

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 189/08
5128924

BETWEEN BRENDON GALLAGHER
Applicant

AND INTERIOR DRYWALL
SYSTEMS LIMITED
Respondent

Member of Authority: James Crichton
Representatives: David Goldwater, Counsel for Applicant
Wayne Kerr, Counsel for Respondent
Investigation Meeting: 12 November and 5 December 2008 at Christchurch
Determination: 12 December 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Gallagher) alleges that he was unjustifiably dismissed, suffered a disadvantage by way of an unjustified action and a breach of good faith in respect of his employment with the respondent (Interior Drywall Systems Limited). Interior Drywall Systems Limited resists those claims except to the extent that there is an acknowledgment that there was no completed employment agreement between the parties.

[2] Mr Gallagher was employed as a plasterer by Interior Drywall Systems Limited from March to May 2008. He was, by all accounts, an excellent tradesman and had previously been employed by another entity in which Interior Drywall Systems Limited's governing director was previously involved.

[3] Interior Drywall Systems Limited alleges that the previous employment between its governing director and Mr Gallagher had been marred by Mr Gallagher's

unsatisfactory timekeeping and that before Mr Gallagher was employed on this occasion, assurances were sought that those timekeeping issues had been overcome.

[4] Interior Drywall Systems Limited's governing director, Mr Reuben, became concerned about Mr Gallagher's timekeeping again during the employment with Interior Drywall Systems Limited. Mr Reuben's evidence is that he asked his foreman to give Mr Gallagher a verbal warning about timekeeping and he himself gave a general warning to all of Interior Drywall Systems Limited's staff about timekeeping issues.

[5] Mr Reuben says that he intended to follow those matters up with a written warning to Mr Gallagher which he drafted and prepared.

[6] However, before he was able to issue that written warning, he says that he became aware of Mr Gallagher having *intimidated* other staff and it is his evidence that he sought to arrange a meeting with Mr Gallagher to discuss this latest issue but when Mr Gallagher did not attend, a further letter (this one of dismissal) was prepared and eventually sent to Mr Gallagher. In the meantime, there had been a telephone discussion during which Mr Reuben had indicated to Mr Gallagher that he was dismissed.

[7] A personal grievance was raised on Mr Gallagher's behalf by letter dated 12 June 2008. The parties attended mediation but were unable to resolve their differences.

Issues

[8] I am satisfied that the Authority needs to consider the following issues:

- (a) Was there a problem with Mr Gallagher's timekeeping?
- (b) Did Mr Gallagher intimidate his workmates?
- (c) Was the dismissal process fair?
- (d) Is there a personal grievance in consequence?

Was there a problem with Mr Gallagher's timekeeping?

[9] I am satisfied that Mr Gallagher's timekeeping has not been as precise as it ought to have been. Mr Moir, who was one of Interior Drywall Systems Limited's supervisors, gave evidence at my investigation meeting that Mr Gallagher had had four or five days' sick leave over the three month period he was employed together with 17 early finishes.

[10] Mr Gallagher disputed the second figure (the 17 early finishes), and gave evidence that since he travelled to and from work in Mr Moir's car, he was at a loss to know how Mr Moir could contend that he was finishing early on that number of occasions because Mr Gallagher said he would have had no way of getting home even if it were true that he was finishing early.

[11] Conversely, Mr Moir referred to his diary which he said he used to maintain a contemporaneous written record of employment issues. Indeed, one might say that precisely because Mr Moir was responsible for taking Mr Gallagher to and from work, he would have had a better idea than most if Mr Gallagher was finishing early.

[12] The evidence I heard suggested that Mr Gallagher would occasionally ask his partner to collect him early although the evidence before the Authority in that regard related to when Mr Gallagher was ill.

[13] I found both Mr Gallagher and Mr Moir straightforward and honest in their approach to giving evidence before the Authority and, on this occasion, I prefer Mr Moir's recollection of events simply because he maintained a record of the absences and because of the system that Interior Drywall Systems Limited operated in respect of timekeeping.

[14] That system involved each of the supervisors being responsible for the men under their control and the hours that those men worked. On a daily basis, there would be telephone communication between the supervisor and Mr Reuben with the supervisor being responsible for telling Mr Reuben what hours were actually worked by each worker.

[15] Mr Reuben would then enter that information into the firm's computer system so that the men could be paid accurately and jobs could be correctly costed.

[16] Given that Mr Reuben's evidence was that he became increasingly anxious about Mr Gallagher's timekeeping, and Mr Reuben himself was not physically on the job on a regular basis, the only source of that intelligence, given the system I have just described, was the information provided by the foreman, Mr Moir.

[17] Mr Moir had no reason to falsify that information and, based on the interaction between Mr Moir and Mr Gallagher at the investigation meeting, their relationship appeared to be a sound one.

[18] On balance then, my considered view is that Mr Gallagher's timekeeping was not as tidy as it might have been and that Mr Reuben was right to be concerned about it and to start trying to take steps to address it. Clearly, as I have already noted, Mr Gallagher was an excellent tradesman and Mr Reuben's default position was to keep Mr Gallagher in employment but address this timekeeping deficiency.

