

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 89
3028275

BETWEEN DAVID PENMAN
 Applicant

AND NICO KITCHENS AND
 JOINERY LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Kevin Murray, advocate for the Applicant
 Andrew Marsh, counsel for the Respondent

Investigation Meeting: 6 December 2018 at Christchurch

Submissions Received: Submissions on the day and further submissions on
 14 December 2018 from the Respondent
 19 December 2018 from the Applicant

Date of Determination: 19 February 2019

DETERMINATION OF THE AUTHORITY

- A David Penman was unjustifiably dismissed.**
- B Taking contribution into account Nico Kitchens and Joinery Limited is to pay to David Penman:**
- (i) **Reimbursement of lost wages in the sum of \$ 9,545.67 gross under s 123 (1) (b) of the Employment Relations Act 2000.**
- (ii) **Compensation in the sum of \$6,800 without deduction under s 123 (1) (c)(i) of the Employment Relations Act 2000.**
- C Costs are reserved and failing agreement a timetable set for an exchange of submissions.**

Employment Relationship Problem

[1] David Penman completed his apprenticeship as a Cabinet Machinist and Chair and Frame maker in 1998 and has worked since then in the trade in New Zealand and overseas. He commenced employment with Nico Kitchens and Joinery Limited (Nico Kitchens) on 1 April 2017 as a Joiner and was party to an individual employment agreement.

[2] On 12 or 13 December 2017 a discussion took place between Mr Penman and the sole director of Nico Kitchens, Paul Eastwick, about a measurement error on a bench top. Having heard the evidence I conclude it is more likely the discussion occurred on 13 December 2017; the discussion only took place on one day and whilst there was a dispute about which day it is not material.

[3] What was said during the exchange is material because Mr Penman says that he was dismissed and Mr Eastwick says that Mr Penman resigned. How the relationship ended is an important issue for determination.

[4] Mr Murray confirmed that the penalties claimed in the statement of problem were no longer pursued and the claim for unjustified action causing disadvantage was effectively absorbed into the claim of unjustified dismissal. This leaves for determination the claim of unjustified dismissal.

[5] Mr Penman seeks reimbursement of lost income and compensation for hurt and humiliation in the sum of \$20,000 together with costs.

[6] Nico Kitchens says that Mr Penman was not dismissed but that he gave two weeks' notice on 13 December 2017 of his resignation. Mr Eastwick says that he accepted the resignation and advised notice in lieu would be paid out so that Mr Penman could leave straight away.

The issues

[7] The Authority needs to determine the following issues in this matter:

- (a) What was said on 13 December 2017?

- (b) What, if any, further communication took place between the parties?
- (c) Material provisions in the employment agreement.
- (d) Conclusion about how the relationship ended.
- (e) If there is a finding that the relationship ended by way of dismissal, then was that dismissal justified applying the test in s 103A of the Employment Relations Act 2000 (the Act)?
- (f) If the dismissal was not justified then what remedies should be awarded and are there issues of mitigation, the application of s 128 of the Act and contribution?

What was said on 13 December 2017?

[8] Mr Penman said that the material exchange with Mr Eastwick took place between 7:30am and 7:45am in the benchtop part of the factory. There is no significant disagreement about the time of the exchange.

[9] Mr Eastwick told Mr Penman that he had made a mistake on a measurement of a benchtop that would cost Nico Kitchens \$1,500.

[10] Mr Penman expressed his view that he had undertaken the measurement to what he thought was on the plan that Mr Eastwick had drawn up. He said consistently with that view in an answer to a question from Mr Marsh that he believed it was Mr Eastwick's mistake and he became *defensive*. Mr Eastwick agreed Mr Penman told him that his plans were the reasons for the error. Mr Penman did not accept that he became angry, although agreed he was emotional. Mr Eastwick said that although they were both annoyed Mr Penman was more emotional and that he was *incredibly defensive*.

[11] Mr Eastwick did not disagree that he made a statement to Mr Penman along the lines of whether he thought Nico Kitchens was *the right place for you to work*. He said he did so to find out what Mr Penman was trying to do and to *achieve something a bit more honest*. He felt that Mr Penman was struggling.

[12] He elaborated on this and referred to three mistakes by Mr Penman with three

benchtops over a period of time with the first in late November and the other two in early December 2017. He told Mr Penman on 13 December 2017 to look at the benchtop and said it was *wrong again*.

