mrs Davis met with Mr and Mrs Robertson to discuss the role. She was told by the Robertsons that they had no background in retail flooring and were relying on staff while they "found their feet". Mrs Davis says she was told her role would be to assist Mr Davis with the backlog of complete measures waiting for quotes to be sent out. Mrs Davis agreed to take the position and left her role at the time in order to do so.

October – December 2016

[22] In late October 2016, at a meeting with the Robertsons to discuss the level of workload, Mr Davis suggested that they may wish to look at employing a person who solely did the measuring. Mr Davis suggested that he would continue to do the scaling and quantifying ready for Mrs Davis to process the jobs and submit the quotes. During the discussion, Mr Davis suggested that a former employee at On All Floors, Ms Mel Morris who had experience in measuring may be a possible candidate, if the Robertsons thought this idea was a good one.

[23] Mr Davis says that his idea was rejected outright by Mr Robertson who angrily asked him "do you think you are the manager?" Following that discussion, Mr Davis says that he felt a change in attitude towards him by Mr Robertson. Mr Davis referred to an example of this change of attitude. He says he was discussing the installation of a sisal carpet with Mr Robertson. Mr Davis says he tried to explain that the way in which Mr Robertson was proposing to install the carpet was incorrect and that it

would create ongoing problems for the client and potentially cost On All Floors a lot of money. Mr Davis says Mr Robertson became extremely angry, ordered him into his office and remonstrated with him over the matter.

[24] Mr Robertson disputes Mr Davis' version of events. He says in late October 2016, Mr Davis' attitude towards him and Mrs Robertson changed. He believed this was because they had declined his proposal that they employ another staff member to undertake part of his role.

11 November 2016 – Meeting to discuss issues

[25] On 11 November 2016, Mr Robertson requested a meeting with Mr Davis. Mr Davis was given a letter which listed a number of items which were of concern to the Robertsons and which stated had previously been discussed with him on an "informal basis."

[26] Allegations included:

- Refusal to follow instructions from the Robertsons
- Refusal to make scheduled appointment times
- Belligerent and disrespectful attitude towards the Robertsons

[27] Other allegations concerned negativity and disruption by Mr Davis which was affecting the business.

[28] Mr Davis was told to take the letter away and to meet with Mr Robertson on Monday 14 November 2016 at 3:30 pm to discuss the concerns. Mr Davis was invited to bring a support person if he wished to do so and was cautioned that following hearing his explanation, he may be issued with a written warning. Mr Davis took a few handwritten notes. Mr Davis' handwritten notes of Mr Robertsons' request on 11 November 2016 for a meeting stated:

Called to Doug's office again. He gave me a notice of written warning to come. Most of this stuff is made up. I said I wanted the proof and would speak to other staff about it. He said if I speak to anyone I will be dismissed immediately.

[29] Mr Davis took the letter of 11 November 2016 home. Mr Davis was distressed by the letter and began formulating his response.

Meeting on 14 November 2016

[30] Mr Davis attended the meeting on 14 November 2016. He did not take a support person as he felt that none of the issues set out in the letter of 11 November 2016 apart from one, had ever been raised with him before. He felt they could discuss the matters.

[31] Mr Davis says he attempted to address each of the issues which had been set out in the letter of 11 November 2016, but that Mr Robertson would not listen to him and spent the time in the meeting sighing and rolling his eyes. This is disputed by the Robertsons.

[32] At the meeting Mr Robertson told Mr Davis that he had conducted an investigation and that he had decided that a written warning was appropriate. Mr Davis says at the conclusion of the meeting, Mr Robertson picked up an envelope off his desk and handed it to him stating “this is your first written warning.” Mr Davis’ handwritten notes of the meeting are as follows:

Today couldn’t have got much worse. Wouldn’t let me talk about accusations. Told to go home and read it which I did.

Written warning letter

[33] Mr Davis took the envelope home without opening it. When he got home he opened the envelope in his garage. Mrs Davis says Mr Davis arrived home early, at 4.15pm which was unusual. She says she could tell Mr Davis was upset but they had tradespeople in the house so were unable to talk. Later he told her he had received a written warning.

[34] The warning letter of 14 November 2016 concluded as follows:

These attitudes towards management and these behavioural concerns are not acceptable and must change as they disadvantage our organisation in the marketplace and directly affect staff morale and business profitability. We do regard that your actions constitute serious misconduct. We confirm that this letter is your first written warning. Please be advised that any further behavioural issues as

outlined above may render you liable to a second written warning or termination of your employment contract. ... Please sign and return one copy.

[35] Mr Davis says he signed the warning letter, acknowledging receipt of it but did not agree with its contents.

Reply to written warning

[36] At the same time, he finalised his own letter responding to all of the allegations made against him in the letters from the Robertsons of 11 and 14 November 2016. He says he placed them in an envelope and gave them to Mr Robertson on approximately 21 November 2016.

