

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA  
TAIMAHI ŌTAUTAHI ROHE**

[2023] NZERA 448  
3170844

BETWEEN

STEFAN BENDALL  
Applicant

AND

PRECUT CONSTRUCTION LIMITED  
Respondent

Member of Authority: Antoinette Baker

Representatives: Anita Blockhouse, Maryline Suchley, advocates for the Applicant  
Robert Thompson, Andrew McInnes, advocates for the Respondent

Investigation Meeting: 19 April 2023 at Christchurch

Submissions received: 17 April 2023 from the applicant  
15 May 2023 from the respondent

Determination: 16 August 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Mr Bendall was employed by the respondent (PC) from February 2021 until March 2022 to do the work of a construction estimator<sup>1</sup>. The role included quantifying materials into client quotes for framing trusses and frames.

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<sup>1</sup> The term 'quantity surveyor' has or may also still be used to describe this type of role.

[2] Mr Bendall claims that during his employment there were incidents when the managing sole director of PC, Mr Miller, acted in an aggressive manner towards him and cumulatively this had adverse consequences on his mental health causing him to resign. Alternatively, he says his resignation was in the 'heat of the moment' and when he asked to retract it PC should not have declined. On this basis he says his termination of employment was a direct unjustified dismissal.

[3] Mr Bendall also claims he was disadvantaged in his employment based on the same series of actions relating to Mr Miller's alleged way of engaging with him.

[4] PC denies all of Mr Bendall's claims. It says Mr Bendall resigned from his employment, and that it did not have to accept his resignation retraction. PC says that Mr Bendall did not raise issues about the stress and health issues that he says were caused by the alleged way Mr Miller dealt with him. In these circumstances, PC says that it could not reasonably have foreseen that Mr Bendall would resign. PC also challenges whether Mr Bendall can claim some incidents as part of a disadvantage grievance claim because they were not raised within time.<sup>2</sup>

[5] Mr Bendall claims compensation and lost earnings because of the grievance(s). He claims payment of one day's pay that he says should not have been deducted during 'garden leave' at the end of his employment, and repayment of a shortfall relating to a reimbursement for study leave (\$49.49).

### **The Authority's investigation**

[6] An investigation meeting was held. Before the investigation meeting Mr Bendall through his advocate asked for a former employee manager of PC, Mr Leon Forde, to be summonsed. I considered this request and accepted that this person would be useful to my investigation. Mr Forde was summonsed to appear and did so giving evidence on oath and answering questions from myself and both parties' representatives.

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<sup>2</sup> Section 114 Employment Relations Act 2000.

[7] Briefs of evidence were lodged before the investigation meeting by Mr Bendall and his wife Mrs Tayleisa Bendall, and for PC by Mr Miller and Ms Yoko Rae a former employee of PC who worked alongside Mr Bendall in a similar role. All witnesses gave their evidence on oath, I asked questions of all witnesses and both parties' representatives did the same.

[8] I received IRD records after the investigation meeting from Mr Bendall at my request and parties provided timetabled written submissions after the investigation meeting.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

### **The issues**

[10] The issues requiring investigation and determination are:

- a. Did PC accept Mr Bendall's retraction of his resignation and then reverse this decision? If so, was this an unjustified dismissal?
- b. Was Mr Bendall constructively dismissed?
- c. Did Mr Bendall suffer disadvantage in his employment due to the unjustified actions of PC?
- d. Depending on the above what if any remedies are to be awarded?
  - i. Compensation
  - ii. Lost earnings
- e. Should any remedies awarded be reduced for blameworthy conduct by Mr Bendall?
- f. Should either party be ordered to pay a contribution towards their legal costs by the other?

**Did PC accept Mr Bendall's retraction of his resignation and then reverse this decision?  
If so, was this an unjustified dismissal?**

[11] While the Employment Court has considered it reasonable that an employer could allow an employee a 'cooling off' period after an employee resigns in the 'heat of the moment'<sup>3</sup>, more recently the Court has considered that the starting point is to ask whether the employee has clearly and unequivocally resigned:<sup>4</sup>

...the key question is whether the employee resigned. This is an objective assessment and will likely be informed by the relevant circumstances.

A resignation given in clear and unequivocal terms is more likely to satisfy an objective assessment than words of resignation expressed in an equivocal manner, or which are plainly not meant to be taken seriously.

[12] If Mr Bendall's resignation was clear then it would be for PC to decide whether to accept his retraction. I will therefore first consider whether Mr Bendall's resignation was unequivocal and then if so whether his request to retract was accepted or declined.

*18 February 2022*

[13] Mr Bendall's evidence is that he returned to work on Friday 18 February 2022 after a day off sick. He says he was stressed due to an interaction with Mr Miller the day before on 16 February 2022. After an hour or so back at work on 18 February 2022 he resigned verbally to Mr Miller and soon after put it in writing:

Dear Chris Miller

Please accept this letter, as my final 2-week notification. That I am resigning from my position at Precut Construction. I will be finishing up on the 4<sup>th</sup> March 2022.