[13] Mr Eastwick gave evidence about the period between July and December 2017. He said that Mr Penman used to turn up at work well presented every day, was a very enthusiastic golfer and that his workmanship was at a high standard. Over the period between July and December 2017 Mr Eastwick felt that a few more mistakes were *creeping in* with Mr Penman's work and that there were changes with his appearance, work and enthusiasm towards golf. He said that he noticed Mr Penman was unhappy in October and November 2017.

[14] There was agreement that Mr Penman had issues with his allergy medication in or about October and November 2017. Photographs viewed by the Authority showed dramatic swelling of Mr Penman's face. The evidence supported that the allergy issues were under control before December with the correct medication having been prescribed.

[15] Mr Eastwick said that he felt that they were both annoyed during the discussion because there were *three little tops* and mistakes made three times. Whilst Mr Penman accepted that he was defensive and emotional he did not accept he was angry.

[16] Mr Penman said when asked whether Nico Kitchens was the right place for him that he responded "*Do you want me to go now?*" and that Mr Eastwick responded "*Yes*".

[17] Mr Eastwick did not accept Mr Penman asked him whether he wanted to *go now*. He denied therefore responding in the affirmative to that question.

[18] Mr Penman in his oral evidence said that he told Mr Eastwick "*I'd better do it properly and give two weeks' notice*". In his written evidence he stated he responded "*Okay, then I'll work out my notice*". Mr Eastwick said that Mr Penman told him that he would give two weeks' notice.

[19] Mr Eastwick could not recall Mr Penman asking if he could work his notice

period but said in his oral evidence that he *could have assumed* that was what Mr Penman wanted to do. He said in his oral evidence that Mr Penman advised him that he would give two weeks' notice and threw his arms up in the air.

[20] Mr Penman said in his oral evidence that Mr Eastwick responded *No, fuck off and grab your tools and I will pay you out*. In his written evidence Mr Penman stated that Mr Eastwick responded *don't bother*. Mr Penman did not use the words *fuck off* in his written statement of evidence and it was not used in the letter raising a personal grievance. When asked about that at the Authority investigation meeting he said that he felt strongly about *fuck off* but did not think it appropriate to write it down.

[21] Mr Eastwick did not accept that he told Mr Penman to *fuck off, grab his tools and go*. He accepted that he told Mr Penman to pack his tools up but only did that after Mr Penman had given notice of his resignation.

[22] Mr Penman said that he was dismissed and it took about 15 – 20 minutes to gather a full set of his tools that were in the factory. There was no discussion at that time. Mr Eastwick said that he was in the other workshop when Mr Penman was collecting his tools.

[23] Mr Penman then left the premises.

The July incident and what Mr Eastwick said he thought would happen on this occasion

[24] Mr Eastwick referred to an earlier exchange in July 2017 and Mr Penman *storming off* and returning a day or so later when there was a discussion about the issues of concern. Mr Eastwick said that he wanted to give Mr Penman an opportunity to cool down and thought he would then return to work as he did on the earlier occasion and there could be a discussion and sorting out of issues. Mr Eastwick said that he did not want Mr Penman to go although the exchange viewed as a whole including the instruction to gather his tools does suggest some finality to the relationship that the evidence did not support there was in July 2017.

[25] When asked by Mr Murray why he did not try to talk Mr Penman out of it he said that he thought it was a similar situation to July and that he would give Mr Penman an opportunity to calm down. He said in answer to a question at the

Authority investigation meeting that Mr Penman did not offer to resign in July 2017.

[26] Mr Penman did not return to work after the 13 December 2017 exchange.

Material provisions in the employment agreement

[27] The employment agreement under *Termination* refers to different ways that the relationship could end including redundancy, abandonment, serious misconduct, medical and force majeure. There was a trial provision but the relationship continued on well beyond the first 90 days.

[28] Under a heading *Ending employment* the clause states amongst other matters that an employer might end the employee's job with reasonable cause or the employee might resign. Further it is stated either the employer or the employee can end employment by giving two weeks' notice in writing and the employer may decide to pay the employee instead of the notice period.

What further communications/actions took place between the parties after 13 December 2017?

[29] Chief Judge Goddard who was a former Chief Judge of the Employment Court in a succinct and helpful judgment *Boobyer v Good Health Wanganui Limited*¹ set out some different examples of cases where there have been disputed resignations. He notes that the issues in these cases are difficult and the importance of resolving them *as soon as possible and as close as possible to the workplace in which they occurred.*² Although some time has passed since *Boobyer* if there is doubt as to how the relationship ended communication to clarify reduces the need for judicial intervention and accords with good faith.

