

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 508
5466542

BETWEEN DAVID ELDER
 Applicant

A N D PHILIP KING
 RESTORATIONS LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: David Flaws, Advocate for the Applicant
 Philip King, Advocate for the Respondent

Investigation Meeting: 21 October 2014 at Auckland

Date of Determination: 9 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Elder) alleges that he was unjustifiably dismissed and unjustifiably disadvantaged in his employment with the respondent (Philip King Restorations). Those claims are resisted by Philip King Restorations.

[2] Mr Elder was employed by Philip King Restorations as a furniture polisher and had 14 years' service in the business. Mr King was effectively Mr Elder's boss.

[3] Both parties agree that the workplace was a "*robust*" one in the sense that bad language was, to use Mr Elder's phrase, "*part of the deal*".

[4] According to Mr Elder, there have been a number of previous issues where various people (including Mr King) have abused Mr Elder and Mr Elder also maintained in his evidence that he was bullied and suffered threats from other workers, none of which were dealt with appropriately by the employer, according to

Mr Elder. Mr Elder denied ever initiating any of these matters; on his evidence, he was always the victim.

[5] Mr King denied any knowledge of the bullying allegation, denied that it had ever been brought to his attention, denied any lack of control of the employees, and contended that Mr Elder was the initiator of any unpleasantness in the workplace and not the victim of it. He said that the workplace was now a much happier place, without Mr Elder present.

[6] On Wednesday, 22 January 2014, Mr Elder was given instructions by Mr King to visit a client at her home to assess a particular job. Mr King gave Mr Elder directions but Mr Elder got lost.

[7] As a consequence, Mr Elder returned to the workplace later than was originally planned. Mr King had intended that Mr Elder would assist him with another client on Mr Elder's return but on Mr Elder's return (later than anticipated), Mr Elder insisted upon having his lunch break which he had missed as a consequence of attending to the initial client visit.

[8] This meant that Mr King was unable to have the assistance of Mr Elder with the second job which caused tension between the two men and resulted in Mr King having to ask another employee who was due to finish early to assist him instead.

[9] There is dispute between the two men about whether Mr Elder ought to have taken his break when he did; Mr Elder's evidence (which is disputed by Mr King) is that Philip King Restorations was very rigid about when breaks were taken and the requirement was that they be taken only at the designated time. Mr King says that claim is simply nonsense.

[10] As a consequence of this whole episode, Mr King gave Mr Elder a letter which I shall refer to throughout this determination as the first warning letter. The first warning letter contains some general observations about Mr Elder's alleged behaviour deficits and concludes with the suggestion that Mr Elder might want to think about his future in the business.

[11] Mr Elder responded to this letter by a letter of his own dated 23 January 2014 confirming that he wished to continue working for Mr King and maintaining that he had "*always gone the extra mile*".

[12] Matters did not improve in the short term because on 26 January 2014, Mr King issued Mr Elder with another letter (which I shall refer to as the second warning letter). Again, this letter is general in tone and in allegation but essentially, as well as complaining about Mr Elder's general attitude, the second warning letter made broad allegations about Mr Elder's sloppy workmanship and intimated that in future, repairs to that workmanship (Mr King calls them "*redos*") would be funded by Mr Elder and not by the firm. A written response from Mr Elder was demanded.

[13] Instead, Mr Elder sought a meeting and while the terms of that meeting are in dispute, it does seem clear that there was an argument about whether Mr Elder had ever received a copy of his employment agreement or not. Mr Elder maintained that when he was employed, he was given an employment agreement to review, that he reviewed it, signed it, and returned it but was never given a copy back.

[14] That claim is not supported by the evidence; the Authority has on its file a note from Ms Judy King, Mr King's former wife, who was involved in the business when the employment agreements were being provided to staff and who is very clear that Mr Elder received his employment agreement when everybody else did.

[15] In any event, that meeting is not of any particular significance in the scheme of things; based on the evidence of the only independent person (another staff member, Ms Annie St Clare), the meeting was inconclusive.

[16] Ms St Clare also gave me evidence that she remembers Mr King signing Mr Elder's employment agreement after the 29 January meeting between Mr King and Mr Elder but Mr King indicates that that was simply a copy of the employment agreement and, as I have already indicated, the evidence is that Mr Elder had a copy of the original agreement given to him at the time.

[17] There was a further meeting between the parties on 4 February 2014 which culminated in Mr Elder's dismissal. That meeting was attended by Ms St Clare as well as the two principal protagonists. She had no wish to be there and was anxious about being involved at all in the dispute between Mr Elder and the employer. However, she was asked to take notes of the meeting and was in no position to refuse to obey a lawful instruction.