Regards,

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<sup>3</sup> *Boobyer v Good Health Wanganui Limited* EmpC Wellington WEC3/94, 24 February 1994

<sup>4</sup> *Mikes Transport Warehouse Limited & Modern Transport Engineers Limited v Wayde Vermuelen* [2021] NZEmpC 197 [17 November 2021] at [37] and [38].

Stefan Bendall

[14] I find the above supports that Mr Bendall's communication that he was resigning was unequivocal.

*'Heat of the moment'*

[15] I have noted above the Employment Court's approach to 'heat of the moment' situations. I do not find the resignation was made in the 'heat of the moment.' My reasons follow.

[16] Firstly, Mr Bendall's resignation was unequivocal.

[17] Secondly, even if the resignation was equivocal, I accept the submission for PC that Mr Bendall resigned after having a day off after the alleged challenging interaction with Mr Miller on 16 February 2022. This was different to resigning in the middle of a heated interchange and then cooling down later.

[18] Thirdly, and more particularly, Mrs Bendall's evidence is that she did not know Mr Bendall was going to resign that morning although knew he was stressed ongoing about his employment. When Mr Bendall rang and told her he had resigned she gave oral evidence that she was 'angry' and 'made him stay' due to concerns about their mortgage for a new build and her still being on parental leave. She appeared genuinely tearful and distressed giving her evidence. She explained she was now sorry that she had put him under pressure to retract his resignation.

[19] Accordingly, I find it likely that Mr Bendall having spoken with his wife, went to Mr Miller at the end of the working day and told him he wanted to retract his resignation. His wife's reaction (which I find humanly understandable in the then circumstances) was likely the reason behind this and not a regret that he had acted too impulsively and really wanted to stay.

*Did PC accept Mr Bendall's resignation?*

[20] When Mr Bendall went to Mr Miller's office to retract his resignation there was a conversation (the retraction conversation) <sup>5</sup> that lasted about 15 minutes with a break in the middle. Much of the conversation included Mr Miller talking about concerns he had with the way Mr Bendall questioned his authority in terms of how he wanted things to be done. Mr Bendall can be heard challenging Mr Miller by repeating that he did not like the way that Mr Miller talked to him in his employment. I will return to this material later. For now, I note that references to the resignation retraction are interspersed throughout this conversation.

[21] Mr Bendall says that at the end of the retraction conversation he was left with the understanding that his retraction was accepted. I do not find Mr Bendall's interpretation consistent with what was said. My reasons follow.

[22] At the start of the conversation Mr Miller's first response to Mr Bendall's request to retract his resignation was:

Well you better put that in writing again so validate.

[23] It has been submitted for Mr Bendall that I should accept at this point that the retraction was accepted. I do not agree. It simply means 'validate' which could reasonably mean just put it in writing. If I am wrong, it is ambiguous particularly given the reasonable tone heard on the audio at the start of the conversation.

[24] The next reference about the retraction was:

Mr Miller: ... you put it back in writing [the retraction request] because I can't and

[Cuts in] Mr Bendall: I'll email you now

Mr Miller: You

[Cuts in] Mr Bendall: I'd still like to ...yeah retract my resignation, I still find, yeah, I'd like to have a relationship moving forward, but

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<sup>5</sup> A digital recording was made and the parties agreed to the accuracy of the transcript provided to the Authority.

[Cuts in] Mr Miller: Well why don't you put that in there as well and if, put that into writing too so that we know that this is the past and this is the future going forward

[25] At this stage I find there is some potential ambiguity in Mr Miller's last comments above.

[26] Part way through the retraction conversation there is a break and Mr Miller leaves the room and Mr Bendall returns to his desk. The next reference is:

Mr Miller: I don't know why you're retracting the thing, you can turn around and say look, as I say, no matter what I am going to do here, I'm doing wrong ... I am going to have a meeting so that it is not just me here, I'm going to have Bradley [Mr Miller's son and a PC manager] and Leon [PC Manager] here at the meeting at the same time, OK. You can write the retraction statement.

Mr Bendall: Oh, I'm just about to send that to you now

Mr Miller: No, and then its not going to, we will have a meeting on Monday to see whether it is going to be accepted or not

Mr Bendall: What's going to be accepted?

Mr Miller: The retraction. The thing is, I don't know, I've got to seek legal advice for a start off, because there is, there is other issues, there is your health issues ...

[27] The final reference is:

Mr Miller: ... I said by law I've got to accept it back, I'm pretty sure I've got to accept it back because I think it's 24 hours. And because it's you have just said what it was for the reasons.

Mr Miller: But the thing is, as I say, you, you put it back in writing [the retraction] because I can't and ...