[30] In this case that communication did not occur. Payment in lieu of two weeks' notice was made on 22 December 2017 to Mr Penman. The first exchange which set out Mr Penman's view of what had occurred on 13 December 2017 was a letter from his advocate Mr Murray on 10 January 2018.

[31] Mr Murray in the letter advised that Mr Penman considered that he had a

¹ *Boobyer v Good Health Wanganui Limited* Employment Court Wellington 24 February 1994 WEC 3/94

² Above n1 pg. 3

personal grievance of unjustified dismissal setting out, amongst other matters, the exchange that occurred in December 2017 after which Mr Penman left his employment. Mr Eastwick did not respond to that letter. He said that the reason he did not respond to the letter was that he considered that it was a scam. He felt that there was nothing in the letter that was credible and it was akin to a prank phone call. He said that it could have been written by anyone and likened it to a request for money.

[32] I accept that there are some matters in the three page letter that were general in nature. For example the second page of the letter refers to sections of the Employment Relations Act 2000 (the Act). Following that is a broad request for disclosure. It is only in the second to last paragraph of the letter, when the next step in the process is identified as mediation. A person not familiar with employment law could well have been somewhat overwhelmed by the length of the letter and some general references.

[33] That said the first page of the letter does set out in detail Mr Penman's view of the December exchange. It is unlikely that a prank or a scam letter would contain specific detail which includes the amount of the error of \$1500 discussed that only Mr Penman and Mr Eastwick would know. I do not find the explanation that it was considered a *prank letter* particularly plausible.

Conclusion as to how the relationship ended

[34] Mr Eastwick was entitled to raise a concern with Mr Penman about the benchtop. The business is a small one and communication is to be encouraged when there is concern about a matter. There was no suggestion at that stage that a more formal performance process was to follow although it could have at a later time.

[35] Mr Penman became defensive and emotional. He felt that Mr Eastwick's plans were the reason for mismeasurement and mistake and he responded along those lines. Mr Eastwick was annoyed at the mistake which was going to cost the business money and with Mr Penman's defensive response continued constructive dialogue was unlikely. The type of understanding that Mr Eastwick said he wanted about his broader concerns in then asking whether Nico Kitchens was the right place for Mr

Penman was unlikely. Returning to the discussion about the concerns at a later time would have worked better.

[36] There is an important dispute about whether Mr Penman then asked whether Mr Eastwick wanted him to *go now*. Mr Penman says that the affirmative answer from Mr Eastwick resulted in his statement about notice. Mr Eastwick denies making the statement.

[37] Objectively assessed subsequent statements that Mr Eastwick agreed he made during this heated exchange are consistent with Mr Penman leaving immediately. There is the advice that notice would be paid out. Whilst Mr Eastwick did not recall Mr Penman offering to work his notice out his evidence was that he *could have assumed that*. Even if paying out in lieu of notice was something Mr Eastwick did routinely as he said in his evidence there was no attempt to arrive at an understanding about what Mr Penman wanted to do. Mr Eastwick accepted that he advised Mr Penman to pack up his tools but he says that was only following his resignation. He did not agree that he told Mr Penman to *fuck off* and I could not be satisfied from the evidence that he used those words. They did not appear in Mr Murray's letter of 10 January 2018 or the written statement of evidence. Mr Penman in answer to a question from Mr Marsh said that he felt it was when Mr Eastwick said to grab tools and get out that *that was it*. There was no discussion with Mr Penman as he packed the tools up and before he left.

[38] I find on the balance of probabilities that Mr Penman's evidence Mr Eastwick confirmed he wanted him to *leave now* is more likely than not what occurred when the exchange is considered overall including because of its consistency with what followed.

[39] *Cornish Truck & Van Limited v Gildenhuis*³ is a recent Employment Court judgment. Judge Holden set out in that the test for determining whether the actions of an employer constituted a dismissal as an objective one *was it reasonable for somebody in Mr Gildenhuis' position to have considered that his or her employment had been terminated?*⁴.

³ *Cornish Truck & Van Limited v Gildenhuis* [2019] NZEmpC 6

⁴ Above n 3 at [45]

[40] The circumstances were that there was a heated exchange about a mistake. There was then a question put by Mr Eastwick about whether Nico Kitchens was the right place for Mr Penman. There was, I have found, Mr Eastwick's affirmative response to Mr Penman's question about whether he wanted him to leave. Finally there was no discussion about notice to be worked or not and Mr Penman was sent away immediately following the packing of his tools. Objectively assessed it was reasonable I find for Mr Penman to conclude that his employment had been terminated. There was no attempt within a reasonable time by Mr Eastwick to communicate with Mr Penman and to correct any misunderstanding about that even after Mr Murray's letter of 10 January 2018.

