Employment Court of New Zealand

Allison v Ceres New Zealand LLC [2021] NZEmpC 177 (18 October 2021)

Last Updated: 23 October 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2021] NZEmpC 177
EMPC 218/2020

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	DAVID ALLISON Plaintiff
AND	CERES NEW ZEALAND LLC Defendant

Hearing:	28–30 April 2021 (Heard at Christchurch)
Appearances:	A Oberndorfer, advocate for plaintiff S Townsend and H Rossie, counsel for defendant
Judgment:	18 October 2021

JUDGMENT OF JUDGE K G SMITH

[1] David Allison was dismissed by Ceres New Zealand LLC on 25 October 2018 on the basis that his position with the company was redundant. He does not agree and considers the decision was a sham.

[2] Ceres was incorporated in Minnesota, USA. It is registered under the Companies Act 1993. The company's core business is providing contracting services, involving large scale construction, disaster recovery, demolition, deconstruction, environmental remediation and recycling projects. Ceres has had a presence in Christchurch since the earthquakes in 2011.

[3] Mr Allison began working for Ceres as a welder/boilermaker on 2 February 2016, after a short spell providing services to the company as a contractor.

[4] Mr Allison's employment was to carry out welding repairs and maintenance on Ceres' heavy machinery. Initially, at least, he reported to the company's New Zealand Operations Manager, Swaroop Gowda.

[5] Ceres' Director and sole shareholder is David McIntyre. He lives in the USA and travels to New Zealand from time to time to oversee Ceres' business. On 19 September 2018 Mr McIntyre wrote to Mr Allison about a restructuring proposal that, if implemented, would lead to the disestablishment of Mr Allison's job. The letter informed Mr Allison that Mr McIntyre had conducted a review of the business and identified that the company may not need a full-time welder/boilermaker. The reason given for that view was the state of the current and forecasted workflows and Ceres' overall financial performance. The proposal was for future welding work to be provided by a contractor "as required" rather by a full-time employee. Mr Allison was advised that, subject to redeployment opportunities within the business, he might face dismissal. His response to the proposal was sought.

[6] A few days later, on 28 September 2018, the response came from Phil Butler Employment Law (PBEL), an employment

advocate company Mr Allison instructed to act for him. PBEL emphatically rejected the proposal as a sham for two reasons. The first reason was because locks on Ceres' commercial premises were changed after Mr Allison left work on 31 August 2018 and without his knowledge. The second reason was that Mr McIntyre was reorganising the company to address other managerial problems having nothing to do with Ceres' financial performance.

[7] PBEL's letter was referring to an allegation of dysfunctional management caused by two factions in the company that did not communicate with each other. Later, this allegation expanded to include a claim that Mr Allison was being removed because he and Mr Gowda did not get along. PBEL's letter ended with a statement that if Mr Allison's position was disestablished he would have grounds to raise a personal grievance.

[8] Ceres continued with its proposal. Mr Allison was eventually dismissed for redundancy and paid out the notice period under the employment agreement, although he was not required to work it.

[9] Mr Allison raised a personal grievance for unjustified dismissal and unjustified disadvantage. He was unsuccessful in the Employment Relations Authority.1 He challenged the Authority's determination and placed in issue the whole matter that was before the Authority.2 The challenge fell into three broad parts:

(a) A claim that he was unjustifiably dismissed having been made redundant in circumstances where redundancy was not the operative reason for the termination of his employment.
(b) A claim that he was unjustifiably disadvantaged in that:
    (i) his access to the workplace was removed without notification or discussion;
    (ii) he was suspended contrary to clause 23.4 of the employment agreement; and
    (iii) Ceres pursued an unfair and unreasonable disciplinary process against him.
(c) A claim that there was a breach of good faith, in that Cere's embarked on a course of conduct in pursuit of the termination of his employment.

[10] Ceres denied Mr Allison's allegations. It stated that the decision-making was based on commercial needs. Further, it did not accept that Mr Allison was disadvantaged or that its actions lacked good faith.

1 *Allison v Ceres New Zealand LLC* [2020] NZERA 267 (Member Doyle).