[28] I find that the recording and transcript of the retraction conversation show that Mr Miller became tangled in his words and didn't finish his sentences. I accept that it was an unexpected conversation at the end of the working day and week when he was about to leave for the weekend to go away. However, I find it reasonable to conclude that Mr Miller for PC

did not verbally accept the retraction. He refers to needing to take advice and that he was going to involve others in management in the decision making. Consistent with this is Mr Forde's evidence which supports that Mr Miller talked to him about a response and that he drafted the letter declining the retraction.

[29] Accordingly, I find that Mr Bendall verbally and then in writing unequivocally resigned. PC did not then accept the retraction later that day after which this was confirmed in writing.

[30] The Employment Court<sup>6</sup> has observed that where there is a claim for 'pressured' resignation, or a resignation stemming from the employer's misconduct or breach the matter is more appropriately addressed as constructive dismissal. The focus of Mr Bendall's evidence is the way he was treated by Mr Miller and that this led to his resignation. This matter is more appropriately dealt with as a constructive dismissal. I will consider this now.

### **Was Mr Bendall constructively dismissed?**

[31] When considering whether there has been a constructive dismissal the Court of Appeal<sup>7</sup> has said it is

essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the border line which separates inconsiderate conduct causing some unhappiness or resentment to the employee, from dismissive or repudiatory conduct reasonably sufficient to justify the termination of the employment relationship.

[32] There are three non-exhaustive situations<sup>8</sup> where constructive dismissal might occur:

- a. Where the employee is given a choice of resignation or dismissal;
- b. Where the employer has followed a course of conduct with the deliberate and dominant purpose or coercing an employee to resign;

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<sup>6</sup> Above at note 4 at [24].

<sup>7</sup> *Wellington Clerical Union v Greenwich* [1983] ACJ 965 at 975

<sup>8</sup> Cooke J in *Auckland Shop Employees Union v Woolworths (New Zealand) Limited* (1985) 2 NZLR372 (CA) at 374 following an approach previously taken in the former Arbitration Court in NZ.

- c. Where a breach of duty, serious enough to be reasonably foreseeable by the employer leads a worker to resign.

[33] It appears that the latter is what is claimed for Mr Bendall in that a breach of good faith resulted in him resigning, characterised as a series of alleged ‘bullying’ behaviour by Mr Miller that culminated in Mr Bendall’s mental health deteriorating.

[34] WorkSafe New Zealand<sup>9</sup> provides a useful definition of ‘workplace bullying.’ It includes ‘repeated’ behaviour towards a worker or workers that is ‘persistent (occurs more than once) and can involve a range of actions over time’. ‘Unreasonable’ behaviour means actions that a reasonable person in the same circumstances would see as unreasonable. It includes victimising, humiliating, intimidating, or threatening a person.

[35] The above definition also includes things that are not ‘workplace bullying’ such as ‘one-off or occasional instances of forgetfulness, rudeness or tactlessness,’ ‘constructive feedback and legitimate advice or peer review’, a manager requiring reasonable verbal or written work instructions to be carried out, a single incident of unreasonable behaviour, reasonable management actions delivered in a reasonable way, and a difference in opinion or personality clashes that do not escalate into bullying, harassment or violence.

[36] The Authority has considered the above definition framework (and its earlier iterations) useful.<sup>10</sup>

*Was there a breach of duty?*

[37] A breach of the duty of good faith<sup>11</sup> includes something wider than implied obligations of ‘trust and confidence’ which is a duty implied into employment relationships. A breach of good faith includes that:

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<sup>9</sup> Worksafe New Zealand Mahi Haumarū Aotearoa: <https://www.worksafe.govt.nz/topic-and-industry/bullying/bullying-at-work-advice-for-small-businesses/#lf-doc-51849>. This definition notes that it is ‘adapted from Safe Work Australia’s definition.’

<sup>10</sup> See for example, *Van der Lee v Bella Vita Day Spa Ltd* [2017] NZERA 41.

<sup>11</sup> Employment Relations Act 2000, s4(1) and s4(1A)(a) and (b).

the parties to an employment relationship to be active and constructive in establishing and maintain a productive employment relationship in which the parties are, among other things, responsive and communicative; ...

[38] I will therefore first consider the alleged incidents, and what more likely than not happened, before considering whether they could be regarded cumulatively as breach of good faith serious enough that PC ought to have reasonably foreseen that Mr Bendall would resign. Then I will consider whether the dismissal was justified.

*Friday 26 February 2021*

[39] Mr Bendall says that two weeks into his employment at the end of a working day, Mr Miller aggressively criticised the work he had done. At the time he had little or no training. Part of what Mr Bendall was required to do was to provide quotes for approval for Mr Miller. He says Mr Miller aggressively 'berated' him by swearing at him while at the time physically standing over him while Mr Bendall sat at his desk. He says that the criticism included Mr Miller saying that Mr Bendall had not provided the correct information to him and that he was 'just as useless as the other girls that had previously worked there'. Mr Bendall says at the time he verbally challenged Mr Miller's behaviour and manner of speaking to him as 'unacceptable.'

[40] Mr Bendall says that Mr Miller's daughter Karena Miller (Ms Miller) was in the office at the time and later came to him and said she had spoken to her father, and she said to Mr Bendall it was 'unacceptable'. Mr Bendall says he took the matter no further due to a concern that he wanted to keep his job particularly given he was subject to a 90-day trial period.

[41] Mr Miller says he could not recall any of this happening on that date, and that he would not have 'berated him for his work in the first couple of weeks of his employment' when it takes time to learn the job. He also says had he been unhappy with Mr Bendall's 'progress' he could have utilised the 90-day trial period.

[42] I prefer Mr Bendall's evidence that something like he describes occurred. It is consistent with Mr Forde's evidence of his observations of Mr Miller's behaviour and that Ms Miller acted as a buffer. Mr Forde was very clear that he observed Mr Miller 'standing over' Mr Bendall albeit not being able to when given the passage of time since. Mr Forde further gave plausible evidence that when he observed this type of behaviour, he thought to himself that 'if ever he turned his sights on me I would leave.' He did leave after three months. While Mr Forde was not employed until January 2022 I find his evidence supports that this was the likely way Mr Miller interacted with Mr Bendall. Mr Forde was a straightforward witness who was summonsed to appear and who I accept had not talked to either party before giving his oral evidence.

[43] Accordingly, I find the incident as described by Mr Bendall on 26 February 2021 more likely than not occurred.

*6 or 7 May 2021*

[44] Mr Bendall claims a further specific incident occurred when Mr Miller was discussing with him a job about steel foundations at Mr Bendall's desk. Mr Bendall says Mr Miller stood over him, yelling and swearing at him aggressively. Mr Bendall says he retaliated by saying he would not be talked to like this. He describes it as a 'yelling match' that ended when Mr Miller stormed out of the office and was not seen by Mr Bendall for the rest of the day. After this, it is Mr Bendall's evidence that Ms Miller, who overheard this interchange, came to him and put in place that Mr Bendall was to report to her from then on. Mr Bendall gave oral evidence that Ms Miller told him Mr Miller would not communicate with Mr Bendall.

[45] Mr Miller's evidence is that he checked his diary and there is nothing regarding a meeting with Mr Bendall about steel foundations which he says Mr Bendall was not trained to do in any case. He says it is so long ago he has nothing to add, and it was not raised as a complaint at the time by Mr Bendall.

[46] As above at [42] I accept Mr Forde's straightforward evidence that supports this incident more likely than not occurred as described by Mr Bendall. It is also consistent with

Mr Miller admitting (albeit not agreeing with the reason) to Mr Bendall that the reporting lines changed away from him to Ms Miller.<sup>12</sup>

[47] I find a likelihood that the behaviour of standing over and yelling at Mr Bendall occurred as he described on the 6 or 7 May 2021.

*19 November 2021*

[48] There is reasonably consistent recall from both parties about this incident. Mr Bendall came into the staff room portacom. It is not disputed that Mr Miller, Ms Miller and Mr Brad Miller, (Mr Miller's son) were discussing Mr Bendall when he walked in on the conversation. The discussion related to a complaint from Mr Bendall's co-worker, Ms Yoko Rae who has been a witness for PC in this matter. There is a dispute as to who started the conversation but either way, I am satisfied that things almost immediately escalated.

[49] I find it likely that Mr Bendall felt aggrieved that three senior people from the family that ran the business he worked for were discussing him in relation to another employee's complaint about him in a tearoom when he walked in. I find it reasonable that if Mr Bendall had a reaction to this with saying something like 'this is bullshit', it was understandable. A reasonable employer could be expected to carry out a fair investigation about a fellow employee's complaint regarding work performance and not be having that discussion in a communal staff area. Mr Miller's approach appears to have been to then off-the-cuff tell Mr Bendall he was not performing and when Mr Bendall challenged this Mr Miller confirms he told Mr Bendall something like, 'Fuck off then if you don't like it.'

[50] Mr Miller says he apologised later. He tells me there was a lot going on for him at the time. Under cross examination, I understood him to say it was all a matter for interpretation as to his behaviour and that people swear in the construction industry. I find this admitted interchange in the context in which it likely happened to be the antithesis of what a fair and reasonable employer could do in relation to behaving towards its employees. In terms of the

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<sup>12</sup> Line 182 of the transcript of the retraction conversation.

apology, I accept Mr Bendall's evidence that he returned to his desk and had started to pack up his things but then went to Mr Miller and asked him whether he really wanted him to leave. In other words, the approach to apologise initially did not come from Mr Miller.

[51] From an employee's perspective it is difficult to see how a more unfair and distressing situation could present itself in the workplace. There is no evidence that there was any discussion about preventing such a recurrence in the future or that PC carried out a reasonable or fair investigation into any issues raised about Mr Bendall by a fellow employee. In fact, I do not understand the complaint was ever put to Mr Bendall in any clear way.