[41] Mr Eastwick seized on the words spoken by Mr Penman unfairly as a resignation. I find that Mr Penman was actually dismissed from his employment on 13 December 2017.

Was the dismissal unjustified?

[42] The Authority must, in determining whether a dismissal was justifiable, objectively determine whether the actions of Nico Kitchens and how it acted were what a fair and reasonable employer could have done in all the circumstance at the time the dismissal occurred. In applying the test set out above the Authority must consider the four procedural factors set out in s103A(3)(a) to (d) of the Act and any other factors that it thinks appropriate. An employer must in order to justify a dismissal sufficiently investigate an allegation against an employee, advise the employee of concerns, offer an opportunity for the employee to be heard and take the employee's responses into account in making a decision. The Authority cannot determine a dismissal unjustified solely because of defects in the process if they were minor and did not result in the employee being treated unfairly. A fair and reasonable employer will also comply with the statutory obligations of good faith.

[43] In this case the concern was work performance. In those circumstances where performance is an issue an employer should disclose specific reasons for the dissatisfaction; identify a reasonably specific and measurable improvement to be made and allow reasonable time to demonstrate any improvement; and consider any further process and remedial steps before dismissal can fairly and reasonably be

considered.

[44] I do not find that the dismissal was procedurally or substantively justified.

[45] Mr Penman was unjustifiably dismissed from his employment with Nico Kitchens and is entitled to consideration of remedies.

Remedies

Lost Wages

Mitigation

[46] The Authority asked for Inland Revenue statements. Mr Penman's evidence and the statements confirm that he obtained work with another employer from about 6 or 7 January 2018. He describes working initially on a casual basis until 1 September 2018 when he obtained full time employment.

[47] Mr Marsh submits that there were a number of job opportunities that Mr Penman did not pursue because he was hoping that a permanent role would come up with his new employer. In that way Mr Marsh submits Mr Penman failed to mitigate his loss.

[48] In his evidence Mr Penman said that he had heard *whispers* one of the employees with his new employer was going to leave and eventually he was offered a permanent full time role. As Mr Marsh submits Mr Penman when questioned at the Authority investigation responded *that he did not want to go to a job and only be there for one or two months*. He then went on to describe one job as unsuitable and then said that he was always looking for a job that would suit but 70% did not get back.

[49] I accept in all likelihood Mr Penman did not look for many jobs or look as energetically as he may have, had he not held out hope he could be offered a permanent role. His decision to largely focus on the casual role was as it turned out the right one when he achieved full time employment in September 2018. Although the employment was of a casual nature Mr Penman was working reasonable hours. I assess that by way of a comparison of the earnings over 8 months 1 April – 30

November 2017 that Mr Penman was working at Nico Kitchens.⁵ The IRD information show gross earnings were \$37,371.00. For the 8 months Mr Penman was working at his new employment on a casual basis (January to August 2018) his gross earnings were \$30,582.

[50] I find that there were appropriate steps taken in the circumstances to mitigate loss and that Mr Penman has lost remuneration as a result of the personal grievance.

Actual loss versus three months loss

[51] The period from 13 December 2017 to 1 September 2018 for which lost wages are claimed is 37 weeks and 3 days not the 33 weeks that Mr Murray referred to in his submissions. At the material time Mr Penman's hourly rate with Nico Kitchens was \$29 and the hours of work in his employment agreement set out as 40.5 hours per week.

[52] Following dismissal Mr Penman received a payment in lieu of notice for two weeks. On the basis of a payment for a 40.5 hour week at \$29 per week that is \$1174.50 per week multiplied by two which is \$2349 gross. He also received earnings of \$30,582 gross.

[53] Section 128(2) of the Act provides that the Authority must if the employee has a personal grievance whether or not it provides other remedies order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months ordinary time remuneration.

[54] Ordinary time remuneration for the period of three months calculated on the basis of 40.5 hours per week multiplied by \$29 per hour, \$1174.50, multiplied by 13 weeks is \$15,268.50.

[55] To assess actual loss I have calculated what Mr Penman could expect to have received for 37 weeks and 3 days from Nico Kitchens. That is the sum of \$43,456.50 being \$1174.50 x 37 weeks. Added to that is \$704.70 for the three days ($\$1174.50 \div 5 \times 3$ days). A total of \$44,161.20. From that I have taken the actual earnings over the

⁵ Excluding December 2017 as the final pay included holiday pay.

period of \$30,582.00 and \$2,349 for the notice payment to arrive at \$11,230.20.