[18] This meeting occurred because of an insistence by Mr Elder that there be a formal discussion when he was directed to apply a top coat to a particular piece of

furniture without an undercoat. Mr Elder questioned that instruction on the footing that he thought an undercoat was required and he went to the trouble of ringing the manufacturer's representative to try and get further information about that.

[19] It is clear from the notes of the meeting that Mr King commenced the meeting by indicating that he had already given Mr Elder two written warnings and now there was a further instance where Mr Elder was, to use the language recorded in the notes, being "*obstructive towards the manager [Mr King] and refusing to listen to the manager's instruction*".

[20] It is apparent that the meeting was unpleasant and that both parties were agitated.

[21] Mr Elder says that Mr King was so close to him that Mr Elder was spat on and Mr King maintains that Mr Elder assaulted him. The notes of the meeting are clear that there was an assault. There are issues though about whether it was a technical assault and whether it happened sufficiently proximate to the decision to dismiss to be the operative reason for the dismissal.

[22] Certainly, Mr Elder was dismissed for serious misconduct at the end of the meeting. He subsequently sought a written statement of the reasons for the dismissal and this was provided by Mr King dated 25 February 2014. That document identifies the reasons for the dismissal under two broad heads.

[23] The first is what Mr King calls "*blatant and ongoing breaches of your employment contract*" and he gives four examples of this that occurred on 4 February, noting that the business had previously given Mr Elder two written warnings barely a week beforehand.

[24] The second broad basis for the dismissal was the:

... complete breakdown in respect for me as your employer, making it virtually impossible to continue to employ you – frequent disrespectful and abusive outbursts; often appearing utterly contemptuous of my instructions and/or advice; increasing examples of poor workmanship, leading to costly returns for "redos"; belligerent and insolent comments such as "what are you going to do about it?" and "stuff off" when called to account for such occurrences.

[25] A personal grievance was promptly raised by Mr Elder after the dismissal and the matter proceeded to the Authority in the usual way.

Issues

[26] It will be convenient if I assess whether Mr Elder has suffered a disadvantage as a consequence of unjustifiable actions of the employer and further whether Mr Elder was unjustifiably dismissed from his employment.

[27] Accordingly, I propose to address the following questions:

- (a) Was Mr Elder subjected to disadvantage as a consequence of unjustifiable actions; and
- (b) Was Mr Elder unjustifiably dismissed?

Was Mr Elder subjected to unjustified disadvantage?

[28] Mr Elder's claim for a personal grievance on the basis of disadvantage rests on his complaints about the written warnings given to him by Philip King Restorations on 22 and 26 January 2014.

[29] The essence of what Mr Elder says through his able advocate, Mr Flaws, is that both those written warnings were so defective as to fail to achieve their objective of being a proper written warning, and moreover, to create the legal elements of disadvantage.

[30] Certainly it is apparent that the warnings are not written either by a lawyer or by a human resources practitioner. They are written by a small business owner who is intelligent and literate but who is not expert in matters to do with employment law.

[31] It is a truism that I am required to take account of the circumstances of the employer in assessing whether the employer's conduct meets the standard required by the law.

[32] This is a very small business, providing a specialist service, and employing literally a handful of people, not all of them full time employees.

[33] Mr King, the principal of the business, is not even a full time manager; he is a tradesman who works in the business but seeks to manage the business as well.

[34] It is also apparent to me on the evidence I heard that the business has insufficient income to justify any significant expenditure on obtaining legal or employment law advice. When this matter was first on foot, Philip King Restorations engaged a firm of lawyers with experienced employment practitioners within it but it subsequently dispensed with the services of that firm, not it seems because it was dissatisfied with the service but simply because it could not be afforded.

[35] In those circumstances, I would be failing in my duty if I applied the same standard to Philip King Restorations' warning letters as I might apply to either a large corporate with an in-house human resources department or a business which is able to afford and does in fact obtain proper employment law advice.

[36] Having said all that, I accept without reservation the point that Mr Flaws makes in his able submissions that the warning letters are not as explicit as they might be about the specific concerns that Philip King Restorations has about the behaviour of Mr Elder. But I am not satisfied that those letters fail entirely to convey an appropriate message.

[37] I am satisfied that any reasonable reader of the letters would apprehend that there was a serious problem in the relationship between the parties such that, at worst, a sensible recipient of those letters would be motivated to seek further and better particulars.

[38] The context is important also. Both parties seem to accept that the employment relationship had been, at best, rocky over the last short period. Mr Elder talks about various difficulties in the workplace, all of which, on his evidence, are directed at him, and all of which, on his evidence, he is innocent of having any responsibility for.

[39] Based on the evidence that he gave at my investigation meeting, I have to say I do not accept that evidence at face value. I think it inconceivable that Mr Elder is not at least partly to blame for at least some of the matters that he now complains about. I formed that view because that is consistent with the other evidence that I heard. I refer to evidence from Mr King and the evidence of Ms St Clare.

[40] Both Mr King and Ms St Clare thought that Mr Elder's behaviour was frequently part of the problem.

[41] I do not mean to imply that I regard Mr King as being blameless in the exchanges between employer and employee. What I found difficult to believe was Mr Elder's contention that he was innocent of any wrongdoing and that everybody else was to blame.

[42] He talked of bullying in the workplace and being threatened with violence by other staff but with one exception, Mr King was simply unaware of these other events. On the issue of bullying for example, there is no point whatever in claiming to an Authority Member that you have been bullied in the workplace if the Authority's investigation meeting is the first occasion when the employer is confronted with that allegation.

[43] Mr King's evidence also speaks of difficulties in the employment relationship and a deteriorating relationship between himself and Mr Elder. Mr King speaks loosely in his evidence of there being previous warnings and I must presume that these were verbal because there is no evidence before me of any documentation pertaining to that.

[44] But there is evidence before me of a deteriorating employment relationship between Mr King and Mr Elder and while these two warning letters are not as precisely expressed as they ought to have been, they are nonetheless evidence of a growing rift between the principal protagonists, which I am satisfied a reasonable recipient of the letters would have wanted to address.

[45] Mr Flaws is also right to complain about Philip King Restorations' reference in both letters to the question whether Mr Elder wanted to continue working in the business. That question may seem an innocent one to a lay person, but in the employment law context, it carries the implication that the writer would rather have the recipient leave the employment than remain, thereby raising the spectre of a potential sending away.

[46] The thrust of Mr Elder's complaints about these two letters appears to be that their general tone was threatening and that there was insufficient material of a specific nature for him to be able to respond. That, it is said, constitutes the unjustifiable disadvantage.

[47] I have not been persuaded by that argument despite the clarity of the submissions. I agree that the warning letters are not perfect, particularly in the respect

that they do not, with sufficient particularity, identify exactly what it is that the employer complains about.

[48] But I do not accept the observation about the tone of the letters; I think the tone of the letters simply reflects the nature of the workplace which, as Mr Elder himself observed in his evidence, was “*robust*”. Given the nature of the way that language was used in this workplace, and its size, I think the tone of the letters simply mirrors the way that the principal protagonists would address each other face-to-face. In the context of a deteriorating employment relationship which even on Mr Elder’s own evidence was “*volatile*”, I have not been persuaded that these letters are inappropriate in the circumstances and I do not accept the submission that they are a result of unjustified actions of the employer causing the employee disadvantage.

[49] Even if, properly construed, the letters could not be regarded as the best examples of their type and therefore constitute a breach of the employer’s obligations to not commit unjustified actions, it is difficult to see how the letters could be a disadvantage to Mr Elder. This is because, on any construction of the matter, an employee needs to know that he has gone so far as to place his employment in such jeopardy that his employer has issued him with two written warnings within a space of a handful of days.

[50] I am not satisfied then that Mr Elder has suffered an unjustified disadvantage as a consequence of these two warning letters, notwithstanding my acceptance of the claim made for Mr Elder, that these letters are not perfect examples of their type.

Was Mr Elder unjustifiably dismissed?

[51] I have not been persuaded either that Mr Elder has been unjustifiably dismissed. The focus of much of the discussion between the parties after the dismissal was whether, and to what extent, Mr Elder was dismissed from his employment for allegedly assaulting Mr King in the meeting on 4 February 2014. I am satisfied on the evidence I heard that Mr Elder did assault Mr King but it was in the nature of a technical assault where the two men effectively bumped their fronts together.

[52] That said, I am satisfied that Mr Elder, on the evidence as I heard it, was the person who initiated the bumped fronts. The area in which the two men had their meeting, which I physically inspected, was very small, and physical contact between

the two men, while not inevitable, was certainly more likely to occur than would have been the case if the meeting had taken place in a larger venue.

[53] It is also relevant to the assault matter to note Mr Flaws' point, again from his excellent submissions, that the assault happened, as he put it in his cross-examination in the investigation meeting, on p.2 of the notes of the meeting, and the dismissal did not take place until p.4 of the notes.

[54] All of that is true as far as it goes but the basis on which Mr Elder was dismissed, according to the letter Mr Elder requested from his employer, was first, ongoing breaches of the employment agreement and second, a breakdown in trust and confidence between the parties. The assault is mentioned only as one of the breaches of the employment agreement and not even the first, but the last.

[55] In my opinion, based on the evidence that I heard, a fair and reasonable employer in the position that Philip King Restorations was in and with the resources that that small employer had, could have concluded that Mr Elder was guilty of serious misconduct by virtue of the escalating difficulties in the relationship, the apparent inability of the parties to continue to have a working relationship, to continue having respect for each other, and to continue to work together as a team for the benefit of this very small business.

[56] The dismissal occurred at the end of a period of heightened tension between the parties evidenced by the two written warnings which I have already addressed, Mr Elder's description of his relationship with Mr King as volatile, and Mr King's evidence that Mr Elder was abusive towards him, unwilling to take direction, and unwilling to deal with his occasional bouts of untradesmanlike work.

[57] The 4 February 2014 meeting began with a discussion about that untradesmanlike work where the parties argued about who should pay for the effect of Mr Elder's failure to produce a quality product and the need for that work to be done again.

[58] Mr Elder complained that Mr King was effectively asking him to fund what Mr King refers to throughout his evidence as "*redos*", but Mr King's evidence to the Authority (which I accept), was that that question was just rhetorical. Mr King was simply trying to make the point to Mr Elder that every time Mr Elder failed in his tradesmanship, there were financial consequences for the business.

[59] I do not accept Mr Elder's claim that the dismissal was completely without process nor his attempt to characterise this as reliant upon the assault in the final meeting. The dismissal took place within the context of two written warnings shortly before the dismissal, and the disintegrating relationship between Mr Elder and Mr King which the evidence of both parties amply demonstrates. Mr King says that the dismissal was caused by a number of breaches of the employment agreement (of which the assault was just one), and the "*complete breakdown*" of the relationship.

[60] In a small business environment where the resources available to a larger employer are simply not present, it is difficult to see what else Philip King Restorations could have done in that situation. Its evidence is that Mr Elder was truculent and aggressive, would not accept direction from the employer and was simply dismissive of the employer's attempts to get him to address his deficiencies.

[61] On the evidence I heard there was a complete breakdown of the employment relationship. Certainly, it would have been preferable for the employer to have adjourned the final meeting, reflected on where the parties had got to, given a preliminary view about the conclusion of the employer, but in a small business environment with an already poisonous personal relationship, those niceties may simply not be available.

[62] In the alternative, if I have been too generous in the allowances I have made for Philip King Restorations, I must be clear that even if I were persuaded that the decision to dismiss summarily was so mistaken as to not comply with the law, and therefore ground Mr Elder's personal grievance, Mr Elder's behaviour was such as to justify a conclusion that significant contribution would have applied, potentially to the extent of 100%.

[63] The evidence before the Authority is that Mr Elder had become increasingly challenging to manage, that he knew best and was unable or unwilling to take direction, that the employment relationship was, in his own words, "*volatile*". Furthermore, as I have already made clear earlier in this determination, I found his evidence that he was innocent of any wrongdoing in the relationship totally unconvincing.

[64] This is a case where credibility is very much in issue. Despite the able efforts of his advocate to advance his case as attractively as he could, I had difficulty

accepting Mr Elder's evidence that he was never in the wrong in the employment relationship. Given the background of hostility and difficulty between Mr Elder and Mr King (amply played out again in my investigation meeting), I found it simply inconceivable that Mr Elder could not have had something to do with the deteriorating relationship and yet his evidence was that it was all someone else's responsibility.

[65] While his behaviour after dismissal cannot be used as evidence to justify the dismissal, it does go to credibility and Mr Elder's display of temper after the dismissal was disgraceful. He deliberately smashed two fans in the workplace after the 4 February 2014 meeting, one immediately after the meeting and one some time later.

[66] That display of bad temper seems to me to support the evidence for the employer that at the very least, Mr Elder had something to do with the deteriorating employment relationship.

Determination

[67] I have not been persuaded, despite the efforts of Mr Elder's able advocate, that Mr Elder has any personal grievance.

Costs

[68] Philip King Restorations acted for itself in this matter but did seek legal advice as part of the disciplinary process. If Philip King Restorations wishes to seek a contribution to its costs in successfully defending this matter, it should initially consult with Mr Elder through his advocate, Mr Flaws, to see if some arrangement can be made for Mr Elder to make a contribution to its costs.

[69] If Philip King Restorations wants a contribution to its costs from Mr Elder and the parties are unable to agree that contribution, Philip King Restorations must make a formal written submission to me to have me fix costs and when it produces that submission, it should send a copy to Mr Flaws as well as to the Authority. Mr Flaws will then have 14 days from receipt of that document to file his submission in response and I will deal with the matter on the papers.