2 Employment Relations Act 2000, ss 179(1) and 179(3)(b): usually called a hearing de novo.

The issues

[11] The issues in this case are:

(a) Was Mr Allison's dismissal for redundancy a sham?
(b) Was the procedure used to dismiss Mr Allison fair in the circumstances?
(c) If the decision to dismiss was unjustified what remedies, if any, should be awarded?
(d) Was Mr Allison locked out of his workplace and, if he was, did that give rise to a disadvantage personal grievance?
(e) Was Mr Allison improperly suspended from work?
(f) If the answer to either (d) or (e) is yes, what remedies (if any) should be awarded?
(g) Was there a breach of the duty of good faith by Ceres, and if so, should a penalty be imposed?

[12] Each of these issues will be considered in turn.

Was the dismissal a sham?

[13] Redundancy is a dismissal and, to be justified, must satisfy s 103A of the Employment Relations Act 2000 (the Act). Under s 103A(2) the Court is required to determine, on an objective basis, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.3

3. See *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129.

[14] In applying the test in s 103A(2) the Court must consider s 103A(3). That involves considering whether the employer sufficiently investigated allegations against the employee, raised concerns with the employee before taking action, provided a reasonable opportunity to respond and genuinely considered the employees explanations, if any.4 As has been commented on previously, s 103A(3) is geared toward situations where the reason given for the dismissal is misconduct but, nevertheless, it applies to a redundancy dismissal.5 It is, therefore, necessary to interpret the section adaptively. The Court is also empowered to consider any other factors it thinks appropriate and that may have a bearing on applying s 103A(3).6

[15] In *Grace Team Accounting v Brake* the Court of Appeal held that if an employer can show the redundancy is genuine (where genuine means the decision is based on business requirements and is not a pretext for dismissing a disliked

employee), and that the notice and consultation requirements of s 4 of the Act have been complied with, that could be expected to go a long way towards satisfying the s 103A test.7

[16] Ms Oberndorfer, Mr Allison's advocate, raised several reasons said to illustrate why Ceres' decision was not genuine. These submissions drew heavily on *G N Hale & Son Ltd v Wellington etc Caretakers etc IUW* for the proposition that the Court is entitled to scrutinise claims that the dismissal was for redundancy and to expect from the employer an adequate commercial reason for the course adopted.8

[17] One of the improper reasons attributed to Ceres was a claim that Mr McIntyre was systematically removing employees who did not support Mr Gowda. This claim fell into two parts; that Mr McIntyre was removing one faction within the company and Mr Allison was targeted because he had clashed with Mr Gowda previously.

[18] It appears Ms Oberndorfer accepted there may have been some commercial reason involved in the company's decision-making. However, she considered that was not the primary reason, or even a significant reason, for the decision. Part of this

4 Section 103A(3)(a)–(d).

5 *Grace Team Accounting*, above n 3, at [77].

6 Section 103A(4); *Grace Team Accounting*, above n 3, at [77].

7 At [85].

8 *G N Hale & Son Ltd v Wellington etc Caretakers etc IUW* [1991] 1 NZLR 151 (CA) at 157.

criticism was that Ceres had failed to explain how, if the financial losses were as significant as they were claimed to be, removing one position would "remedy any concerns". Compared to the number of staff the company employed removing the welder/boilermaker position to address its problems was said to be implausible.

[19] When Mr McIntyre wrote to Mr Allison on 19 September 2018, the letter began by stating that the company was taking the opportunity to review it business structure and future needs. It informed Mr Allison that this review was partly the result of an investigation into the work environment that recommended organisational changes be made. The second reason was to inform Mr Allison about the downturn in business.

[20] In discussing the downturn in business, Mr McIntyre's letter told Mr Allison that Ceres would sustain a financial loss in 2018, and that current work and future work forecasts did not show any significant uplift was likely. As well as generally, and briefly, describing the company's financial state, the letter informed Mr Allison that Ceres was working on three projects in Christchurch that were scheduled to be completed by the end of the following month and was unsuccessful in securing big projects that, if they had been won, would have started in November 2018. There was no financial information in the letter beyond the statement that a loss was expected.

[21] The letter explained that Mr McIntyre was meeting staff members, including Mr Allison, to try to better understand how the business had been operating and what workflows and business requirements were likely to be for the future. However, Mr Allison was advised that, because of the review that Mr McIntyre had already undertaken, the company may not need a "full-time welder". The possibility that any welding work needed in future could be performed by a contractor on an "as required" basis was raised for discussion. His views and comments were requested before any decision was made.

[22] The reply to the invitation to consult about the proposal was a letter dated 28 September 2018 from PBEL. That letter contained a blunt response, that the proposal was a sham and had not been caused by a downturn in business. PBEL went on to say that if Mr Allison's position was disestablished as a result of the proposal he would have grounds for a personal grievance for unjustified dismissal. Mr McIntyre was

asked to consider the complaint that the restructuring was a sham before acting on the proposal. He was invited to "give us a call" to discuss the statement that the proposal was a sham. There was no subsequent discussion.

[23] On 12 October 2018, Mr McIntyre wrote to Mr Allison again about the review and informed him that his position was to become redundant. In this letter, Mr McIntyre went further than saying the company was sustaining losses and stated what they were expected to be for the 2018 year. The letter explained that the company had significant negative equity and had accumulated losses for the years 2016 and 2017, which meant that it needed subvention payments from him to survive. As to future work, the letter stated that the demolition market was slowing down and repeated that the company had been unsuccessful in winning a tender for a large project on the West Coast.

[24] Mr McIntyre's s 12 October 2018 letter went on to inform Mr Allison that the company had not been able to find any redeployment options for him to consider, but a discussion about redeployment was invited. Mr Allison was informed that if redeployment could not be achieved he would be dismissed. He was offered the opportunity to consider carrying out any

future welding work required by the company as a contractor. The letter did not ignore PBEL's assertion that the proposal was a sham and provided a response to that criticism.

[25] There was no discussion between Ceres and Mr Allison. The invitation to discuss redeployment went no further. On 25 October 2018 Ceres wrote to Mr Allison again to advise him that the company had not identified any redeployment opportunities and, consequently, gave notice of the termination of his employment for redundancy. Instead of working out the notice period under the employment agreement a payment in lieu was made. The invitation made previously, about potentially taking up the welding work as a contractor "as required" was repeated.

[26] In the employment agreement between Mr Allison and Ceres, redundancy was defined as arising when the position held by the employee becomes surplus to the employer's requirements or was otherwise disestablished due to the closing down of all or part of the employer's business or because of a reduction in work or as a result

of any other genuine business decision. Ceres' decision, therefore, appeared to be consistent with the agreement. Ms Oberndorfer's submissions were, however, designed to attempt to demonstrate that the agreement had not been complied with by questioning the bona fides of the dismissal. The argument is untenable.

[27] There is no doubt that Ceres was losing money at the point in time when the proposal to dispense with the position of welder/boilermaker was made. There was also no dispute that work was declining as at September 2018 and looked likely to continue to decline. Mr Allison readily acknowledged that he knew work was tailing off before being informed about that by Mr McIntyre's letter. He knew that the remaining jobs the company was working on were scheduled to end in October 2018 and that Ceres had been unsuccessful in its bid for a project on the West Coast.

[28] There was no attempt to dispute that Ceres was surviving on supporting payments made to it by Mr McIntyre. Mr McIntyre's summary of the position, in his 19 September letter to Mr Allison, was accurate. Monika Bratownik is Ceres' Accounting Manager. She produced a report for Mr McIntyre predicting the extent of the loss for the 2018 year. Her report, completed in late September 2018 after Mr McIntyre had written to Mr Allison, showed Ceres was expecting a significant loss. Financial information from Ms Bratownik's report was in the letter to Mr Allison of 12 October 2018. By the time the year ended the loss actually exceeded her forecast.

[29] The timing of Ms Bratownik's report to Mr McIntyre meant that he did not have her financial analysis when he wrote to Mr Allison. Nevertheless, there was no suggestion that Mr McIntyre lacked an adequate grasp of the financial position to be able to make statements about Ceres' financial performance, especially given that the company had been surviving on injections of money from him.

[30] Mr McIntyre's review went beyond Mr Allison's position. On 16 October 2018, Mr McIntyre wrote a letter to all of Ceres' New Zealand-based employees describing the proposal for restructuring the company. All staff were informed that the review was necessary because of a downturn in business. Staff were advised that changes were to be proposed to the business structure and to job duties. The extent of the company's losses for the financial year, as it was then understood, were stated. Mr

Allison received a copy of that letter. That correspondence was consistent with the letter he received a few days earlier.

[31] Over the following six months the number of staff reduced, by about 30 per cent, through restructuring and attrition. There was, in fact, no dispute that other redundancies occurred. All of that is consistent with the existence of proper business reasons to review Mr Allison's ongoing employment.

[32] Nevertheless, Mr Allison claimed that the redundancy dismissal was a sham because it masked a decision to resolve other managerial problems involving Mr Gowda. The 19 September 2018 letter touched on these managerial issues because it included a statement about a recent investigation into the work environment recommending the business be restructured.

[33] Mr McIntyre had commissioned the investigation to consider whether the company's Christchurch-based senior management had become dysfunctional. Concerns had emerged over alleged bullying and whether Mr Gowda, and another senior manager, Bernie deVere, had a viable working relationship. Mr Allison was interviewed as part of that investigation.

[34] The problems between Mr Gowda and Mr deVere were only briefly traversed in the evidence but it appears they clashed about overall responsibility for managing the Christchurch–based business and alleged bullying. Mr Allison was not a senior manager and was not involved in the alleged bullying or the problems between Mr Gowda and Mr deVere. His involvement in the investigation was relatively minor, by making a statement to the investigator that went into her report. Nothing in Mr Allison's statement was particularly concerning or pivotal to the report or its recommendations.

[35] It is correct that Mr deVere's employment ended, but that occurred well after Mr Allison was dismissed. That outcome had more to do with a dispute between Mr McIntyre and Mr deVere than resolving any problems between Mr deVere and Mr Gowda. Mr McIntyre was dissatisfied with Mr deVere's handling of Mr McIntyre's wider personal and business interests

in New Zealand outside of the company and their

previously cordial relationship ended acrimoniously. However, that had nothing to do with Mr Allison.

[36] There is no substance to the assertion that Mr McIntyre decided to dismiss Mr Allison as part of cleaning up the company to remove dysfunctional management.

[37] Separately from the investigation, Ms Oberndorfer submitted that the predominant purpose of the September proposal was to resolve a conflict between Mr Allison and Mr Gowda that had emerged in early to mid–2017. In support of that contention, she attributed to Mr Gowda considerable involvement in the decision to dismiss Mr Allison. That was because Mr Gowda assisted Mr McIntyre by drafting letters, spoke to him daily, and they had a long-standing and close working relationship. The closeness of Mr Gowda's relationship with Mr McIntyre was said to manifest itself in a biased influence over the decision-making affecting Mr Allison's ongoing employment.

[38] It is true that Mr Allison and Mr Gowda had clashed in 2017. However, remedial steps were taken which resolved the problem. Instead of Mr Allison reporting to Mr Gowda, another project manager, Samuel Brown, was interposed between them. From then on Mr Allison reported to Mr Brown and took all of his instructions from him.

[39] After Mr Brown assumed managerial responsibility for Mr Allison there was no suggestion that the previous problem persisted or re-emerged. Mr Gowda said, without contradiction, that after Mr Brown became Mr Allison's manager the new system worked well and he had almost nothing to do with Mr Allison. Mr Allison was not dismissed for over a year after that step was taken and there was no evidence that during the interval he was on borrowed time.

[40] There is one issue that also needs to be touched on dealing with Mr Allison's role in the company. At some point in time, although precisely when is unclear, Mr Allison considered that he had been promoted or transferred so that he was no longer working as a welder/boilermaker but was working closely with Mr deVere on a

specific project. If Mr Allison is correct, that would mean Mr McIntyre's September 2018 review had miscued.

[41] I do not accept that Mr Allison was promoted or transferred away from working as a welder/boilermaker. I prefer Mr Brown's evidence that Mr Allison remained as a welder/boilermaker. The fact that Mr Allison worked with Mr deVere was a symptom of the declining welder/boiler-making work rather than any indication of a change of duties or responsibilities. In any event, that work was not ongoing because the project ran into consent-related difficulties and was placed on hold.

[42] In reaching the decision to dispense with the welder/boilermaker position it is more plausible that Ceres was motivated by a consideration of the savings to be made by reducing its salary costs rather than any of the alternatives floated by Ms Oberndorfer.

[43] The idea that there was an improper motive for dismissing Mr Allison is inconsistent with other steps taken by Ceres. The first of them was an offer to him to work for several months in the USA provided he could obtain a visa. The company provided assistance to him in applying for the visa and to travel to the American Consulate to progress it. The proposal could not be taken up because Mr Allison ran into difficulties in securing a visa. Nevertheless, it is unlikely the company would have offered him this opportunity if it was manoeuvring to dismiss him.

[44] The second step was that, several months before the restructuring was announced, Mr Allison was successful in securing a pay rise. That decision resulted from him informing Mr McIntyre, and Mr Brown, of job offers he had received from at least two other businesses. The pay rise was to secure his ongoing service. It is unlikely the company would have been prepared to offer a pay rise to an employee it was planning to dismiss.

[45] I have not overlooked Mr deVere's evidence that in a discussion he had with Mr McIntyre in March 2018 he was told it was likely Mr Allison would be dismissed. The circumstances of that conversation appeared to be a general discussion about the business. The implication invited to be drawn was that Mr McIntyre had already made

a decision and that it was for reasons other than redundancy. Unfortunately, Mr deVere was not cross-examined about the notes he took of that meeting. However, Ms Townsend submitted that little weight can be placed on the meeting because it pre- dated the attempt to have Mr Allison work in the USA, as well as the pay rise secured in June 2018, both of which are inconsistent with a decision to dismiss Mr Allison having already been made. I agree.

[46] Finally, when the September 2018 letter was sent to Mr Allison, Mr McIntyre offered to explore a resumption of their previous working relationship where he provided "as required" welding services as a contractor. Had the company been determined to rid itself of Mr Allison it is unlikely that such an offer would have been made.

[47] I am satisfied that the decision to dismiss Mr Allison for redundancy was for a proper business reason and was not a

sham.

Was the process fair?

[48] The duty of good faith requires, among other things, an employer proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of an employee's employment, to provide the affected employee with:9

(a) access to information, relevant to the continuation of the employee's employment, about the decision; and
(b) an opportunity to comment on the information to the employer before the decision is made.

[49] Ms Oberndorfer was critical of Ceres' process because, she said, it had failed to discharge the duty of good faith. She argued that what the company supplied to Mr Allison was inadequate, because it did not provide financial records or information relating to the failure to obtain other tenders before making the position redundant. On this analysis, even if the financial information in the September letter was correct,

9 See Employment Relations Act 2000, s 4(1A)(c)(i)–(ii); see also the limitation in s 4(1B).

it was insufficiently detailed so that Mr Allison could not provide meaningful feedback about Ceres' proposal.

[50] I agree that an employer proposing a redundancy dismissal needs to satisfy the duty of good faith.10 I do not accept Ms Oberndorfer's submissions that what was done in this case was deficient.

[51] In assessing whether Ceres met the duty of good faith, the whole picture needs to be considered. Ms Oberndorfer concentrated on the financial information in the September letter and equated its general content with a failure to provide access to information relevant to Mr Allison's ongoing employment. Her submission amounted to an argument that the financial information supplied ought to have been more detailed, perhaps as disclosed in the letter of 12 October 2018, or in Ms Bratownik's report, but without saying how much information must be supplied to meet the duty of good faith. The argument concentrated on the statement about financial losses in the letter but overlooked or paid inadequate attention to the totality of the information that was supplied.

[52] Ceres' statement about its financial losses was only one part of the information provided. The company linked that information with statements about its existing jobs ending and its failure to secure a tender on the West Coast. Mr Allison knew the information was accurate. He knew when the jobs he was working on would end and it was common knowledge in the company that it had been unsuccessful in securing the West Coast job.

[53] I consider there was sufficient information in the 19 September 2018 letter to enable Mr Allison to understand the reasons relied on by Ceres and to formulate a response. He did respond without calling into question either the statement by the company that it would suffer a loss, or about its work or, for that matter, by finding it necessary to ask for further information.

[54] When Mr Allison responded he did not focus on the quality or quantity of the financial information but, rather, on whether the proposal was a sham to mask an

10 Above n 9; *Grace Team Accounting*, above n 3, at [80]–[81].

undisclosed reason for the decision. Now, well after the event, he claims that Ceres failed to satisfy s 4 by not providing more financial information than it did in the September letter, when that information had not been raised as an issue between them and, in fact, Mr Allison was not interested in receiving it.

[55] Further, when Mr Allison raised a personal grievance it was based on a claim that the decision was a sham and not because inadequate financial information was supplied to him. Nor was it based on any claim that he was unable to respond meaningfully. PBEL's letter referred to Ceres' statement that it was making significant losses. PBEL's response was that the company's financial position was not, by itself, sufficient to establish that the redundancy was genuine and justified before concluding that it was unlikely disestablishing one position, Mr Allison's, would alleviate the effects of the downturn in Ceres' business.

[56] There is nothing in the exchange of correspondence between Ceres and PBEL to show that inadequate information was supplied so that Mr Allison did not understand Ceres' reasons for its proposal. To the contrary, he understood them but did not accept them.

[57] Ms Oberndorfer's criticism of the October 2018 letter as being too late in supplying more information, because the decision to disestablish the position had already been made, does not really capture what was communicated by the company in both letters. The submission assumed that the 12 October 2018 letter was intended to provide access to relevant

information, to comply with s 4, because what had proceeded it was inadequate. I am not persuaded to look at the subject in the same way. Both letters advised Mr Allison that the company was making financial losses and had very limited present and future work. The only real difference between the two letters is that the October one actually states, in dollar values, what the anticipated loss was expected to be as at that date.

[58] I am satisfied that Ceres complied with the duty of good faith and provided access to information relevant to the decision it was proposing. I agree with Ms Townsend that there was no flaw in the procedure used by Ceres and it did not fail to comply with ss 4(1A)(c)(i) or (ii) of the Act.

Changing the locks

[59] When PBEL wrote to Ceres on 28 September 2018, a claim was made that Mr Allison was locked out of the workplace because the company had "surreptitiously changed the locks". Mr Allison lived in a caravan on Ceres' site. An aspect of this grievance is that when the locks were changed he was denied access to his personal property, meaning the caravan and his tools stored in a workshop on site.

[60] As originally formulated by PBEL, the locks being changed was called on to support the claim that the dismissal was a sham. That act was seen as part of a course of conduct to force him to leave. In the Authority, and again in this challenge, the lock-changing claim was pursued as a separate disadvantage grievance.11

[61] On the afternoon of Friday 31 August 2018, Mr Allison left the workplace abruptly. He informed some office staff that he felt unwell, suffering from stress. He did not communicate with Mr Brown, his manager, to explain he was leaving.

[62] Mr Brown became aware of Mr Allison's departure when he was spoken to by a contractor working on site. The information provided to Mr Brown was that Mr Allison left because he had quit his job. There is some disagreement about what Mr Allison said when he left, but it was agreed that he did not return to the workplace that day and could not be contacted.

[63] Mr Brown made more than one unsuccessful attempt to contact Mr Allison to find out what was going on. Mr Allison did not answer his private or work phones or respond to text messages. He was not on the premises. He was not in his caravan.

[64] Mr Allison had keys for the entire premises. That included to the gates, a stand- alone workshop and several container-like storage facilities secured by padlocks.

[65] Mr Brown was unsure what to do. He spoke to Mr Gowda who referred him to Mr McIntyre. Mr McIntyre, responding to the only information available, that Mr

11 Employment Relations Act 2000, s 103(1)(b).

Allison had abruptly left the premises, may have left his employment and could not be located, instructed Mr Brown to change the locks.

[66] Mr Brown changed some of the locks late on the afternoon and early evening of 31 August 2018. He did not change the lock on the gate immediately adjacent to Mr Allison's caravan. The following day, 1 September 2018, he returned to complete the task. While Mr Brown was in the process of changing the remaining locks, Mr Allison returned. There was a conversation between them and Mr Allison explained why he had left. Mr Brown accepted what was said and immediately gave him a set of replacement keys. Subsequently Mr Allison obtained a medical certificate to explain his absence.

[67] Ms Oberndorfer criticised the decision to change the locks because Mr Allison had not resigned or abandoned his employment. She said that the company did not clarify the situation before acting. Changing the locks was said to be unnecessary and part of the overall scheme to end Mr Allison's employment. She pointed out that Mr Allison stored his own tools in the workshop which was already locked when Mr Brown had the lock on it changed. She described the company's actions as so extreme that common sense dictated it was not an act of good faith.

[68] In these submissions, Mr Brown was said to have "conveniently re-worded" what he was told by the contractor to indicate Mr Allison had left his employment. This event was described as a deliberate attempt to undermine the employment relationship. I disagree.

[69] To establish a disadvantage grievance it is necessary to show that the employee's employment, or one or more conditions of the employee's employment, is or are or was affected to the employee's disadvantage by some unjustifiable action by the employer.12 Ms Oberndorfer did not point to any condition of Mr Allison's employment that might have been adversely affected by the decision to change the locks. For present purposes I am prepared to accept that it was at least arguable that unrestricted access was a term or condition of employment.

12 Employment Relations Act 2000, s 103(1)(b).

[70] I prefer Mr Brown's recollection of what happened over the criticisms made of him by Ms Oberndorfer. The contractor Mr Brown spoke to was not called as a witness by either party. However, Mr Brown referred to the text messages he sent to Mr Allison about what had happened. They clearly stated why Mr Brown was attempting to contact him. One of the messages asked Mr Allison if it was true that he had quit his job. There was no response because both of Mr Allison's phones were switched off.

[71] Mr Allison was not denied access to the premises and said so himself. He described being distressed, and to have walked for several hours before returning to the premises. He was able to gain access to the premises, and his caravan, because the lock on the gate near his caravan had not been changed. As soon as the situation was explained replacement keys were provided.

[72] The criticisms made of the decision to change the locks benefited from hindsight where it is now possible to point out that there was no reason to be concerned. When the decision was made, however, no one knew where Mr Allison was or what he was doing. In those circumstances I accept that a prudent employer is entitled to take steps to ensure that its property remained secure.

[73] I am not satisfied that any term or condition of Mr Allison's employment was affected to his disadvantage by what happened. Even if a term or condition had been adversely affected by Ceres' decision to change the locks, the company could not be criticised as having acted in an unjustified manner in the circumstances.

[74] The disadvantage grievance is unsuccessful.

Suspension

[75] On 1 October 2018, Ceres informed Mr Allison by letter that it was investigating an incident at one of its worksites that day. The letter was not overly detailed. It informed Mr Allison that there had been some volatile and irrational behaviour on site by him. He was said to have made unspecified negative comments about the company to staff and suppliers and to have engaged in unprofessional

conduct. What was alleged to have been said, and to whom, was not explained. Nevertheless, he was advised that the company proposed to suspend him on pay while an inquiry was conducted. The letter invited Mr Allison to a meeting on 4 October 2018. In the meantime, a response to the proposal that he be suspended was requested by 10 am the following day; that is, 2 October 2018. There was no immediate response from Mr Allison and he was suspended on full pay pending an investigation.

[76] The incident was, in fact, confined to alleged exchanges between Mr Allison and another employee, Mr McMillan. Mr McMillan initially complained in person on 1 October 2018 and followed up his complaint with a written statement. In that statement Mr Allison was described as becoming very angry and physically threatening, including shouting at Mr McMillan. At the same time, according to Mr McMillan's statement, Mr Allison was said to have threatened to sue the company and to have made adverse comments about it. Mr Allison was alleged to have accused Mr McMillan of "stealing his job" and to have said that everyone in the company was stupid and told lies.

[77] Mr Allison responded to the complaint on 3 October 2018 when PBEL advised Ceres that the letter about possible suspension was received outside of business hours. The response to the substance of the investigation was that it was part of a "witch hunt". The proposed suspension was described as a sham and part of a deliberate course of conduct having the dominant purpose of forcing Mr Allison out of the business. PBEL informed Ceres that, if disciplinary action was to be pursued, further particulars of the allegations would need to be provided.