[56] The next assessment to be made is what is the lesser of the two amounts under s 128(2) of the Act. It is the actual loss of remuneration. Subject to any issue of contribution the award for lost wages is the sum of \$11,230.20.

[57] My figures for lost remuneration are different to both representatives' in final submissions provided to deal specifically with remedies. I tried to ascertain how that occurred because it did cause a moment of disquiet. I think the following is the reason why. Mr Murray's figures differ I believe because he calculated a different number of weeks than I did for the period for which lost wages was claimed. His calculation of earnings received at the new employer was less than I calculated. Mr Marsh arrived at a figure of actual loss of \$2,545.89 gross over three months with an average monthly loss of \$848.63. It may have been that he used actual earnings from Nico Kitchens from the Inland Revenue statements for a comparative period. Assessing in that way would not reflect the hourly rate at the material time which had increased to \$29 per hour from \$27 from when Mr Penman started. It would not reflect the whole period from 13 December 2017 to 1 September 2018 for the claim for lost wages.

Compensation

[58] I accept that Mr Penman suffered humiliation, loss of dignity and injury to his feelings when he was sent away. He said that he was very anxious, his heart was pounding and he was *a little bit in shock*. He described the situation as a nightmare. He said that he was *a bit of a mess* all the way home. There was a period of uncertainty until employment was obtained albeit of a casual nature. I do weigh that Mr Penman was able to return to work fairly quickly with an employer who he had been employed with before Nico Kitchens.

[59] Mr Penman wanted \$20,000 under this head. In all the circumstances I am of the view that a more moderate award of \$8000 subject to any issue of contribution is appropriate. The most significant distress occurred at the time of dismissal and shortly thereafter and the employment that followed would have alleviated some of the financial and other distress although I do accept there was some continued

uncertainty.

Contribution

[60] The Authority is required under s 124 of the Act where it has determined a personal grievance to consider the extent if any to which the actions of the employee contributed toward the situation that gave rise to the grievance and if so required reduce the remedies that would otherwise have been awarded.

[61] Mr Marsh submits that Mr Penman has contributed by making an error, becoming involved in a heated discussion, becoming overly emotional during the discussion and misunderstanding the employer's position as a sending away and failing to engage later with the employer.

[62] I accept that there was a mistake made by Mr Penman. That caused Mr Eastwick dissatisfaction and he was entitled to raise the mistake with Mr Penman. The answer to mistakes is to undertake a fair and reasonable process. In the absence of such a process I do not find that Mr Penman contributed to his grievance because he made an error.

[63] Given my finding of an actual dismissal then I do not find contribution on the basis of a misunderstanding about how the relationship ended or a failure to engage. I have found objectively assessed it was not unreasonable for Mr Penman to conclude he had been dismissed. He did attempt to raise the issue with Mr Eastwick on 10 January 2018 in a letter from Mr Murray but there was no response.

[64] The final issue raised is that Mr Penman became emotional when the mistake was raised. Mr Penman agreed that he became emotional and defensive. I accept that Mr Penman genuinely believed that there was a link between the mistake he made and plans drawn by Mr Eastwick. Good faith behaviour requires an employee to be responsive and communicative so that they can be active and constructive in establishing and maintaining a productive employment relationship. I find that Mr Penman's defensive rather than emotional manner contributed in part to Mr Eastwick's subsequent statements. A mistake had been made that was going to cost the company \$1500. Mr Penman's response even within the context that he may not have accepted responsibility for reasons set out above was not constructive and

somewhat unhelpful.

[65] I conclude some limited blameworthy conduct on the part of Mr Penman to the extent of 15% reduction in remedies because of his defensive response to the informal raising of a mistake. I have balanced with that Mr Eastwick should have stopped what was otherwise not going to be a constructive conversation to deal with it at a later time.

Orders

[66] Taking contribution into account Nico Kitchens and Joinery Limited is ordered to pay to David Penman the sum of \$9,545.67 gross being reimbursement of lost wages under s 123(1)(b) of the Employment Relations Act 2000.

[67] Taking contribution into account Nico Kitchens and Joinery Limited is ordered to pay to David Penman the sum of \$6,800.00 without deduction being compensation under s 123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[68] I reserve the issue of costs. Failing agreement Mr Murray has until 5 March 2019 to lodge and serve submissions as to costs and Mr Marsh has until 19 March 2019 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority