



# New Zealand Employment Relations Authority Decisions

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## **Baker v Baker Timber Supplies AA 352/07 (Auckland) [2007] NZERA 818 (13 November 2007)**

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 352/07 5055039

BETWEEN David Baker

AND Baker Timber Supplies

Member of Authority: Janet Scott

Representatives: Tania Waikato Counsel for Applicant

Danny Jacobson, Counsel for Respondent Investigation Meeting: 8 August 2007 at Tauranga

Submissions received: 16 August & 2 November 2007 for applicant

23 August & 2 November for respondent

Determination: 13 November 2007

DETERMINATION OF THE AUTHORITY

### **Employment Relationship Problem**

[1] The applicant claims he has grievances against his former employer, Baker Timber Supplies Limited, in the nature of unjustifiable disadvantage and constructive dismissal.

[2] To remedy his alleged grievances the applicant claims reimbursement of lost remuneration and benefits, compensation pursuant to s.123 (1) (c) (i) of the Act.

[3] The respondent submits that the applicant suffered no unjustifiable disadvantage in his employment. The respondent also denies the applicant's claim that he was constructively dismissed from his employment.

### **Background**

[4] The events giving rise to the applicant's claims occurred against a background of a family fall out over the management of family businesses and an estate.

[5] Baker Timber Supplies Limited ("BTS") is one of three companies owned and operated by the Baker family in Katikati. The other two companies are Glenville Properties (Katikati) Limited and Fraser Street Firewood Limited.

[6] Mrs Florence Baker and her late husband, Douglas, started the company BTS in March 1972. They also set up the other two companies. They were the sole directors of the first two companies and were two of the four directors of the latter company. Mr Douglas Baker was the overall manager of the three companies until his health prevented his taking an active part in the management of those companies from 1999/2000.

[7] Florence and Douglas' son, Peter Baker, managed BTS from approximately 2000 until Peter left BTS in 2005. Valerie Baker (Florence and Douglas' daughter) became acting manager of BTS at that time. Valerie had managed Glenville Properties since 1995 and Fraser Street Firewood since approximately 2000.

[8] From March 2006 Valerie Baker was confirmed as general manager of all three family companies.

[9] The applicant, David Baker, worked for BTS for 20 years. He was employed as a plainer machinist/plant maintenance technician. At the time of his resignation on 6 September 2006 he was in receipt of a salary of \$48,000.

[10] Relevant to the issues giving rise to the claims before me are convictions for and allegations of assault against Valerie Baker by her brothers Peter and David. Peter was convicted of assaulting Valerie in December 2003.

[11] The evidence suggests that at that time David Baker's relationship with Valerie was good. However, that relationship deteriorated in late 2005 and in April 2006 there was an argument in the office of BTS between Valerie and David over the right to monies from the sale of pigs raised on the family farm. David and Valerie had different perspectives on the argument between them. It is relevant to the matter before me, because from that time David Baker tried to avoid communication/contact with Valerie Baker. He did this, he said, because Valerie had become verbally and physically aggressive towards him during the argument they had about the pigs and because he was worried about physical confrontation with her because she had been involved in similar incidents with his brothers, Lloyd and Peter, which had led to

them both their losing their jobs at BTS and in Peter's case it had led to him being charged with assault.

[12] However, in May 2006, there was another confrontation between David and Valerie at the family farm, again over the management of pigs. At some stage during this confrontation, Florence Baker arrived at the farm. Both she and Valerie allege David assaulted his sister that day. David denies assaulting Valerie and submits that in fact he was the victim of assault by his sister. Neither Valerie nor David laid charges of assault against the other in relation to this incident.

[13] This incident is also relevant to David's claim before the Authority because the deterioration in the relationship between David and Valerie spilled over to compound an already poor relationship in the workplace.

[14] Evidence was introduced for the respondent showing that the company had been performing poorly in recent years. In particular the financial accounts for 2005 show that the company had made a loss of more than \$140,000. It was Valerie Baker's evidence that she was working very hard to turn the company's losses around.

[15] Following the death of Douglas Baker in June 2006, his widow, Florence, who remained a majority shareholder and a director of the three companies, entered into negotiations with another party to lease BTS with the staff retaining their positions.

[16] This decision was communicated to family members at the reading of Douglas Baker's will. Florence Baker subsequently reminded family members that it was proposed that a condition of the lease be 'vacant possession' of the site. For that reason Florence wanted the family to remove all their property (which it seems was substantial) from the site in time for the new operator to take over the lease in September 2006.

[17] In the workplace, however, David Baker was doing everything possible to keep his distance from Valerie. He took his smokos and lunch breaks away from the smoko room in order to avoid contact with her, and he began to communicate with Valerie through another employee, Steve Barker who would advise of the work they had to do for day. He would also come to work early (before Valerie arrived each day) to check the daily diary in the office and the work board in the smoko room so that he could find out what work had to be done for that day. It is David's evidence that he carried on working like this for four months without any problem up until

August 2006. Neither Valerie nor anyone else raised an issue with him with regard to his avoiding Valerie at work.

[18] The events that gave rise to David resigning from his employment commenced from 18 August 2006. On that day Florence Baker put out a notice to all family members at BTS. That notice instructed family members to remove personal property from the site by 25 September to enable vacant possession of the site to be given to the new operator.

[19] David explained that over the 20 years of his employment he had been allowed to store various personal belongings at the site and at the time he received the notice to remove his belongings, he had stored there timber, a boat, a shed, freezers, a mincer and other items. He began moving his property from the site during working hours in accordance with the instruction that property was to be removed during normal operating hours.

[20] On the following Tuesday (22 August), David found a letter in his work truck dated 21 August from the company's lawyers. That letter had been written under instructions from his mother and Valerie, the general manager of BTS after Mrs Florence Baker, who had been helping out in the business, observed David's conduct in the workplace. The letter raised a number of issues with David and included a copy of the employment agreement. The issues raised were:

- That David Baker had failed to sign and return a copy of the new employment agreement which had been provided to him a month before.

*David Baker submitted that he was surprised by this and it was his evidence that the first time he saw the agreement was when it was attached to this letter dated 21 August.*

- That he was required to devote all his working time to his duties for BTS and he was not allowed to work for any other companies, including the other family companies during his BTS work hours.

*David Baker said he was surprised by this as he had always been asked to do things for the other companies from time to time during his 20 years at BTS.*

- That he was required to take instructions from Valerie Baker as the general manager of BTS and failure to do so would be seen as serious misconduct and result in disciplinary action.

*David Baker said he was surprised with this instruction too as it was the first time he had been told that Valerie Baker had been made general manager of BTS and he did not understand what was meant by the expression failing to take instructions as Valerie Baker did not give him instructions.*

- That he would be required to fill out a daily time sheet from 1 September 2006 along with other employees.

*It was David Baker's evidence that he was in receipt of a salary and not an hourly rate and he found the instruction confusing. However, he was again warned that if he did not comply, disciplinary action would be taken against him.*

[21] It was the evidence of Valerie and Florence Baker, that David Baker had been coming and going from the BTS workplace without accounting to anyone and was not fully committing his time to BTS. Valerie Baker acknowledged that David Baker had in the past been asked to do work for other family companies, but she made the point that at this time David Baker was not being instructed to work for any of the other family companies and he was still coming and going from the BTS workplace without accounting to anyone as to his whereabouts and not committing his working time to BTS.

[22] It was also their position that David Baker was well aware that Valerie had been appointed Acting General Manager of BTS in February 2005 and confirmed as general manager of BTS in March 2006. Valerie Baker said she had found it difficult to give David Baker instructions because he was avoiding her and when she spoke to him he simply ignored her or grunted an unintelligible response.

[23] It was Valerie Baker's evidence that the proposal that required David to fill out a daily timesheet from 1 September 2006 was because of concerns to maximise workplace efficiency for all staff and to address and obtain some accountability from David as to what he was doing during the working day. It was acknowledged by Ms

Baker that the reference (in the letter of 21 August) to Mr Baker being required to fill out timesheets from 1 September should have stated *25 August*.<sup>1</sup>

[24] The bottom line for Flo and Valerie Baker was they said that they needed to raise their concerns regarding

David's conduct in the workplace in a controlled and impartial manner through their employment lawyer since he would not communicate appropriately in the workplace. It was always their intention to try to get David working properly as a productive employee and to keep him in employment after the company was leased.

[25] It is David Baker's evidence that he saw the letter of 21 August (particularly the references in it to failure to comply with work instructions being considered serious misconduct that could lead to disciplinary action) as an intention by Valerie Baker to fire him, albeit he stated, he did not see the contents of the letter of 21 August 2006 as constituting any breach of duty by the respondent towards him.

[26] On 23 August Mr Baker went about his work. He did not prepare his own property for removal from the site – work which he had undertaken on the 22nd.

[27] Then on 24 August his mother, Flo Baker, approached him in the yard. She was accompanied by Senior Constable Lindsay Freeman. He attended at Mrs Baker's request because she wished to speak to David in relation to employment issues she had with him. Given the events at the farm in May 2006, she was fearful of his reaction and she asked Senior Constable Freeman to accompany her when she spoke to David. Mrs Baker advised David:

- To stop removing firewood from the site. It was her concern that while it was acceptable for family members and staff to take firewood, David had been observed taking far more firewood than he was entitled to.

*It was David's evidence that he was completely unaware of any issue relation to his removing firewood. It was his belief that he and family members were entitled to as much firewood as they needed.*

1 It was acknowledged by Mr Jacobsen (counsel for BTS) that he had made a mistake in this regard.

- David was instructed to move timber he had left leaning against a wall because it was dangerous.

*David's evidence was that it was not uncommon to leave timber resting in the manner that he did and he did not believe it to be dangerous.*

[28] David was also instructed to stop doing his own work in BTS time. This, it appears, is a reference to preparatory work David had been undertaking in BTS to remove his property from the site, as he had been instructed by the memo issued by his mother earlier that month. It was Florence and Valerie's Baker's evidence that the reason family members were instructed to remove their property during BTS operating hours was to ensure that there were no security issues arising from the removal of this property. However, it had not been intended by them that it would be done in BTS working time, and it was their evidence that BTS was open on Saturdays and David did not work Saturdays. There was ample opportunity for him to remove his property without doing it in BTS time.

[29] It was Mr Baker's evidence that he was shocked and upset that his mother had sought police assistance in order to give him simple instructions. Mrs Baker's evidence was that she was genuinely apprehensive about how David would react when she conveyed these instructions to him. It is her evidence that she had no intention to embarrass David with the police presence and she felt that he had got things out of proportion and was not accepting the consequences of his own behaviour.

[30] Relations between the parties went on to deteriorate further that day. After discussion with his mother, Mr Baker returned to his work area. Some time later that morning, his brother Peter arrived on site to speak to his mother about items being removed from the site and his late father's will. David, who was still upset, explained the events of that morning to his brother. Together they decided to go to the Police Station to find out why Senior Constable Freeman had come to the site that morning. David accepted that Constable Freeman had explained the reasons for his attendance at the meeting that morning i.e. that he was there at Florence Baker's request. However, David said he was so shocked by events that morning that he had not comprehended the situation.

[31] The two brothers went to the Police Station where they met Senior Constable Freeman who reiterated the explanation for his presence on site that morning. They then returned to the site with a view to meeting Florence Baker.

[32] It was Valerie Baker's evidence that when the two men arrived at the office at BTS, they ordered her out of the room and commenced to speak in aggressive tones to their mother who was accompanied only by an elderly woman friend. Valerie Baker decided to call the police. Apparently, however, Florence Baker decided that she would not speak to her sons and she left the room. It seems, too, that Peter Baker also asked for the police to be called and in the event, the two brothers waited outside the offices for the police to arrive so they could speak with

their mother.

[33] Senior Constable Freeman returned to the site and the parties met. He provided affidavit evidence to the Authority. In his affidavit he stated that he acted as a mediator at this meeting. Nothing was resolved, however, and after about 10 minutes he suggested the parties put their concerns in writing and attempt to resolve their issues through their respective lawyers. Senior Constable Freeman then left the site.

[34] After that meeting Peter Baker left the site and David went back to work.

[35] Some time in the early afternoon Peter Baker returned to the BTS site. He wanted to speak to his mother about an office that was being removed from the site. David accompanied him to this meeting. Mrs Baker said that she would not meet with them and told them to leave the office. They complied albeit it may not have been immediately because Valerie Baker again called the police. Peter left the site and David returned to work.

[36] Then at about 2.30pm David was approached by Valerie Baker again. She was accompanied once more by Senior Constable Freeman and another Constable. The Senior Constable's affidavit evidence was:

*Valerie informed David that he was to be stood down from work for the rest of the day and was to leave the premises. She emphasised that he was not being sacked and it was a stand down period only and that he was to be paid for the rest of the afternoon.*

*Valerie also informed David that he would no longer have the use of his work vehicle and he was to collect his possessions and leave. David informed Valerie that he had his house keys and other personal property in the work vehicle and that vehicle was at the Rea Road, Katikati farm property.*

*I then offered David a ride to lift his keys and possessions from his vehicle and return him to his home address as he had no vehicle. David accepted this. There is a suggestion that David was escorted from Baker Timber Supplies by the Police. This is not the case and it was David's decision to either accept or reject this offer of assistance.*

*David was taken by me to the Rea Road farm property where he uplifted his keys and other property. I then returned him to his home address at approximately 3.10pm.*

[37] Valerie Baker's evidence was that Peter and David had been asked to leave the office previously and Senior Constable Freeman had suggested they put their concerns in writing. Despite this they had returned to the office. When they returned, Mrs Baker had told them she did not want to speak with them. There were bitter words spoken between Florence and Peter. Valerie told them to leave and when they did not, she rang Senior Constable Freeman again, who attended the site for the third time that day. By the time he arrived Peter and David had left.

[38] There is some dispute between the evidence of Valerie Baker and that of Senior Constable Freeman as to when the decision to ask David to leave the site for the remainder of the day was taken. Senior Constable Freeman's evidence suggests he was asked to come to the site and accompany Valerie while she communicated this decision to David Baker. Valerie Baker's evidence is that she rang Senior Constable Freeman when David and Peter initially refused to leave the office on the occasion of their second visit there that day. She submitted that upon his arrival she discussed with the Senior Constable Freeman the fact that she and her mother were tired of the brothers' persistence in returning to the office of BTS and that as a result of her discussions with Senior Constable Freeman, she decided to ask David to leave the site to allow a *cooling off* period. Senior Constable Freeman accompanied her to give David this message. It was her evidence that David was informed he was not being dismissed but was being asked to go home for the day to allow things to cool down. She directed that David – who had been using the work vehicle to travel to and from work – was to hand over the work vehicle because it was needed for the business (The evidence discloses there had been occasions in the past when both Peter and David had denied BTS access to work vehicles).

[39] David was extremely upset at this latest turn of events. He said that when he got home he collapsed in tears when telling his wife what had happened during the

day. He could not believe that after 20 years of loyal service he had been treated in such a harsh manner. He had no idea why he had been stood down or why his work vehicle had been taken off him. He felt so sick and stressed out that he could not sleep at all that night and went to the doctor the next day. He told the doctor what had happened and the doctor immediately put him onto two weeks stress leave. David Baker submitted a medical certificate to confirm this.

[40] In the meantime, BTS's employment advisers had been instructed to write to David Baker again as there had been no response to the letter of 21 August and he had not commenced filling out timesheets from 25 August (albeit the instruction had been mistakenly notified to commence on 1 September).

[41] This letter advised Mr Baker that as he had not addressed the issues raised in the previous letter, the issues were now to be treated as disciplinary matters. These issues were:

- Failure to work your contractual hours and to devote all your working time to your duties for Baker Timber Suppliers Limited.
- Failure to take and follow instructions from the General Manager.
- Failure and/or refusal to fill out a daily timesheet accurately recording the start time and the end time of your employment each day together with time taken for any meal breaks.
- Failure and/or refusal to enter into an updated employment agreement.

[42] Mr Baker was instructed to attend a disciplinary meeting at 2.00pm on 31 August. He was advised the issues were seen as serious misconduct and put on notice that his position could be in jeopardy if he did not provide satisfactory explanations to the respondent's concerns. He was advised to seek independent advice and to have a representative of his choice at the meeting on 31 August.

[43] Subsequently there were communications between the parties and Tania Waikato (acting for David Baker) outlined in writing (30 August) David's response to the employer's concerns including questioning the fact that David's failure to complete timesheets was treated as serious misconduct when the instruction did not require him to do so until 1 September.

[44] It was also advised that Mr Baker had only just received the new employment agreement and could not be said to have failed or refused to enter into the complex agreement at such short notice.

[45] It was advised that Mr Baker was currently on sick leave and was not in a position to attend the disciplinary meeting scheduled for 31 August at 2.00pm.

[46] On 1 September BTS's advisers wrote to Mr Baker's representative and advised that it was appropriate to reschedule the planned disciplinary meeting until Mr Baker was fit to return to work.

[47] A typographical mistake regarding the instruction to commence completing timesheets was acknowledged. However, it was the respondent's position that Mr Baker had received a copy of the new employment agreement in April 2006 and it was stated it was high time he responded to the agreement.

[48] The company's position in calling the disciplinary meeting was also explained and stated

*That while a disciplinary process has been initiated, the company sees the potential outcome at this point to be no greater than the issuing of an employment warning. What is being sought is David's willing co-operation in performing the duties for which he has been employed and his performance of lawful instructions given by his employer.*

[49] However, the letter went on to notify four additional issues the employer intended to raise with David Baker at the proposed disciplinary meeting. They were:

- His taking time off work without first seeking approval of the General Manager (for example 13 April, 16 June and 28 June).
  - His taking five loads of firewood, the property of Fraser Street Firewood Limited and loading some during his work hours for his employer.
  - His building without his employer's permission a separate smoko facility away from the company's existing smoko rooms.
- Why he has been, without first seeking authority to do so and without accounting for any proceeds, taking and delivering wood shavings that the company otherwise has orders for.

[50] It was also advised that despite David claiming to be medically unfit to return to work, he had been at the workplace on 28 August; 30 August; and 1 September 2006. It was noted he had not had the courtesy of calling in at the office to let the General Manager know what he was doing. It had been assumed he was removing his personal property from the company premises. On each occasion he had spent a number of hours physically carrying out the loading and removal of property and obviously this raised a question concerning whether he was fit for work

or not.

[51] On receipt of this letter Mr Baker decided he could not go back to work again and on 6 September he sent a letter of resignation to BTS addressed to the Director (Florence Baker):

*“To whom it may concern*

*Due to the recent actions the Company has taken against me including the humiliation of having the Police called in to escort me from the premises and remove my work vehicle from me for no apparent reason, I can no longer continue to work for Baker Timber Supplies. You have made it clear by changing all the locks and involving the Police that you do not trust me anymore and I cannot work somewhere where I am made to feel like a criminal.*

*The stress on me from these actions has caused me to become unwell and I feel that I am unable to return to work under such conditions. I am resigning from my employment with Baker Timber Supplies from today.*

*Yours sincerely David Baker”*

[52] On 8 September Florence Baker wrote to David.

*Dear David*

*Re Your Resignation*

*I acknowledge receipt of your letter of resignation addressed to me as company director rather than to Valerie Baker the general manager.*

*There are a number of statements made by you in your letter of resignation which I do not accept.*

*The first is your claim of being humiliated and being escorted from the premises by the Police. You well know that this allegation is untrue. The Police were called in to assist on three separate occasions on Thursday 24 August. I called them the first time to assist me to explain to you that you were not allowed to remove firewood being company property, unless you had authorisation to do so. As you did not have authorisation to do so, you were not entitled to take company property. About one and a half hours later both you and Peter came to the office. You also well know that Peter has a history of violent behaviour and is not allowed on site without permission. I asked you both to leave my office and I told you I did not wish to speak with you and instead suggested you put any matters to me in writing. Despite my request for you to leave the office you didn't. The local constable was himself concerned about the potential for trouble and was called to help have you comply with my request that you leave the office. On the third occasion later that same day Peter came back and you both came back to the office. I repeated that I didn't want to talk with you and you were asked to leave. Again you refused to leave. The general manager then suggested to you that you go home for the rest of the day to let things cool down a little. You were told you were not being sacked but that you were being asked to leave the premises so as to calm the situation down. You then refused to go until you got something out of the company truck which was at the farm. The Police offered to take you out to the truck to get your possessions and you accepted their offer.*

*In relation to the company vehicle I was concerned to ensure that the vehicle was made properly available for company business rather than for your own personal use. The truck is, after all, an important vehicle in the company operation. It was unacceptable that you were not making the truck available for company business.*

*It is also important to the company particularly at the present time there is no unauthorised access to company premises and company property. That is the reason the locks were changed.*

*I do not accept that any actions of the company have caused stress on your. You have never raised stress before as an issue. I must say I was very concerned to note that you appeared to be totally unprepared to take direction from the general manager and in fact you appeared to be refusing to communicate with anyone concerning your work duties. You were not working*

*your contractual hours and you were frequently leaving the site without telling anyone what you were doing. It was for that reason that the company raised various issues including the above with you and initiated a disciplinary process. You were advised that it was anticipated that the likely outcome of that process if, after hearing from you, the allegations were found to be substantiated, was an employment warning. The intention of the company was to ensure that the issues were addressed and that your employment would continue with the company in a way profitable to both the company and yourself.*

*I note that you have chosen to resign from 6 September 2006. Your resignation is accepted as being given entirely of your own free will. If you consider that not to be the case then please respond to the company's general manager. Please do not communicate any employment concerns to me. You are to deal directly with Valerie as general manager. She has been appointed to deal with the day-to-day management of the company.*

*If you wish to withdraw your resignation then please let Valerie know by close of business Monday, 11 September 2006. In that*

case and once you provide a medical certificate that you are fit to return to work you will be allowed to return to work and the company will continue the disciplinary process as previously advised.

Yours sincerely

Flo Baker Company Director

[53] Mr Baker did not return to the workplace and he subsequently raised his personal grievance claims.

[54] The parties have attended mediation in an attempt to resolve the matter, but were not successful. As a result the matter falls to be determined by the Authority following an investigation meeting.

### Issues for Determination

- Did the suspension of David Baker and the removal of the work vehicle amount to an unjustified action grievance?
- Was David Baker unjustifiably dismissed?

### Relevant Legislative Provisions

#### Good Faith Provisions

[55] While (within reason) the law does not seek to intrude on the attitudes and conduct of family members towards each other it does have something to say about the way people are to behave in the workplace.

[56] Section. 4 of the Act deals with good faith. That section requires the parties to an employment relationship to deal with each other in good faith and in doing so to do nothing to mislead or deceive the other party or that is likely to mislead or deceive. It also requires parties to an employment relationship **to be active and constructive in establishing and maintaining a productive employment relationship and among other things to be responsive and communicative.** (Emphasis mine).

[57] I note too, that the [Employment Relations Act 2000](#) was amended in 2004 by the insertion of a new [section 103A](#) against which the actions of an employer must be tested when considering claims of unjustified disadvantage and unjustified dismissal

#### [Section 103A](#) Test of justification

[58] For the purposes of [section 103\(1\)](#) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[59] In determining the claims before me I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time...*

[60] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06 and among other things the Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

#### Suspension

[61] The then Chief Judge (Goddard CJ) has provided a helpful discussion on the law as it results to suspension. It is set out in *Grey v Nelson Methodist Presbyterian Hospital* [1995] NZEmpC 130; [1995] 1 ERNZ, 672, 694. It is

confirmed there that suspension is not allowed unless expressly authorised by contract and the Court of Appeal in *Birss v Secretary of Justice* [1984] NZCA 24; [1984] 1 NZLR 513,521 referred to suspension as a “drastic measure which if more than momentary must have a devastating effect on the [employee] concerned.” The decision to suspend an employee pending an investigation into their conduct is not a decision to be taken unilaterally and the rules of procedural fairness apply. At the minimum the employee should be advised of the proposal to suspend and be given an opportunity to comment.

[62] However, also relevant to my findings in this matter are the findings of the then Chief Judge in *Amaltal Fishing Co Ltd v Morunga* WC 31/02. The events in that case put it into that rare category of cases where an employer is “entitled to act without further enquiry”. *Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand* (1990) ERNZ Sel Cas 985 (CA). In the *Morunga* case the Chief Judge overturned an Employment Tribunal decision in favour of a fishing industry employee who had during a period of “self-inflicted alcoholic indulgence” urinated from the sixth floor window of a Nelson hotel on to the assistant manager of that hotel which was owned and operated by a sister company to the respondent employer. The Tribunal found the procedure adopted by the employer was deficient or non-existent as the employer had on hearing of the matter, taken a letter of dismissal to the police station where the worker and his colleagues were being held. The letter of dismissal was simply left at the police station with the applicant’s belongings. The Tribunal found the worker had been unjustifiably dismissed on procedural grounds and set contribution at 30%. The Chief Judge found that although the respondent’s manager had acted “somewhat hastily and in less than a perfect way” in all the circumstances the dismissal was justifiable. He also found that the Tribunal should have looked at the “overall justice” of the case, instead of subdividing the question of justification into the separate components of substantive and procedural fairness.

## Discussion and Findings

[63] In arriving at a determination in this matter I have had regard to the evidence and submissions of the parties and to relevant case law.

[64] The events that led to the termination of David Baker’s employment with BTS Ltd amount to one sad part of a very sorry saga – that relating to much wider fallout between family members over family businesses and estate matters. In determining this matter it is not possible to avoid considering in that process those broader family disputes and the history associated with that. That is because David Baker had himself observed no boundaries as to what was appropriate conduct in the workplace given the issues he had with his sister Valerie who was General Manger of the business.

[65] I find there were longstanding grievances between member of this family associated with the management of family businesses and Douglas Baker’s estate. However, from the time David fell out with Valerie over the pigs I find there was a quantum leap in workplace tensions between Valerie and David with David Baker acting out his grievances with Valerie in the workplace as follows:

- He refused to acknowledge her appointment as General Manager/recognise her authority.
- He avoided all contact with her under the pretext of keeping himself safe from possible “assault charges”. (Acting in a civil way towards his sister would hardly have brought assault charges down on his head I find).
- In avoiding contact with his sister and General Manager he removed himself from almost all contact with others in the workplace, coming in early to note work orders and communicating only through another non-managerial employee. He took this to the lengths of setting up a microwave in his boat that was stored on the property and having his smokos there.
- When communication was unavoidable I find he would refuse to acknowledge communications or grunt in response.
- He worked work hours to suit himself with no consultation or agreement with his manager – supposedly skipping tea breaks and lunches and absenting himself without permission from mid afternoon.
  - He started using to excess the indulgence given to family to take firewood for their own use without consultation and agreement and he also removed wood shavings from the property for his own purposes without consultation and agreement
  - He used his authority as a director of Fraser St Firewood Ltd to further his dispute with his sister by withholding use of the workplace vehicle.

[66] All of the above issues related to his conduct in the workplace that preceded and/or continued after the serious incident May 2006 where Mr Baker allowed himself to become embroiled in a dispute with his sister on the family farm which resulted in her receiving physical injuries. While no charges were brought and it is not possible to say

either that David assaulted his sister and/or that there was not provocation on her part both Valerie and her mother Flo who witnessed that incident consider that she was assaulted by her brother and the medical records show she suffered injuries as a result of the altercation.

[67] Being a witness to this had a profound affect on David's 78 year old mother, Flo.

[68] Florence Baker was the sole remaining Director of the family businesses and the main shareholder and she had the primary responsibility to negotiate the lease of the business and in doing so to prepare the business for handing over to the new operator. She particularly wanted to preserve the employment of current employees in a functioning unit.

[69] In order to achieve this it was decided that David Baker's attitudes and conduct in the workplace needed addressing. As a result legal advice was sought and a series of written communications to David ensued as a result of that advice.

[70] However, when it came to face to face communications with David Baker the events of 27 May had, I find, left Mrs Baker decidedly nervous about meeting David situations where instructions which he might find unpalatable had to be

communicated. This affected her approach to David Baker in face to face communications in the workplace.

[71] Matters came to a head in the latter half of August and early September 2006 I find.

[72] On 18 August Mrs Baker communicated in a written instruction that all personal property must be removed from the property within a month. The instruction was given in writing Mrs Baker said because previous oral requests had not been acted upon. Family members were advised to remove their property "*during normal operating hours*". David Baker interpreted this to mean during his working hours and he set about preparing to remove his substantial property from the site during working hours.

[73] Mrs Baker did not mean David to do this in working hours but to do it on Saturdays when the yard was open and he was not working. Mr Baker could be forgiven for having been confused by this instruction but nothing really turns upon it.

[74] The respondent then communicated with David in a letter dated 21 August received by him on the 22nd. That letter began a series of communications and started to lay some ground rules for Mr Baker. I find in all probability too that he had previously received the draft copy of a new IEA but consistent with his refusal to communicate constructively he had ignored it. In any event the respondent took a reasonable approach to the issue in August supplying him with another copy and asking him to either sign it after taking legal advice or to arrange to meet with his employer to discuss and negotiate over it.

[75] Mr Baker noted with concern the reference to the fact that a failure to take instructions from Valerie Baker would be treated as serious misconduct. I would note on this point an employer is required to set out for its employees the consequences of a failure to follow instructions. In any event while Mr Baker said he took from this letter the view that Valerie was intending to get rid of him he also said he did not treat this letter as a breach of duty by the respondent.

[76] I find the respondent was entitled to raise these issues with Mr Baker albeit in better circumstances there would have been a frank discussion of expectations around the table. I accept this was not possible with David Baker at that time and it was reasonable to raise the issues of concern in writing.

[77] The first letter - raising concerns with David Baker - was, I find reasonable in tone and appropriate in all the circumstances,

[78] Thereafter things became more problematic. After David received this letter he properly attended to his work rather than preparing his own property for removal and the 23rd went without incident.

[79] However, on the 24th Mrs Florence Baker decided she needed to speak with David about the fact he had been seen to be taking an excessive amount of firewood from the worksite. She intended to instruct him to stop doing this and because she was nervous as to how he would respond - given the events she witnessed in May that year out at the family farm - she decided to ask Senior Constable Freeman to accompany her while she communicated this instruction to him.

[80] David was extremely upset that his mother felt the need to have a police officer accompany her to give him simple instructions.

[81] I accept this seems, from a sober distance, to have been rather heavy handed but that would ignore the climate David's passive aggressive behaviour over many months had created in the workplace and the genuine apprehension felt by Florence Baker<sup>2</sup> regarding David's potential for physical aggression when he was annoyed. I must therefore find Mrs Baker's actions in having the police accompany her when she gave instructions to David to have been sad in the extreme but reasonable in all the circumstances.

[82] As for the other two visits of the police that day I can only say that in all the circumstances it was extremely unwise of David Baker to accompany his brother Peter to visit their mother during business hours at his workplace to challenge her on decisions she had made which she was entitled to make as the sole director and majority shareholder of the family businesses and to do it a second time after the police had attended once to mediate discussions between the parties was, I find, was aggressive and intimidating conduct. It may have been primarily at Peter's behest but David was well aware of the history between Peter and his sister Valerie. His own conduct towards her left much to be desired and it was a recipe for disaster to go to the office for the second time when the police had had to attend previously to mediate their discussions.

<sup>2</sup> As a result of the altercation she witnessed on 27 May that year.

[83] So I am finding that, however, the decision to send David home for the day was arrived at it was reasonable. Certainly, I accept there is generally no ability to suspend an employee in the absence of a statutory or contractual right to do so. However, there are situations where it may be necessary to contemplate removing a worker from the workplace where for example there is a risk to vital company property or where serious health and safety issues arise. In this case David Baker and his brother Peter had persisted, for the second time that day, on approaching their mother at the office to argue the toss about business and estate matters. The police had had to be called the first time to ensure discussions could take place in a safe and controlled atmosphere. It was quite simply lunacy to persist in returning later in the day to repeat the exercise whatever the merits of their arguments. I accept that David Baker may have been an ameliorating influence at that second meeting but the fact he and his brother were there at all was in all the circumstances unreasonable conduct.

[84] Given the events of the day neither Mrs Baker nor Valerie could be assured there would not be a repeat of these unwanted visits from their brothers and sons so following the *Morunga* principles set out above I find this is one of those rare situations where the employer was entitled to act without further enquiry in order to preserve their personal safety and, as Ms Baker stated to allow for things to cool down. If I am wrong in my reliance on *Morunga* in this matter I have to say that no remedies would have flowed from any finding that Mr Baker was unjustifiably suspended and that he therefore had a disadvantage grievance. Mr Baker's unwise actions would disentitle him to remedies in this matter.

[85] In making this finding I have also taken into account the suspension was to be for a very short period to allow the situation to stabilise and it was on full pay. I also find the requirement that Mr Baker forgo the use of the vehicle he usually used was reasonable in all the circumstances. The vehicle was a work vehicle and was currently in use for work purposes.

[86] Thereafter things muddled on to a messy conclusion between the parties.

[87] Mr Baker was I find genuinely upset by the recent events that had transpired in the workplace – albeit I find his own conduct had contributed to those events in no small measure. He took medical advice and required time off work for stress related

reasons. However, he then went on to compound the deteriorating relationship between himself and the respondent by turning up at the worksite where for several hours over a number of days he went about removing his belongings from the site without notifying the respondent as to the reasons for his presence and the real nature of his current illness. This was a continuation of his conduct in refusing to recognise the authority of Valerie Baker as General Manager.

[88] Then on 25 April the respondent wrote to Mr Baker advising his failure to address the matters raised in its letter of 21 August now called for the matters previously raised to be dealt with on a disciplinary basis. I find it was unreasonable to take such a step in such a very few days after Mr Baker had been put on notice that his conduct (tolerated for months) was required to be addressed by him within days. The problem was compounded by the mistake made in the 21 August letter that he was to start completing time sheets with effect from 1 September<sup>3</sup>. Even if the expectation was to apply from 25 September it was unreasonable to turn it into a disciplinary matter on

25 September especially given that David Baker was not at work that day to comply. And of course the instruction which on its face was effective from 1 September could not become a disciplinary matter on 25 August.

[89] This letter, together with the respondent's letter of 1 September (to the extent it raises four additional issues to be discussed at the disciplinary meeting notified to David Baker) starts to have the tone of communications described by then Chief Judge Goddard in *Donaldson and Young v Dickson* [1994] 1 ERNZ. The Court had this to say about the approach taken there to raising complaints with an employee.

*"To store them up and to smite the employee with them, hip and thigh, in one giant instalment, is about as great a breach of the duty of trust and confidence inherent in every employment contract as can be imagined".*

[90] I accept there are some differences between the facts of this case that those of *Dickson* (cited above).<sup>4</sup> Nevertheless I find it was inappropriate and unfair to gather up a host of complaints relating to incidents that went back over time (and which were not raised and dealt with at the time) and put those complaints to Mr Baker enmasse

<sup>3</sup> When it was intended to be 25 September.

<sup>4</sup> There the respondent's criticisms of the worker encompassed the entire work performance and unlike that case Mr Baker was appropriately notified of the respondent's concerns and invited to seek advice.

and – having given Mr Baker very little time to seek advice and respond - to escalate (within days) the severity with which those complaints were viewed.

[91] That said, there were aspects of the employer's communication to David Baker on 1 September that signalled a more conciliatory approach and he was put on notice that the worst outcome of the planned disciplinary discussions was anticipated to be a warning and that the respondent was seeking his willing co-operation as an employee.

[92] Regardless of this Mr Baker decided to resign his employment and he wrote a letter of resignation addressed to Florence Baker. This was no oversight or accident I find. Mr Baker was again failing to recognise his sister as General Manager of the company.

[93] On 8 September Mrs Baker responded to Mr Baker's resignation explaining the company's actions in respect of the issues he raised in his resignation letter (including the fact that locks had been changed for business reasons)<sup>5</sup> and reiterated that the company's actions were undertaken with the purpose of addressing the concerns regarding his conduct in the workplace so that his employment could continue with the company in a way that was profitable to both the company and himself.

## Conclusion

[94] This has been a very difficult case to do justice between the parties in all the circumstances particularly given that the workplace issues in question are a very small part of a much bigger and more distressing tableau being played out between these parties.

[95] I conclude by finding that the tone and timing of the respondent's letter to Mr Baker dated 25 August 2006 was unfair given that in the main the conduct complained of had been going on for months and had not been appropriately addressed at the time. To the extent the 1 September letter added new and dated complaints it too was unfair. This amounted to a breach of good faith towards the applicant and severely shook his trust and confidence in the employment relationship. I find the respondent's actions in

<sup>5</sup> In fact the locks to the area where David's belongings were stored had not been changed.

this regard were unjustified and Mr Baker has a disadvantage grievance against the respondent. In making this finding I am relying on [s. 122](#) of the Act and note that parties were requested to address the Authority on the question prior to my making this finding. They provided submissions which have been considered.

[96] Otherwise I must find that Mr Baker did not suffer a disadvantage grievance in relation to his suspension on

24 April (see findings paragraphs 78 – 85 above) above.

[97] Lastly, I find that the applicant was not constructively dismissed. While I have found that aspects of the respondent's approach to dealing with the conduct and performance issues it had with Mr Baker were unfair, I also find that aspects of the respondent's letter of 1 September (confirmed by Florence Baker's explanations to David in her letter of 8 September) ameliorated the negative connotations that could have been taken from the company's earlier communication and made it clear to Mr Baker that it was his willing cooperation in the workplace that was being sought – nothing more. Mr Baker chose not to see this conciliatory approach by the respondent partly, I find, because his mind was already made up that he would not continue to work for BTS under the new arrangements while Valerie was to remain General Manager.

[98] On balance, therefore, I cannot find there was a breach of duty so serious, that it left Mr Baker with no option but to resign.

## **Determination**

- In reliance on [s. 122](#) I find that Mr Baker has an unjustified disadvantage claim of a different type to that alleged.
- I decline Mr Baker's claims that he was unjustifiably suspended and constructively dismissed.

## **Remedies**

### Contribution

[99] In considering the remedies to be provided to the applicant I am required under [s.124](#) of the Act to consider the extent to which the applicant contributed to the situation that gave rise to his personal grievance.

[100] Mr Baker's conduct in the workplace over the time in question was far from exemplary. However, the wrong doing here - to the extent I have found that Mr Baker has a disadvantage grievance – is essentially the respondents so I make no reduction in the modest remedy to be awarded to Mr Baker.

### Compensation pursuant to [s.123](#) (1)(c)(i)

[100] The respondent is directed to pay to the worker the sum of \$2,500 net to remedy him for the grievance he has suffered.

## **Costs**

[101] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined. In attempting to resolve the question the parties should be aware that given all the circumstances of this case I would be minded that this might be a case where costs should lie where they fall. However, submissions made will be carefully considered if the parties are unable to resolve the matter between them.

Janet Scott

Member of the Employment Relations Authority