[78] Matters did not progress far. The issue was cleared up as early as 3 October 2018. On that day Mr McMillan advised the company, by email, that Mr Allison had apologised to him and that he had accepted the apology.

[79] Mr McIntyre said that he decided the incident did not require further investigation because of the apology and the company elected to treat the matter as resolved. The suspension was lifted on 9 October 2018 and Mr Allison and Mr McMillan continued to work together.

[80] Ms Oberndorfer was critical of this suspension because she said it was contrary to clause 23.4 of the employment agreement and meant the company was pursuing an unfair and unreasonable disciplinary process. That clause provided for suspension following consultation. She said that the timeframe for a response was unreasonable and there had, consequently, been no consultation.

[81] Ms Oberndorfer submitted that the decision to suspend Mr Allison was made before the company delivered the letter to him. She drew that conclusion from a document provided by Mr Gowda, in response to a witness summons, which was a draft of the letter written by Ceres to propose suspending Mr Allison. The argument was that there was no genuine attempt

to consult and for that matter the issues were too vaguely expressed to be meaningfully responded to.

[82] Ms Townsend submitted that the employment agreement allowed suspension to be imposed without consultation, if that was warranted by urgency, or where consultation was impracticable for reasons outside the employers control. Relying on *Graham v Airways Corporation of New Zealand*, she argued that there was no immutable rule requiring an employee to be told of the proposal to suspend with a view to giving that employee an opportunity to persuade the employer not to.13

[83] The letter needs to be seen in context. It was handed to Mr Allison on 1 October 2018. He knew the location of the event that had given rise to the suspension because it was stated in the letter and he had been working there that day. While the letter made only a general statement of what was alleged to have happened, he knew what it was about. He had been involved in only one incident that day, in the location stated in the letter, and he knew what was said by him. Mr Allison was well aware of the incident that gave rise to his suspension and was not taken by surprise or disadvantaged by the paucity of information in the company's correspondence.

[84] In fact, the employment agreement allowed for suspension without consultation if the situation was urgent. Ms Townsend submitted that when balanced against the seriousness of the incident, at least as the company understood it on 1

13. *Graham v Airways Corporation of New Zealand* [2005] NZEmpC 70; [2005] ERNZ 587; she also relied on *Downer New Zealand Ltd v Jones* [2018] NZEmpC 77.

October 2018, the decision to suspend was one open to it. The allegations made were serious and justified a prompt response. I agree that there was an adequate reason to suspend Mr Allison without being able to consult him, given the nature of the alleged behaviour.

[85] Finally, Ms Oberndorfer criticised the time it took to advice Mr Allison that the suspension was lifted. She characterised that delay as casting doubt on the genuineness of the concerns. The delay was three working days, which in the circumstances, was not excessive or by itself enough to support Ms Oberndorfer's submission.

Breach of good faith?

[86] There is one allegation that has not previously been addressed in this decision and was described as regular inquiries of Mr Allison asking him when he was leaving. Those inquiries were attributed to Mr Brown, who was not asked about them when he gave evidence. While that was unfortunate, it is unlikely he did that. Mr Brown was the person who recommended the company increase Mr Allison's pay to stave off attempts to entice him away, which is inconsistent with claims that he was encouraging him to leave.

[87] The claim of breach of good faith rests on allegations that Ceres embarked on a course of conduct with the intention of terminating Mr Allison's employment. I do not accept that Ceres did that. This claim was an attempt to weave together a series of disparate points to try to support the conclusion PBEL advanced when first responding to Ceres; that the redundancy was a sham. That contention falls away against the company's financial position and declining work and its attempts to consult. It also fails to recognise that two of the incidents said to show a concerted effort to force Mr Allison to leave arose because of his conduct.

[88] I do not accept that Ceres seized on those events as part and parcel of an ongoing desire to dismiss Mr Allison. It is far more likely, as the company argued, that it needed to make changes to return to profitability.

Conclusion

[89] All of Mr Allison's claims fail.

[90] Costs are reserved. If Ceres wishes to apply for costs it can file submissions within 20 working days. Mr Allison may respond within a further 20 working days. All submissions are to be less than ten pages.

K G Smith Judge

Judgment signed at 4.15 pm on 18 October 2021