[37] The Robertsons say they never received a written reply from Mr Davis to the warning. The first time they saw it was when Mr Davis filed his claim against On All Floors, in the Authority.

[38] In the Statement in Reply filed in the Authority by On All Floors, the Robertsons acknowledge that Mr Davis did provide a written reply. The Robertsons were unable to explain why this was stated in the statement in reply when Mr Robertson's evidence was that he did not receive a written reply and Mrs Robertson's evidence was that she could not remember seeing the letter.

[39] The Authority was provided with records from the properties file on Mr Davis' personal computer. The computer records appear to verify Mr Davis was working on a written response to the letter of 11 November 2016 during the weekend of 13 and 14 November 2016.

[40] I prefer Mr Davis' evidence that he prepared and provided the Robertsons with a written response to the allegations made by them against him. Mr Davis' version of events was not taken into account by the Robertsons. The written warning was not the action of a fair and reasonable employer in all the circumstances at the time.² The written warning was unjustified.

[41] Mr Davis gave evidence of his distress at receiving a written warning. This was supported by his wife. Mr Davis was very experienced and was humiliated by his

² Section 103A Employment Relations Act 2000.

treatment. Mr Davis hoped the working relationship would improve and did not raise the issue as a personal grievance until following his dismissal later for redundancy.

Compensation

[42] I consider compensation in the sum of \$5,000 is appropriate for the humiliation, loss of dignity and injury to Mr Davis' feelings.

Second Issue

Was Mr Davis discriminated against on the grounds of age and if so did this amount to an unjustifiable disadvantage?

[43] Section 104 of the Act provides as follows:

- (i) For the purposes of s 103(1)(c), an employee is **discriminated against in that employee's employment** if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in s 105, or involvement in the activities of a union in terms of s 107 –
 - (a) refuses or omits to offer or afford to that employee the same terms of employment conditions of work, fringe benefits, or opportunities for training, promotion, and transfer as are made available for other employees of the same or substantially similar qualifications, experience, or skills employed in the same or substantially similar circumstances; or
 - (b) dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or
 - (c) retires that employee or requires or causes that employee to retire or resign.
- (ii) For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.

[44] Mr Robertson told the Authority that he did not consider Mr Davis was suitable to undertake a layer/measurer position. This was because the installation of carpet was a heavy job involving lifting very heavy carpets. He did not consider that Mr Robertson was able to do that part of the role.

[45] Mr Robertson did not meet with Mr Davis to discuss his suitability to undertake the layer/measurer position. However, prior to the purchase of the business

on 1 September 2016, Mr Robertson did speak with Mr Rob Brewerton about whether installers could also measure.

[46] Mr Davis had been an installer for many years and had a great deal of experience within the floor covering industry. Mr Davis when spoken to at the Authority's investigation meeting was not enthusiastic about returning to the position of installing carpet. However, in the context of the possibility of losing his job, he would have considered it.

[47] Chief Judge Inglis stated in *Waikato District Health Board v Archibald*.³

[45] While...counsel...made much of the fact that it should have been obvious to the Waikato District Health Board that a woman of Mrs Archibald's age would struggle with driving nearly three hours per day, four days a week, such an approach appears to me to run the risk of making dangerous assumptions about what people can and cannot do, and what they will and will not struggle with because of their age.

[46] There is a growing volume of academic literature about the impact of ageism in the workplace and the perils associated with applying preconceived stereotypes.⁶

⁶ "See, for example L McLeod and T Bentley "Managing an Ageing Workforce: A Future of Work Programme Report in Conjunction with the Equal Employment Opportunities Trust" (2015), New Zealand Work Research Institute, AUT, Auckland).

[48] It is my view that Mr Davis should have been given the opportunity by the Robertsons to consider whether in the event of a restructure of the business, which was going to impact his role, the layer/measurer position may have been an option for him. They failed to do so.

[49] On the balance of probabilities it appears the Robertson's decision not to consider Mr Davis for such a role was because assumptions were made about his ability to do the work because of his age.

[50] I consider that Mr Davis was discriminated against on the grounds of his age. This was a detriment to him. I consider this to be a matter to be considered as part of Mr Davis' unjustified dismissal claim.

³ [2017] NZEmpC132.

Third Issue

Was Mr Davis Unjustifiably Dismissed by On All Floors?

Restructuring advice

[51] On 9 December 2016, the Robertsons sought advice from Mr Russell Drake, from Drake Consulting. The advice was in respect of the restructuring of On All Floors.

[52] On 23 January 2017, Mr Davis fell down some stairs and injured his shoulder. He was unable to work because of this injury and was on ACC for a period of time.

[53] On 2 February 2017, the Robertsons sent a letter to Mr Drake concerning the restructuring of its business. The letter refers to the conversations with Mr Drake on 9 December 2016. Paragraph 2 of the letter states:

Since purchasing the business on 1 September 2016 Ian Davis has been employed by the company as the company measurer/quantifier. He was in that role when we bought the company and for about 18 months with the previous business owners. We feel this role does not need to be a specific position within the company as our installers are also able to do this function in addition to their installation duties. At the same time, Doug is to commence training in this field and will be able to do this work as required in the future. We heeded your advice to not do the restructuring in December prior to Xmas and to wait until the New Year to discuss our plans to restructure with Ian. It was our intention to have a meeting to discuss this restructuring with Ian in the New Year when he returned to work but unfortunately he had only returned to work for one week before suffering an accident at work and has been away on ACC since so we have not had the opportunity to discuss it with him. However, we would like to proceed with the restructuring as we are clear this is how we would like to move our business forward. We would like to engage your services to assist us in this restructuring process to ensure that we do this in the legally correct manner.

Kind regards

Doug and Katrina Robertson.

Restructuring process

[54] On 8 February 2017, while still on ACC, Mr Robertson wrote to Mr Davis confirming “the commencement of a formal consultation process concerning a proposal that has potential to affect your current terms and conditions of employment.”

[55] The letter went on to provide a rationale for change. The proposed change was stated to be the “disestablishment of the Measurer role currently held by you, with no new role being established in its place”. The letter stated that Mr Robertson was going to learn the measuring tasks himself and that the current floor layer roles would have measuring tasks incorporated into their roles. If the proposal was to be implemented the letter went on to state, there would no longer be a “dedicated employee measurer role.”

[56] A time frame for consultation was set out at the conclusion of the letter. Mr Davis was requested to provide his feedback by 15 February 2017, his feedback would be considered, and he would be informed of the decision on 16 February 2017. Mr Davis provided feedback.

Mr Davis’ return to work

[57] Mr Davis returned to work on 17 February 2017. At a meeting with him on 21 February 2017, he was informed by the Robertsons that his position was to be disestablished. The reason given was that the business was too small to have a dedicated measurer. At the meeting, Mrs Robertson stated that there was no need for a dedicated measurer and that the best business model was for layers to be able to do measures when they are out in different areas laying carpet.

[58] Mr Robertson confirmed that the restructuring would be taking place and Mr Davis’ employment was to be terminated on the grounds of redundancy.

[59] The letter from the Robertsons to Mr Davis on 21 February 2017 confirmed that he was to be given one week’s notice of termination, he was not required to work out the period of notice and that no redundancy compensation would be payable.

The Law

[60] Mr and Mrs Robertson decided that it could run its business without the services of a dedicated measurer. They had formed this view following discussions with staff and with other similar sized businesses. However, importantly, this was not discussed at the critical times with Mr Davis, the most experienced employee in the floor covering industry. This was a serious failure and a breach of the statutory duty of good faith owed to Mr Davis.

[61] Mr Davis had received a written warning which I have found to have been unjustified. Further, On All Floors failed to consider Mr Davis' suitability for the layer/measurer role on the grounds of his age. I have found this action to have resulted in a detriment to Mr Davis.

[62] On the balance of probabilities, the evidence supports Mr Davis' concern that On All Floors decided to restructure the business in order to manage his exit.

[63] Section 103A of the Act requires the Authority to decide objectively whether the actions of the employer meet the standard of a "fair and reasonable employer"⁴.

[64] The redundancy was not genuine, it was for ulterior purposes. I am fortified in my view by the employment of Ms Melissa Morris by On All Floors in July 2017, in the role of "Sales/Administrator/Quantifier". Based on the evidence, I consider Ms Morris was employed by On All Floors to provide measuring services which were not being adequately provided following Mr Davis' dismissal.

[65] Mr Davis' dismissal for redundancy was unjustified.

Compensation

[66] Mr Davis says he was devastated at losing his job, he had never been dismissed before, had trouble sleeping as a result and felt "down". Mrs Davis gave evidence about the impact of the dismissal on Mr Davis. She says he became extremely subdued. Both Mr and Mrs Davis worried about their ability to pay their mortgage. I consider compensation in the sum of \$20,000 to be appropriate in the circumstances.

⁴ *Grace Accounting Limited v Brake* [2014] ERNZ (CA) at [85].

[67] Mr Davis has not made any other claims for remedies under the Act.

Contribution

[68] I do not consider Mr Davis contributed to his dismissal for redundancy.

Costs

[69] Costs are reserved. Mr Davis has 14 days from the date of this determination to file a memorandum as to costs. On All Floors has 14 days from receipt to file a memorandum as to costs in response.

Anna Fitzgibbon
Member of the Employment Relations Authority