



but I prefer the evidence of Mr Riach and I accept that it is probable that a trial period was agreed to. I also accept Mr Riach's evidence that on several occasions he was asked by Mr Flower as to whether permanent employment would be offered, and that Mr Riach's response was that any decision to offer permanent employment would have to be made by Mr Edwards.

[3] On Friday, 24<sup>th</sup> July 2009, due to a workplace accident, and consistent with the Company's policy, a number of employees participated in a drug test. The evidence of Mr Riach is that the drug test for Mr Flower was negative and upon becoming aware of this, Mr Flower conveyed to Mr Riach that this was "*good*" and then Mr Flower enquired if he would be; "*alright for permanent employment?*" Mr Riach attests that he informed Mr Flower that the matter of permanent employment would be for Mr Edwards to decide and that Mr Flower would need to talk to him. Mr Flower then indicated that he wished to have a meeting with Mr Edwards. Mr Riach says that he arranged for a meeting to take place (with Mr Edwards) on Monday, 27<sup>th</sup> July 2009.

[4] The evidence of Mr Flower is somewhat different. He says that he was told by Mr Riach, that he, and Mr Edwards, wished to meet with Mr Flower on Monday, 27<sup>th</sup> July to discuss; "*my employment with me.*" However, I accept the evidence of Mr Riach, that it was Mr Flower who asked to meet with Mr Edwards to discuss the possibility of permanent employment, given that the trial period of one month had elapsed.

[5] There is also a substantial conflict in the evidence as to what happened on Monday, 27<sup>th</sup> July. Mr Flower says that because Mr Edwards was "*busy*" he only met with Mr Riach. The evidence of Mr Flower is that Mr Riach approached him and: "*told me that there was not a permanent position being offered to me.*" Mr Flower says that Mr Riach told him that: "*some of the guys did not like me.*" The further evidence of Mr Flower is that: "*I was told to go then and there. I did not have a chance to work out a notice period.*"

[6] Conversely, the evidence of Mr Riach is that on 27<sup>th</sup> July, he met up with Mr Flower in the Company car park before the pre-arranged meeting with Mr Edwards. Mr Riach says that Mr Edwards was also present in the car park but Mr Riach and Mr Flower had to wait for Mr Edwards to finish a discussion with another person. Mr Riach attests that while he and Mr Flower were waiting for Mr Edwards to be

available, he asked Mr Flower how he thought things were going. Upon Mr Flower responding that he thought things were “*alright*,” Mr Riach says that he informed Mr Flower that: “*there had been some issues on site and the crew that you have been working with have had some concerns about your level of ability in the field.*” Mr Riach says that Mr Flower then said that he felt that he didn’t; “*want to work here any more.*” To which Mr Riach responded: “*I’m not firing you.*” The evidence of Mr Riach is that he anticipated that he and Mr Flower would meet with Mr Edwards but he observed that Mr Flower; “*seemed to be thinking about things and then said: “Can you manage without me?”* Upon Mr Riach responding that the Company could manage, Mr Flower said: “*that he would like to finish now. We shook hands and Craig [Mr Flower] said that he would drop off his safety gear later in the day.*”

[7] Mr Riach attests that when Mr Edwards finished his discussion with the other person, Mr Edwards could see that Mr Flower was leaving the site and enquired as to what was happening. Mr Riach says that he informed Mr Edwards that Mr Flower had decided he didn’t want to work for the Company any more and would not be meeting with Mr Edwards.

### **Analysis and Conclusions**

[8] The primary question to be determined is: Was Mr Flower dismissed or did he resign on an amicable basis?

[9] Because of the substantial conflict in regard to the critical facts pertaining to the departure of Mr Flower from his employment, I am required to weigh the evidence of Mr Flower and Mr Riach and make findings regarding overall credibility. Overall, I have found the evidence of Mr Riach to be more reliable than that of Mr Flower. The contrast in the evidence of Mr Riach compared with that of Mr Flower, is particularly stark in regard to their respective accounts regarding a “near miss” incident, involving a pedestrian, which occurred on 16<sup>th</sup> July 2009. Mr Flower denies that there was an incident. But the evidence of Mr Riach, as corroborated by an email (16<sup>th</sup> July 2009) from the foreman, Mr Martin Kerley, to Mr Riach and Mr Edwards, is that there was an incident and Mr Flower failed to take the required preventative action. The further evidence is that Mr Flower was spoken about this matter and there was a “big improvement” the following day.<sup>1</sup>

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<sup>1</sup> Recorded in another email from Mr Kerley dated 17<sup>th</sup> July 2009.

**Determination**

[10] Having weighed the overall evidence of Mr Flower and Mr Riach, I find that Mr Riach's version of events in regard to the termination of Mr Flower's employment on 27<sup>th</sup> July 2009 is more reliable. I find that Mr Flower resigned from his employment on that day, of his own free will. It follows that I find that Mr Flower was not dismissed at all and he does not have a personal grievance.

**Costs**

[11] Costs are reserved. The parties are invited to resolve the matter of costs if they can. In the event they cannot, the Respondent has 28 days from the date of this determination to file and serve submissions with the Authority. The Applicant has a further 14 days to file and serve submissions.

**K J Anderson**  
**Member of the Employment Relations Authority**