[52] Had this been a 'one off' situation, it may be explained away as such. However, there were the prior incidents outlined above and I will now consider further incidents after this.

*3 June 2021 and after about the use of two different software systems*

[53] Mr Bendall was enrolled for some industry training (paid for by PC) on using industry software. His evidence is that Mr Miller was unhappy that the training provider had suggested Mr Bendall would benefit from training on an older version (20/20). Mr Bendall says the trainer started to organise this training and Mr Bendall says,

Chris [Mr Miller] finds out and completely loses it at me yelling at me. Then continues to berate and argue with [the trainer] ... on the phone.

[54] Mr Miller's evidence about this is that he checked his diary, and that Mr Bendall was on 'refresher training' on the newer software version (Saffire) which is what PC used. He says that he had a 'robust' discussion with the trainer that he did not want him teaching Mr Bendall on the older 20/20 software. Mr Miller says he did not recall making any comment about this directly towards Mr Bendall but confirms that he was 'irritated' at the trainer and told him 'robustly' that he 'didn't want him wasting time teaching 20/20.'

[55] I agree with the submission for Mr Bendall that Mr Miller's amended statement in reply appears inconsistent with this evidence and includes that he wanted Mr Bendall to get

training on using '20/20' because an overseas contractor did not use the newer 'Saffire' version. The older version '20/20' was being used by that contractor to do trusses. I note that Mr Miller in the 18 February 2022 retraction conversation told Mr Bendall he needed the 20/20 system to be used because that is what he, Mr Miller, could 'understand'. It is Mr Bendall's evidence that a 'month or two after the above issues with the trainer, Mr Miller discovered that Mr Bendall was only doing work on 'Saffire' and not '20/20' and that he 'yelled' at Mr Bendall saying 'why the fuck are you not doing your work on MiTek 20/20 system.'

[56] I find the inconsistencies above also support Mr Bendall's evidence that 'Chris [Mr Miller] was constantly changing the goal posts and work targets on me, I never knew ... what was the right thing to do.'

[57] Again, Mr Forde's evidence is supportive as to how he observed Mr Miller behave towards Mr Bendall. He said that Mr Miller, 'was traditional, old school, got agitated, yelled, got beetroot red in the face.' Mr Forde as a new manager says he initially thought this reminded him of an older relative and that he could handle it but (as I have already referred to above) he also formed the view after observing Mr Miller's interactions with Mr Bendall that he would leave 'straight away' if Mr Miller 'ever got me in his sights.'

[58] I find a likelihood that the above occurred in the way that Mr Bendall has described.

*16 February 2022*

[59] Mr Bendall had a meeting scheduled with an overseas contractor. He says he tried to find Mr Miller and could not and therefore started the meeting without him. Mr Miller says he could easily have been found and was irritated when the meeting had started without him. Mr Bendall says Mr Miller yelled at him for going ahead without him.

[60] The meeting concluded, and Mr Bendall says there was discussion about PC not needing the overseas contractor anymore. Mr Bendall did not agree and in his oral evidence he explained that he felt he should stick up for that person and felt Mr Miller did not have all

the correct information. Ms Rae refers to Mr Bendall yelling. Mr Bendall says it was Mr Miller who was yelling. Mr Bendall says he left and got a drink of water because ‘it was getting too intense, and I was getting anxious.’

[61] Mr Bendall says when he came back to his desk Mr Miller was standing there and started yelling at him again saying another employee (Ms Rae) was doing all the work and that Mr Bendall was not pulling his weight. Later in the 18 February 2022 retraction conversation transcript Mr Miller acknowledges he did not have this correct, and that Ms Rae was not doing any work with the overseas contractor.

[62] Mr Bendall’s evidence is then that:

I felt I was cornered and that I had to defend myself, I said to Chris please leave me alone I’m done, this is too much for me. I had tried to stick up for myself. I said I can’t deal with your aggression and behaviour towards me. I’m not going to accept this. I then turned away from him [Mr Miller] and continued on with my work at my desk. I was shaking with anxiety and stress; my heart was racing I was feeling sick. Everyone in the office could overhear the conversation which increased my anxiety. No one said a thing. Present were Leon Ford [sic] and [another employee].

[63] Mr Bendall in his diary that day (which I accept was a reasonably contemporaneous record) wrote under ‘Meeting with [K, the overseas contractor]’ was ‘Bullied by Employer for about 40 minutes until being absolutely demoralised.’

[64] Mr Miller has a different take on the above, except for confirming he was irritated about the meeting starting without him. In his evidence he says he had wanted the meeting because the overseas’ contractor was not producing as much work as expected and his output was slow. His concern was a flow on affect for the company with jobs being rushed and mistakes made.

[65] After the meeting concluded, Mr Miller’s recollection is that it was he and Ms Rae and Mr Bendall who then discussed whether to still use the contractor and it was Mr Bendall who became upset and began ‘raising his voice’ and saying that ‘we did not know anything and then grabbed his drink bottle and stormed out of the office.’

[66] Mr Miller then says that:

He returned after a couple of minutes, continued to be aggressive, and would not listen to what I was trying to say. He then went to his desk and ignored me. I realised we could not sort out the issues that day, so I left the office at that point.

[67] The above shows a distinctly different viewpoint about what happened. Ms Rae's evidence was that it was Mr Bendall who yelled and not Mr Miller. I found her evidence at times vague, and I note that she had herself complained about Mr Bendall during her time at PC being I take it a complaint that was never properly investigated by PC. I have put less weight on her evidence as a result.

[68] I accept Mr Forde's evidence that he was there that day. He heard the shouting, and he says that he felt Mr Miller's behaviour was 'uncalled for' and that he was not surprised Mr Bendall resigned after this. He gave evidence that it was Mr Miller who was the aggressor. He says it is clear to him that Mr Miller was 'standing over' Mr Bendall in an 'overbearing' manner although under cross examination could not really be clear what exact day he saw this. He was however adamant that he recalled seeing Mr Miller behaving this way towards Mr Bendall when he was present at the workplace. Mr Forde said he recalled that Mr Bendall was very distressed after the incident on 16 February 2022. He recalled that Mr Bendall was visibly upset and sought reassurance from him. Mr Forde gave oral evidence that he was not at all surprised that Mr Bendall resigned after this.

[69] Standing back from the above I find it more likely than not that the incident played out as Mr Bendall has described in that it was Mr Miller's behaviour towards him that he found had a very distressing effect on him. I find it likely Mr Bendall also became upset and tried to (in his words) stick up for himself. I find it likely the situation must have been additionally distressing and humiliating when others were present but from Mr Bendall's perspective that they said or did nothing to support him (for reasons that are not clearly before me). I accept this would have added to the humiliation. Ms Miller, the likely 'buffer' in the past, had by this time resigned and left the business the month before. I did not have the benefit of hearing

from her, but Mr Forde supports that he was aware as a newly briefed manager that she had previously intervened.

*The 18 February 2022 retraction conversation*

[70] While by the time of the retraction conversation Mr Bendall had already resigned, I find the recording useful because it is the closest record I have before me to show me how Mr Miller and Mr Bendall may have interacted. This assists me to consider whether it further supports the submission that Mr Miller's behaviour towards Mr Bendall was a pattern or style of interacting.

[71] I find the manner and tone of the way Mr Miller spoke to Mr Bendall in the retraction conversation consistent with the way Mr Bendall says Mr Miller interacted with him in the above incidents. Mr Bendall comes to the office saying he wants to stay and in response Mr Miller almost immediately starts to tell him that Mr Bendall antagonises him and that he has issues with his performance and the way he questions how work is done:

OK so what's going on, cause obviously, the thing is, I'm being frank with you, because the thing is, at the end of the day, I'm not picking on you. You're antagonising me.

Mr Bendall responds with:

No you're antagonising me.

[72] I might at this point consider that this was a 'tit for tat' conversation. However, I do not find this was the nature of the conversation for the following reasons.

[73] Mr Miller's evidence is that it was Mr Bendall who first said he thought Mr Miller was antagonising him. The recording and transcript shows otherwise.

[74] What then continues in the retraction conversation is predominantly Mr Miller talking in a stream of consciousness style of speaking. His focus remained on his viewpoint about

him being the boss and having a say in what and how things were done with a focus on the 16 February 2022 meeting. He includes that Mr Bendall has only been at the workplace a short time and he has been running the business for decades. He includes that he wants to use the 20/20 system so he could understand the work being done, a system I have found above he earlier berated Mr Bendall for getting training on. This supports Mr Bendall's evidence that it was difficult to get things right for Mr Miller.

[75] Interspersed through the retraction conversation Mr Bendall can be heard trying to interject to say that his problem is with the way Mr Miller talks to him. His tone is reasonable, and he refers to needing to work with someone who he can actually 'talk to in a you know reasonable manner.' He refers to two past incidents when Mr Miller had told him to 'fuck off' if you don't like it or something to that affect. Mr Miller seems to accept this as being 'only twice' although later in his evidence says he only accepted that he second incident occurred because he did not want to get into another disagreement. Mr Miller then later ...says, 'If I'm such an ogre and you can't work with me why stay here ...'.

[76] Overall I find the retraction conversation supports a style of behaviour where Mr Miller appears not to listen or to down play and dismiss what appear to be genuine concerns from an employee about the way he was being adversely treated. In response, Mr Miller focused solely on what I accept sounds like his frustration because he wants Mr Bendall to work differently and or not to disagree with him when he says how he wants things done. Mr Miller continues to argue that the problem is Mr Bendall. He includes that Mr Bendall has 'health issues' and that,

Well, that's just what I'm saying, as I said, that's why I said why aren't we turning around and saying rightly ho we give you a certain time to find another job then if that's the case.

[77] I am satisfied that PC did not carry out an investigation about Mr Bendall's performance or some form of medical incapacity that seemed to be behind Mr Miller's comments here. Mr Bendall accepts he had stresses in his life with a new baby, mortgage for a new build and another family issue with a close relative. However, I am satisfied that his ability to cope in the workplace was affected by being on edge with the way he anticipated Mr

Miller would talk to or interact with him. Mrs Bendall gave credible evidence that supports this and that she raised this with Mr Miller in a phone conversation prior to the resignation, something that Mr Miller says he does not recall.

*Breach of good faith*

[78] I find elements of Mr Miller's behaviour could be categorised as falling within the definition of bullying set out above at [34]. It happened more than once, there was likely yelling and swearing directed at Mr Bendall and some form of 'standing over' and 'overbearing' behaviour that I do not find can be explained as just what happens in the construction industry. Based on the evidence before me, particularly Mr Forde's observations, and the manner of the 18 February 2022 retraction conversation recording I find Mr Miller's behaviour towards Mr Bendall during his employment would be regarded as unreasonable to a reasonable person. I find it was likely humiliating and intimidating and aggressive and likely caused the effect of ongoing anxiety on Mr Bendall that he describes.

[79] I find the evidence does not support it was a 'one off' type of situation where an employee felt annoyed at constructive feedback about performance. Mr Miller may say there was a difference of opinion in that Mr Bendall took issue with things Mr Miller wanted to have done in the workplace and argued about this. However, PC did nothing to address this if it was a performance issue. Instead, I find that all of the above supports that Mr Miller addressed issues he was not happy about in an off the cuff manner that left Mr Bendall likely demoralised and distressed that as he said left him 'petrified' to come into Mr Miller's office to ask him about things.

[80] It should then be evident that I find PC has breached its duty of good faith to Mr Bendall through Mr Miller's behaviour. PC did not act consistently with its duty to be active and constructive in establishing and maintaining a productive relationship in which the parties are among other things responsive and communicative. I will now consider whether PC ought to have reasonably foreseen that this breach was serious enough for Mr Bendall to resign.

*Foreseeability*

[81] While Mr Miller says that Mr Bendall did not complain about the above incidents, I find a likelihood that he did likely verbally challenge Mr Miller about the way he was being spoken to at times when this happened similar to what he tried to do in the retraction conversation. Supporting this is that I also find it likely that Ms Miller in some way ‘spoke’ with her father for some of the incidents that she was likely present for and acted as a buffer albeit apparently not preventing the situation from recurring and especially not after she left in January 2022. I accept the submission for Mr Bendall that the 18 February 2021 transcript shows that Mr Bendall tried to challenge Mr Miller about the way he had been talked to and that Mr Miller appears throughout that transcript to react by reversing this to be Mr Bendall’s fault intermixed with criticism of Mr Bendall’s performance. It has been submitted that this is a form of ‘gaslighting’ and I find some merit in that submission.

[82] I further find it unlikely that if Mr Miller had received a ‘formal’ complaint from Mr Bendall during his employment about the way he spoke and acted towards Mr Bendall, he would not likely have reacted much differently to the position taken in the 18 February 2022 discussion. It is not a stretch to see why Mr Bendall felt he could not complain to Mr Miller as the sole managing director and decision maker and the person he would need to complain to.

[83] I consider that PC in the above circumstances allowed a situation to continue and that a reasonable person in Mr Miller’s shoes ought to have foreseen his behaviour would or could have the effect on Mr Bendall that it did. At the very least I am satisfied his daughter raised issues with him soon after Mr Bendall started, and little was done to address this likely allowing incidents to continue.

[84] Accordingly, I find that Mr Bendall was constructively dismissed and there is nothing before me to show that the dismissal was justified.

**Was Mr Bendall disadvantaged during his employment due to the unjustified actions of PC through its director?**

[85] I have already traversed the same incidents claimed in relation to the disadvantage claims. As such this would seem an unnecessary repetition. I will consider below the remedies for my finding of unjustified constructive dismissal.

**Claims for breach related to the Health and Safety at Work Act 2015**

[86] I note for the sake of completion here that Mr Bendall's Amended Statement of Problem lodged on his behalf also includes that the conduct alleged and what happened are breaches of s 110A(1)(c) of the Act and s 85 of the Health and Safety at Work Act 2015. There was no further progression of this claim for Mr Bendall, and I accept the submission for PC that the reference appears to be misquoted and not applicable here. I have not considered this to frame my findings.

**Remedies**

*Compensation under s123(1)(c)(i) of the Act*

[87] It has been submitted for Mr Bendall that compensation should be awarded to reflect the serious impact on Mr Bendall.

[88] Mr Bendall provided two letters from a counsellor who I accept saw Mr Bendall close to the end of his employment and after as a result of a referral from his doctor for 'work stress.' While for PC there was a challenge about the weight of this evidence in that it was not tested beyond what was written, I find it consistent with Mrs Bendall's evidence. I found her evidence as the person closely living with Mr Bendall to be straightforward and heart felt:

I have known Stefan over 10 years, he is the kindest most caring, hardworking and stress-free person. From working at PreCut [PC] and working for Chris [Mr Miller], Stefan has become a different person,

he was now coming home full of anxiety, tearful and socially withdrawn. The working environment was really starting to affect his mental health and well-being. He was getting to the point he was worried and full of anxiety about going to work, at times he would be physically sick, as it was affecting him mentally and physically which was all new. Doctors and counsellors were now required and involved to help Stefan through.

[89] A doctor's certificate at the time that Mr Bendall resigned said he was unfit for work for three months due to 'work related stress.'

[90] I have already referred above to my finding that the behaviour particularly in front of others would have had a humiliating affect on Mr Bendall. I accept Mr Bendall had a physical reaction to the 16 February 2022 meeting as he described. I also accept Mr Bendall's likely feeling that he was as he told Mr Miller in the retraction conversation, 'petrified<sup>13</sup>' to approach Mr Miller in his office who, as Mr Forde credibly described, behaved 'unacceptably' towards Mr Bendall to the point he was not at all surprised he resigned. Mr Forde also gave evidence to confirm the distressed state Mr Bendall was in after the 16 February 2022 incident.

[91] In the above circumstances I order compensation of \$23,000.00.

#### *Lost earnings*

[92] I will now consider whether Mr Bendall should be awarded lost remuneration as a result of the personal grievance. This takes into account the loss he may have incurred after his employment ended. It is to be based on the lesser of the equivalent of three months earnings after his employment ended or the difference being calculated from what he has earned during that time.<sup>14</sup>

[93] Based on what is before me, I accept Mr Bendall was out of work for five weeks after ending his employment at PC and that he was earning \$33.00 per hour gross for 45 hours per week at PC. Three months at this rate would have been \$17,820.00 gross.

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<sup>13</sup> Transcript of the retraction conversation, line 131.

<sup>14</sup> Employment Relations Act 2000, s128.

[94] Mr Bendall puts forward that he commenced new work on 11 April 2022 on an hourly rate of \$31.25 across 40 hours per week. He worked 7 weeks with this employer equating to \$8,750.00 gross.

[95] The lesser amount (as required under s 128 of the Act) is calculated by subtracting the earnings with the subsequent employer from the three months that would have been earned at PC. I find this figure is \$9,070.00 gross. This is the amount I order to be paid for loss of earnings.

#### *Reimbursement of other earnings*

[96] Submissions for Mr Bendall appeared to add extra days for sick leave to be reimbursed for 14, 17, 21 February 2022. This is a change from the original claim for one day being 17 February 2022. I accept the evidence that Mr Bendall likely did not at the time of taking the sick days on 14 and 17 February 2022 state they were as a result of this matter. However, the 21 February 2022 day appears to be caught by the three-month medical certificate and I have found the 16 February 2022 incident formed part of the reason Mr Bendall resigned. I accept the next day taken as a day off was a likely result.

[97] Section 123(1)(b) of the Act anticipates lost earnings as a result of the grievance. I find it fair to award two of these days claimed being the 17 February and the 21 February as days that Mr Bendall ought not to have had to take off work but for the situation that formed his grievance.

[98] Mr Bendall is to be paid \$594.00 gross plus \$42.52 gross as 8% for holiday pay for these two days.

#### *Training fee reimbursement*

[99] I further accept Mr Bendall should be reimbursed for the training fee difference being \$49.49 net. Again, a reimbursement anticipated by s 123(1)(c)(ii) of the Act.

**Should any remedies awarded be reduced for blameworthy conduct by Mr Bendall?**

[100] Under s 124 of the Act I am required to consider whether Mr Bendall has contributed in some way to the grievance that would support reducing remedies awarded. I do not find anything before me to support a reduction.

**Summary of Orders**

[101] Precut Construction Limited is ordered to pay the following to Stefan Bendall within 28 days from the date of this determination:

- a. \$23,000.00 compensation;
- b. \$9,070.00 gross for loss of earnings after his employment;
- c. \$594.00 gross for two days lost as earnings due to the grievance;
- d. \$42.52 gross for holiday pay entitlement on the above at c.;
- e. \$49.49 net for reimbursement of a training fee.

**Should either party be ordered to pay a contribution towards their legal costs by the other?**

[102] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[103] If they are not able to do so and an Authority determination on costs is needed Mr Bendall may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum PC would then have 14 days to lodge any reply to memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[104] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances required an upward or downward adjustment of that tariff.<sup>15</sup>

Antoinette Baker  
Member of the Employment Relations Authority

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<sup>15</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].