

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 198
5367276

BETWEEN MATTHEW EDWARDS
Applicant

A N D BLAKELY CONSTRUCTION
LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Matthew Edwards, the applicant in person
Amanda Douglas, counsel for the respondent

Investigation meeting 13 August 2012 in Christchurch

Submissions Received Orally from Mr Edwards and in writing from
Ms Douglas at the meeting

Date of Determination: 14 September 2012

DETERMINATION OF THE AUTHORITY

- A. Blakely Construction Ltd's dismissal of Mr Matthew Edwards was unjustified.**
- B. Blakely Construction Ltd is ordered to pay Mr Edwards:**
- (i) \$4200.00 nett lost remuneration;**
 - (ii) \$84.00 for lost employer Kiwisaver contributions;**
 - (iii) Interest on lost remuneration and Kiwisaver contributions;**
 - (iv) \$71.56 reimbursement for the filing fee;**
 - (v) \$4,000.00 as compensation for humiliation, loss of dignity etc.**

Employment relationship problem

[1] Blakely Construction Ltd (Blakely) summarily dismissed Matthew Edwards on 9 December 2011 for serious misconduct arising out of two incidents on 7 December 2011.

[2] Mr Edwards says that the dismissal was both substantively unjustified and procedurally unfair. He also alleges that he was unjustifiably disadvantaged during his employment by being set up by his workmates (the Bower Avenue incident).

[3] Mr Edwards seeks reimbursement of lost wages of \$4200.00 nett, reimbursement of the application fee of \$71.56, compensation for lost training opportunities, lost employer Kiwisaver contributions and compensation (\$15000.00) for humiliation, loss of dignity and injury to his feelings.

[4] Mr Edwards sought a number of remedies in his Statement of Problem, and supplementary documents amending it, that were filed before the investigation meeting. At the investigation meeting I told him that even if I found his claims of unjustified disadvantage and dismissal proved I was unable to order:

- a written apology from the company; or
- any reimbursement to his partner, Danielle Mack, for money she gave him as financial support; or
- reimbursement of any money spent on seeing his doctor; or
- loss of dividends or interest not earned on money not invested as a result of his dismissal¹; or
- reimbursement of \$4900.00 he withdrew from his Kiwisaver account because of his period of unemployment.

These remedies are not within my jurisdiction.

[5] At the investigation meeting Mr Edwards raised the following new claims:

- reimbursement for showers he paid for while living in his car at a caravan park;

¹ Although under clause 11 of Schedule 2 of the Employment Relations Act 2000 I am able to award interest at my discretion on any money I order paid.

- reimbursement for petrol he purchased to relocate to Richmond/Tasman for apple picking work; and
- reimbursement for the cost of a counselling session; and
- a claim of harassment arising out of a letter written by the respondent.

I told Mr Edwards I was unable to consider these new claims because he made them for the first time at the investigation meeting. In addition he is seeking some remedies that I cannot award.

[6] At the investigation meeting I heard evidence from Mr Edwards. For Blakely I heard evidence from Mr Carl Hart and Mr Ivan McPhail. The parties also produced a number of relevant documents which I have had regard to. All of the material evidence has been closely considered by me, although it may not be specifically referred to in this determination.

Background facts

[7] On 26 July 2011 Mr Edwards was employed by Blakely as a driver/demolition labourer specifically to assist the company with demolition of earthquake affected buildings and site clearances.

[8] Clause 18 of Mr Edwards' individual employment agreement headed "Rules and Job Descriptions" lists a number of policies that all employees are bound by, including *BCL House Rules*.

[9] On 7 December 2011 Mr Edwards was working at a demolition site in High Street within the Christchurch CBD "red zone". Mr Edwards was supervised that day by Eric Brown, a builder, and Carl Hart, the demolition foreman. Kevin Miller was working with Mr Brown and Mr Edwards and a truck driver, called Keith, was on site. There were two incidents, one reported by each supervisor; the 'floor incident' and the 'leaving the site incident'.

[10] At the hearing Mr Edwards and Mr McPhail, Blakely's Operations Manager, and Mr Hart stated that Blakely considers health and safety to be paramount.

[11] On 9 December 2011 at the disciplinary meeting Mr McPhail heard Mr Edwards' views on both incidents and decided to summarily dismiss him. Mr McPhail considered that Mr Edwards' behaviour had been in breach of the following House Rules:

6. *Failure to comply with Safety requirements which include:*
 - a) *Carrying out any action or inaction which may cause injury to yourself, another person or public....*
9. *Refusal to perform work assigned and/or walking off the job without authority. ...*
12. *Refusal to carry out lawful and reasonable instructions.*

Issues

[12] The issues for investigation and determination by the Authority are:

(i) Whether a fair and reasonable employer **could** have dismissed Mr Edwards for serious misconduct in all the circumstances at the time. This includes an inquiry into whether there was serious misconduct; and

(ii) Whether the investigation and decision making process undertaken by Blakely's was fair. That includes a consideration of whether the allegation made by Mr Edwards about being *set up* on the Bower Avenue site was sufficiently investigated and considered; and

(iii) If Mr Edwards is found to have a personal grievance for the dismissal or to have been unjustifiably disadvantaged, what remedies should be awarded considering:

- (a) whether he should be awarded lost wages and compensation for hurt and humiliation; and
- (b) whether any remedies awarded to Mr Edwards should be reduced for blameworthy conduct by him contributing to the situation giving rise to his grievance; and

(iv) Whether costs should be awarded to either party, depending on the outcome.

The floor incident

[13] It is clear from Mr Edwards' statement of problem that immediately before the 'floor incident' on 7 December 2011 Mr Brown was already somewhat annoyed and exasperated with Mr Edwards for not turning on a generator downstairs to operate the circular saw.

[14] Mr Brown and Mr Miller were cutting out the first floor of a building, to allow the wood to be salvaged. Mr Edwards was aware that they had already been cutting the floor boards.

[15] Mr Edwards' affirmed evidence at the meeting was that he walked upstairs and saw Mr Brown and Mr Miller standing on the floor against a wall. The circular saw that they had been using to cut the boards was on the floor near the wall at right angles to where the other two men were standing. Mr Edwards walked *into the open floor* towards a sledgehammer lying on the floor which he intended to pick up *to tidy up*. He was about to pick it up when Mr Brown yelled "*Get off there*".

[16] I set out a part of Mr Brown's written statement below. Mr McPhail relied on Mr Brown's oral account of the floor incident when he conducted the disciplinary meeting. Although Mr McPhail did not have a copy of this statement at the disciplinary meeting he confirmed to me that he knew what Mr Brown alleged because he had spoken to him as part of the investigation:

Mathew (sic) had already started walking towards me with an armload of demolition timber when I told him to get off the section of flooring, as I felt that it had become unstable. He ignored me and kept coming. I then told him three more times, in a voice rising in volume to "get off the flooring section", but was further ignored. I finally yelled "get off the fucking floor" at which time he approached me and, with his face less than 300mm from mine, said to me "what the fuck is wrong with you? Did you get out of the wrong side of bed this morning or something?" This tirade went on for fully two minutes.

At this stage he was still standing on the floor. I WAS STANDING ON A SOLID STEEL BEAM. ...

It was myself who went downstairs before Mathew (sic), as I had decided to report this incident to Carl, as Carl has worked for Blakelys longer than I have and I hold him senior to myself.

I was shaken by the ordeal and felt I needed reassuring.

At this time Carl and myself surveyed the problem area and came to the conclusion that "a wall section and an area of the roof structure should be removed before we were to go back to that area".

[17] Mr Edwards went outside and also spoke to Mr Hart. Mr Hart asked him what had happened and Mr Edwards gave his view of the incident. Mr Edwards worked outside for the rest of the afternoon.

‘Leaving the site’ incident

[18] After the ‘floor incident’ Mr Hart and Mr Brown agreed that a further section of the building would have to be removed *before anyone else could enter the building*. Mr Hart went up to the first floor and spoke to Mr Brown, Mr Miller and Keith and told them that:

they could go home and that Matthew could do the dust suppression while I used the digger to do the demolition. Matthew was not with us.

[19] Not long after that Keith, Mr Brown, Mr Miller and Mr Hart walked downstairs. Mr Hart told Keith that he could take the truck load away. Keith left. Mr Hart repeated to Mr Brown and Mr Miller that *they could go*. It is at this point that Mr Hart’s evidence is in sharp contrast to Mr Edward’s evidence. However, they both agree that Mr Brown and Mr Miller began walking towards their vehicles to leave for the day.

[20] Mr Edwards’ evidence is that he was *standing in close proximity* to the others outside when Mr Hart said *OK I guess that’s it I’ll see you guys tomorrow*. Mr Edwards took that to mean that Mr Hart had told them all that they were able to go home for the day. He walked towards his car and drove off.

[21] Mr Hart’s statement prepared in December 2011 reads:

I had no further work for Eric and Kevin so I said that they could leave for the day. I identified them by name and I don’t even remember Matt being present when I told them. I also knew that the driver (Keith) had a load to take back to the yard and that he would be leaving at the time.

[22] Mr Brown’s written statement reads:

We were all gathered to check with Carl on what was happening. Carl said “Eric and Kevin, you may as well go, Matt you can stay on with me”

[23] Mr Hart's December statement goes on to say:

I carried on demolishing the building façade to make it safe for the evening when I realised that Matt was not around. Although I had seen everyone leave the immediate area of demolition, my first thought was that he had returned inside for some reason. ...

I immediately began looking for him around the building and had real concerns that I could have buried him. When I couldn't find him I went looking for his car and found that it was not there. ...

Staff working on any Blakely site know that it's a company house rule that you do not leave the site without the direction or knowledge of the foreman

...

[24] Mr Hart telephoned Mr McPhail about his concern about Mr Edwards' whereabouts before he discovered that Mr Edwards' car was also gone. Mr Hart reprimanded Mr Edwards the next morning and told him that he had not given him permission to leave.

The investigation and the disciplinary process

[25] It is unclear whether Mr Brown reported the floor incident to Mr McPhail, or whether Mr Hart did. In any event, Mr McPhail characterised both 7 December incidents as breaches of health and safety provisions and House Rules and started an investigation. He involved Paul Bradshaw, who is the Demolitions Manager, in the investigation and in the disciplinary meeting. Mr McPhail spoke to Mr Hart and to Mr Brown.

[26] Mr Bradshaw also spoke to Mr Hart and Mr Brown about the incidents. Mr McPhail asked Mr Bradshaw to get the two foremen to put their concerns in writing. Their written statements were not available to Mr McPhail before he called the disciplinary meeting.

[27] Mr McPhail did not speak to Mr Miller or Keith about the 7 December incidents. They were not asked to provide statements.

[28] Mr McPhail informed Woody Blakely, the *owner* of the company about the complaints about Mr Edwards. His evidence was that he did so just *for his information*.

[29] On the afternoon of 8 December Mr McPhail asked Mr Edwards to attend a meeting the next morning.

[30] Mr Edwards' evidence was when he was invited to the meeting he asked Mr McPhail whether it was about *good things or bad things*. Mr McPhail responded *some good, some bad*.

[31] Mr McPhail offered Mr Edwards the opportunity to bring a support person. Mr Edwards wrote in his statement of problem that he declined to bring a support person:

...as I had no idea that possible "Summary Dismissal" was impending. If I had, I would have definitely requested a support person attend.

[32] The general allegations about Mr Edwards' conduct in the incidents on 7 December were put to him. However, I note that in contrast to what Mr McPhail told Mr Edwards the previous day no *good things* were raised by Mr McPhail in the meeting.

[33] There are 'Minutes of the disciplinary meeting'. However, Mr Edwards does not accept that they are accurate. Mr McPhail told me that the minutes were from hand-written notes Mr Bradshaw made at the meeting. Mr McPhail first saw the minutes when they had been typed up *on the Monday*, which was 12 December 2011. He thinks they are *pretty accurate*. However, I note that none of Mr Edwards' explanations about either the 'floor incident' or the 'leaving the site incident' are recorded in the minutes. Mr McPhail agreed that Mr Edwards did offer explanations. I am unable to conclude that the minutes of the meeting are an accurate record.

[34] Mr McPhail reported Mr Edwards as saying:

... he didn't hear Eric or didn't understand so kept walking over the floor. He said Eric swore and cursed at him. He also said that he was part of the group that Carl told to go home and he would have stayed on to work that day but no-one told him to.

[35] At the disciplinary meeting Mr Edwards raised an event which happened on 5 December 2011 at the Bower Avenue site in which he felt that he was *set up* by other employees, including Duncan Taylor, the foreman, to get into trouble with Mr Blakely. He alleged that he was told by another labourer that Mr Blakely had asked for him to go near the digger, being driven by Mr Blakely, to pick up a piece of copper pipe. In fact, Mr Blakely had never asked for that so when Mr Edwards

approached the digger Mr Blakely became extremely angry and abusive because of what he considered Mr Edwards' unsafe behaviour. Mr Edwards believed that his workmates had set up the situation and were laughing at him getting told off.

[36] Mr McPhail did not investigate this allegation before making the decision to dismiss Mr Edwards. He considered it *not relevant* to the incidents he was considering.

[37] Mr Edwards' evidence was that Mr McPhail said *a lot of guys want* (which I am satisfied is meant to read "won't") *work with you*. Mr McPhail's evidence was that he told Mr Edwards at the meeting that in the two incidents on 7 December 2011:

... and more occasions Matthew has failed to follow instructions given to him by his Foreman.

[38] Mr McPhail then told Mr Edwards that the two 7 December incidents involved safety risks for him and others on the site. Mr McPhail said that:

After weighing everything up, I took the view that the incidents were so serious and the ongoing risk was so great that Matthew's employment should come to an end. So, at the end of the meeting, I told Matthew that I had no alternative but to dismiss him for the breach of the company's House Rules.

Mr McPhail made the decision himself without consulting Mr Bradshaw or Mr Blakely.

Determination

Could a fair and reasonable employer have dismissed Mr Edwards for serious misconduct in all the circumstances at the time?

[39] Section 103A of the Employment Relations Act 2000 (the Act) sets out the tests by which I need to decide whether an action affecting the employee or a dismissal is justifiable:

(1) 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 applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[40] In *Angus v Ports of Auckland Ltd*² the Full Court of the Employment Court set out the effect of the then newly enacted test:

The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances. If the employer's decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[41] I note that Mr Edwards had never had a formal warning prior to the disciplinary meeting and had not been told about any complaints about his work, his attitude to work or breaching any health and safety provisions before the disciplinary meeting on 9 December 2011.

[42] The House Rules state that an employee's failure to observe the rules listed in Part 1 *may result in instant dismissal*. It is clear from the use of the word "may" as opposed to "will" the Blakely House Rules contemplate that even in the case of serious misconduct summary dismissal will not always be the outcome.

[43] In addition, work rules themselves are not determinative of whether a breach of them will justify dismissal. The Employment Court has held that instead the Authority should look at the conduct:

*... not in isolation but in its bearing upon the employment, keeping in mind that the duty of trust and confidence is owed as much by the employer to the employee as the other way around. It precludes employers from relying on clever wording to turn ordinary misbehaviour capable of attracting some minor discipline into a dismissible offence.*³

[44] **'The floor incident'** - Mr Edwards certainly behaved improperly and disrespectfully to Mr Brown, his supervisor, in shouting at him and making the

² [2011] NZEmpCa 160, at paragraph 23.

³ *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553 at 569.

comments about the *wrong side of the bed* and that he didn't *have wings* in relation to the floor incident. However, if that was the first instance of that kind of behaviour it could not reasonably form the basis of a reason to dismiss him. In any event, that aspect of his behaviour does not appear to have been considered by Mr McPhail when making the decision to dismiss Mr Edwards.

[45] For there to have been serious misconduct able to give rise to instant dismissal I need to be satisfied that a fair and reasonable employer could have formed the conclusion that Mr Edwards refused to carry out lawful and reasonable instructions. There is no doubt that it was lawful of Mr Brown to instruct Mr Edwards to get off the floor, or the flooring section. It was also reasonable that Mr Brown should direct Mr Edwards to get off the unsafe section of floor.

[46] Mr Edwards told Mr McPhail at the investigation meeting that he *didn't hear or didn't understand* what he was being instructed to do. Mr Brown's evidence does not say that he told Mr Edwards that the floor was unsafe and that he should stop where he was or walk back to the stairs, if that was what he intended Mr Edwards to do. Mr Edwards did not fail to act or follow a lawful and reasonable instruction. He acted; albeit slowly, and in a different way than Mr Brown intended. I do not consider that a fair and reasonable employer could dismiss someone for an action or inaction undertaken by an employee who did not understand what he was being instructed to do. I understand that Mr McPhail's decision to dismiss Mr Edwards was probably based on the combined incidents. However, in relation to the floor incident alone I do not consider that a fair and reasonable employer could have found that Mr Edwards' behaviour was serious misconduct.

[47] **'Leaving the site'** – Mr McPhail interpreted Mr Edwards walking to his car and going home when other workers did as a *refusal to perform work assigned and/or walking off the job without authority*.

[48] Mr Edwards had not been told by Mr Hart that he would be required to stay while the others were free to leave. The Oxford Online Dictionary defines 'assigned' as being "allocated to "or appointed to". At the time Mr Edwards left the site the job of operating the water hose had not been *assigned* to him. He could not have been *refusing to perform work assigned* if he did not know that was expected of him.

[49] There is more substance in what Mr McPhail interpreted as Mr Edwards *walking off the job without authority*. In the light of Mr Hart's evidence that it was general Blakely site practice that no staff could leave *without the direction or knowledge of the foreman* the question is what a fair and reasonable employer could have concluded had happened. Mr McPhail had spoken to Mr Brown and Mr Hart both of whose evidence was that Mr Hart identified by name those who could leave the site and he did not specifically tell Mr Edwards that he could go. That was contrary to Mr Edwards' evidence and it was reasonable to prefer the 'two against one' weight of the evidence.

[50] There was an element of assumption in Mr Edwards' conclusion that he was able to leave along with the other three when he noticed that they had been released and began walking towards their vehicles.

[51] A fair and reasonable employer could have concluded that Mr Edwards' behaviour amounted to serious misconduct.

Was the process of investigation and decision-making fair?

[52] Section 103A(3) is also sets out a number of matters to consider in deciding whether the dismissal was justified or not. However, I note that those considerations were already part of a proper inquiry into fairness prior to 1 April 2011.

(3) In applying the test in subsection (2), the Authority or the court must consider—

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

- (5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

Taking into account the respondent's resources were the allegations sufficiently investigated?

[53] Ms Douglas submitted that a full and fair investigation was undertaken by Blakely. She submitted that the respondent is *not a large company* and at the time was dealing with *a significant number of demolitions arising from the Canterbury earthquakes*.

[54] I consider that a full investigation into the 7 December incidents would have been one in which Mr Miller's views, as an observer of the 'floor incident' and as being present at the 'leaving the site' incident, were sought. I consider that his evidence would have been more objective than that of Mr Brown, Mr Hart and Mr Edwards.

[55] In addition having already sought written statements from Mr Hart and Mr Brown the investigation was not fully complete until those statements were available. Otherwise, I wonder why they were sought. Waiting for those written statements and seeking Mr Miller's views was more a matter of taking more time rather than having to use further or greater resources. If Mr McPhail considered that the investigation and disciplinary process needed to happen quickly because of a concern about Mr Edwards' safety and reliability in the workplace he could have, for example, assigned Mr Edwards to other work with fewer safety considerations or suspended him on full pay while the investigation took place.

[56] I consider that the respondent had the resources to carry out a full investigation but that it did not make its inquiry wide enough, and did not wait until it had completed the investigation it had started to make a decision on what disciplinary action, if any, Mr Edwards should face.

Did the employer raise its concerns with Mr Edwards before making the decision to dismiss him?

And was Mr Edwards given a reasonable opportunity to respond to the allegations before being dismissed?

[57] Mr McPhail told Mr Edwards that he knew of other occasions when Mr Edwards allegedly did not follow instructions. He did not give Mr Edwards any detail of those occasions and did not tell him who had complained about him. Mr McPhail told me that Mr Taylor had told him that on some occasions *Matthew was walking around the site picking up bits and pieces when he should have been working*. However, prior to and even at the meeting on 9 December 2011 Mr McPhail did not tell Mr Edwards that Mr Taylor had raised any issues with him.

[58] Mr McPhail said that he *didn't necessarily take into account the other 'occasions'* that Mr Taylor had raised when making his decision to dismiss Mr Edwards. I do not accept that. The fact that he raised the fact that a third foreman, Mr Taylor, had complained about Mr Edwards' alleged work failings means that issue was in Mr McPhail's mind when he considered what disciplinary action to take.

[59] Mr Edwards said he *was given a good opportunity to respond and did respond*. However, he was only able to respond to the allegations of the two incidents on 7 December 2011. He was unable to respond to the other *occasions* Mr McPhail raised because he was given no details of them and no time to formulate a considered response.

Did the respondent genuinely consider Mr Edwards' explanation in relation to the allegations against him before dismissing him?

[60] Mr McPhail's evidence was that he considered Mr Edwards' explanation but made the decision to dismiss *at the end of the meeting* without considering any other kind of lesser disciplinary action because he considered that Mr Edwards' actions were *in serious breach of the health and safety and company rules*.

[61] Mr McPhail said to me that before and during the meeting with Mr Edwards he did not consider any kind of disciplinary action less than dismissal *because of the serious nature of the incidents*.

[62] The minutes of the disciplinary meeting record that it *was clearly not the case* that Mr Edwards had been *set up* at Bower Avenue. It is puzzling how the respondent came to that view at the meeting when it had not investigated that allegation at the time the notes were taken.

[63] I am left with the impression that Mr McPhail did not genuinely consider Mr Edwards' explanations. Genuine consideration of Mr Edwards' explanations weighed up against Mr Brown and Mr Hart's allegations may have required adjourning the meeting to think about Mr Edwards' explanation before making a disciplinary decision, or could have meant putting Mr Edwards' explanations to Mr Hart and Mr Brown for their further views.

[64] A genuine and open-minded consideration of Mr Edward's explanations would also have required Mr McPhail to consider whether any disciplinary action less than dismissal could have been appropriate. I find that Mr McPhail did not genuinely consider Mr Edwards' explanations before making his decision to dismiss and had a pre-determined view that Mr Edwards had committed serious misconduct which should result in instant dismissal.

Were the defects in the process minor? Was Mr Edwards treated fairly despite the defects?

[65] The process of investigation and decision-making were unfair to Mr Edwards for all the reasons given above. The following defects were not minor:

- Mr Edwards did not know in advance that the meeting could result in summary dismissal;
- Mr Edwards was not offered the opportunity to bring a support person to the meeting.
- The investigation was not full and fair;
- Not all of the respondent's concerns about Mr Edwards' work were put to him and so he had no opportunity to respond to them;

- The respondent did not genuinely consider Mr Edwards' explanation before deciding to dismiss him.

Therefore I conclude that the decision to summarily dismiss Mr Edwards was not justifiable.

Was Mr Edwards' unjustifiably disadvantaged in his employment by the incident at Bower Avenue?

[66] Mr Edwards' claim about being set up by his colleagues on the Bower Avenue site should have been investigated by the respondent before making a decision to dismiss him. However, any disadvantage to him in his employment has been overshadowed by his dismissal, which I have found was unjustified.

Was there any blameworthy conduct by Mr Edwards contributing to his dismissal which should reduce the remedies?

[67] Given that I have decided that Mr Edwards does have a personal grievance for unjustified dismissal I have a duty to consider the extent to which Mr Edwards' actions contributed to the situation that gave rise to his dismissal⁴. If I consider that Mr Edwards exhibited any blameworthy conduct connected to his dismissal I must reduce any remedies accordingly.

[68] 'Floor incident' - I do not consider that Mr Edwards' actions contributed in any blameworthy way to the situation that led to his dismissal. I do not consider that Mr Edwards refused to carry out a lawful and reasonable instruction, when the instruction was not clear to him and he did not know why he had to get off the flooring section. Given his understanding at the time it was reasonable for him to move towards where Mr Brown and Mr Miller were standing.

[69] 'Leaving the site incident' – Mr Edwards' evidence was that when he heard Mr Hart telling the staff near him that they could go *common sense would dictate that he was addressing all of us*. I consider it more likely that Mr Hart addressed Mr Brown, Mr Miller and Keith by their names. I accept Mr Hart's evidence that he needed Mr Edwards to assist him with some more work and never told him that he could leave too. I also find it more likely than not that Mr Edwards was aware that he

⁴ Section 124 of the Act.

could not leave the site without specifically informing the foreman, in this case Mr Hart, that he intended to do so, and simply assumed that he had been allowed to go home when he had not. I conclude that Mr Edwards' behaviour in assuming he could leave the site warrants a reduction of 20 % in the remedies that I award below.

Remedies

Loss of training opportunities

[70] Mr Edwards wanted compensation for loss of potential training opportunities that he may have benefitted from if he had remained employed by the respondent. In principle if Mr Edwards had a reasonable expectation of a specific benefit or benefits from planned training, as opposed to the loss of a hope of further training a remedy may have been available. However, there was no evidence given of the loss of any specific training opportunity.

Lost wages

[71] Under section 128(2) of the Act Mr Edwards is entitled to be paid the lesser of a sum equal to remuneration actually lost or 3 months' time ordinary remuneration. However, Mr Edwards specifically claimed lost wages of \$4200.00 nett.

[72] Mr Edwards' evidence was that he tried to get other civil construction work after he was dismissed. He also looked for horticultural, or 'land' work. Ms Douglas submitted that if Mr Edwards had tried to mitigate his loss he would have been able to, in Mr McPhail's words, *find another job immediately*.

[73] Mr Edwards did get some temporary work in early 2012 and then moved to the Tasman/Richmond area to carry out apple picking.

[74] I am satisfied that Mr Edwards made reasonable attempts to mitigate his loss by seeking new work in the civil construction area. I accept his evidence that he applied for a couple of jobs on-line and rang some employment agencies. He was told to call them back in the New Year. I accept his evidence that it was more difficult than Mr McPhail believes to secure other civil construction labouring or driving work before Christmas 2011.

[75] Mr Edwards also gave evidence that due to the dismissal his confidence was diminished and he felt more comfortable seeking horticultural work.

[76] Prior to his dismissal Mr Edwards worked for Blakely for 18 weeks for an average of 47.45 hours per week. At the time of his dismissal his hourly rate was \$19.50. Therefore, his average weekly pay was \$925.27. Three months ordinary time remuneration would be \$925.27 per week x 13 weeks to 9 March 2012; a sum of \$12028.51 gross.

[77] Mr Edwards has claimed \$4200.00 nett in lost wages. I am satisfied that his lost remuneration was actually somewhat higher than that once his earnings from apple picking and Pacific Rose Nurseries are taken into account. Normally I would award lost remuneration as a gross amount. However, allowing for the fact that I need reduce the remedy by 20% I am satisfied that \$4200.00 nett is a fair amount of reimbursement for lost income.

Kiwisaver

[78] The respondent contributed 2% of Mr Edwards' gross wages to his Kiwisaver scheme. Under section 123(1)(c)(ii) of the Act I am able to order that Mr Edwards be paid for the loss of a benefit. I consider the payment of the employer's Kiwisaver contribution to have been a benefit which Mr Edwards would reasonably have expected to continue to gain if he had not been unjustifiably dismissed. Therefore, he should also be paid 2% of \$4200.00 which is \$84.00. In light of the fact that the reimbursement on which I have calculated the 2% has already been reduced by 20% I do not need to reduce the \$84.00.

Compensation for humiliation, loss of dignity and injury to feelings

[79] Section 123(1)(c)(i) of the Act allows me to order compensation to an employee for humiliation, loss of dignity and injury to his feelings.

[80] Mr Edwards' evidence was that the dismissal was *pretty shocking and upsetting – like a sledgehammer to the back of my head* and that he was *pretty gutted and pretty upset*. He said it was a bad time of year to lose his job and meant he was unable to buy Christmas presents for his daughter or his partner. His evidence is

supported by a letter from a counsellor who he consulted in January 2012 and a copy of a letter from his GP supporting an application for a sickness benefit because of physical symptoms caused by *recent stressful events at work*.

[81] Mr Edwards described being prescribed Ativan medication *to calm me down* and sleeping pills.

[82] I consider that Mr Edwards did suffer distress as a direct result of his unjustified dismissal. Mr Edwards should be compensated \$5,000.00 for humiliation and injury to his feelings. That is reduced by 20% to be \$4,000.00.

Interest

[83] I consider that Mr Edwards is entitled to interest on the amount of lost wages and Kiwisaver contributions from the date of this determination to the date of payment of the amounts ordered at the prescribed rate of 5% per annum⁵.

Filing fee

[84] The respondent must pay Mr Edwards the cost of the filing fee of \$71.56.

Costs

[85] Mr Edwards was self-represented so it is unlikely that he needs to make a claim for his legal costs. However, if he incurred some legal costs which he wishes to claim he should make an application for costs within 28 days of receiving this determination. The respondent will then have a further 14 days in which to respond.

Christine Hickey
Member of the Employment Relations Authority

⁵ The Authority has the power to award interest pursuant to clause 11 of the Second Schedule of the Act at the rate prescribed by the Judicature Act 1908.