Was Mr Gallagher intimidating coworkers?

[19] The reason the written warning about timekeeping was overwhelmed by a subsequent conviction only a dismissal would suffice, was because Mr Reuben became convinced that Mr Gallagher was intimidating coworkers about his early finishes.

[20] In effect, what is alleged is that Mr Gallagher would leave the job early and would, by threats, persuade coworkers to lie for him.

[21] In pursuit of that particular allegation, I asked questions of Mr Moir, the supervisor, and of another former coworker, Mr Levi Maxwell, who I spoke to by telephone because he is now located in Wellington.

[22] Mr Moir said unequivocally that he *never had a problem with him [Mr Gallagher] myself* and went on to say *I never saw him intimidate anyone just the guys said they were intimidated by him.*

[23] Mr Maxwell said something very similar. He said *he didn't personally intimidate me at all. He did ask us to cover for him when he left early.* However, Mr Maxwell went on to make this comment: *Dave Cooper [another coworker] told me that Brendon [Mr Gallagher] would get me if I didn't agree.*

[24] Not surprisingly, Mr Maxwell said that he was concerned at this intelligence, but he agreed that he was not working for Interior Drywall Systems Limited when Mr Cooper is alleged to have told him that, and he agreed with me that Mr Cooper might well have been being simply mischievous.

[25] Mr Maxwell made a complaint to Mr Reuben, the manager of Interior Drywall Systems Limited, about being asked to cover for Mr Gallagher and I am absolutely satisfied that that complaint was the proximate cause of the decision by Mr Reuben to dismiss Mr Gallagher.

[26] A record of the discussion between Mr Reuben and Mr Maxwell is before the Authority in evidence and essentially it records that Mr Maxwell told Mr Reuben that Mr Gallagher had asked them (presumably Mr Maxwell and others) to cover for him if he left the site early. On the particular occasion that Mr Maxwell appears to be referring to, the implication from the notes is that Mr Gallagher left an hour before he wished it to be recorded that he left.

[27] All of this evidence simply reinforces my conclusion that Mr Gallagher's timekeeping was poor, but I am not persuaded that anything I heard entitled the employer to reach the conclusion that Mr Gallagher was intimidating anybody. Neither of the witnesses presented by the employer on this point said they were personally intimidated by Mr Gallagher himself and only Mr Maxwell was able to point to an incident where he was told by a third party that Mr Gallagher would *get him* if he did not cooperate.

[28] That third party (Mr Cooper) was not available for the Authority to question but, in any event, Mr Gallagher's evidence (which on this point I accept) was that Mr Cooper had no basis for saying that, because Mr Gallagher had barely ever spoken to Mr Cooper.

[29] I think this is probably a reasonable example of the old adage about *giving a dog a bad name*. Mr Gallagher is a heavily tattooed man with apparently a reasonably lively recent personal history and while I found his evidence straightforward and believable, I can understand that workmates may have felt somewhat alarmed by Mr Gallagher's appearance and recent associations.

[30] Nonetheless, I am not satisfied that there is any evidence of intimidation before me and even the suggestion that Mr Maxwell claimed Mr Gallagher asked him to cover for him is hotly denied by Mr Gallagher who said that he did no such thing.

[31] On balance then, even if Mr Gallagher did ask workmates to cover for him (as is alleged), I am satisfied that Mr Gallagher did not personally intimidate anybody and I am equally satisfied that Mr Gallagher did not ask Mr Cooper to convey any intelligence in that regard either. If Mr Cooper said something on which other workers relied, that cannot be Mr Gallagher's fault unless he has personally activated that, and I am satisfied he did not.

Was there a fair process?

[32] The evidence is very clear that, while the employer was in the process of dealing with the poor timekeeping issue, Mr Reuben was confronted with an incident report from Mr Maxwell relating to alleged intimidation, upon which Mr Reuben determined to act. Having written a letter of warning in relation to the poor timekeeping, he then wrote a subsequent letter of dismissal relating to the alleged intimidation. However, neither of those letters were received by Mr Gallagher until after he had been dismissed in a phone conversation between the two men on 26 May 2008.

[33] I am absolutely satisfied that this is an unfair process and that Mr Gallagher has, in consequence, a personal grievance by reason of having been unjustifiably dismissed.

[34] The sequence of events leading up to the dismissal begins with a bout of flu which Mr Gallagher contracted in the week immediately prior to his dismissal. His evidence was that he started to feel unwell on Sunday, 18 May 2008, but nonetheless continued work during the early part of the following week. On Wednesday, 21 May 2008, Mr Gallagher went home early because he was so unwell. The following day, despite continuing to feel unwell, he returned to work simply because he needed the income.

[35] The following day, Friday, 23 May 2008, Mr Gallagher's evidence is that he rang his foreman, Mr Moir, to say that he was too ill to attend work and he asked Mr Moir to convey that intelligence to Mr Reuben.

[36] When he was giving his evidence, I asked Mr Moir whether he remembered that telephone call and whether he had in fact passed on the message to Mr Reuben who had denied receiving any such message when he gave his evidence. Mr Moir agreed that he might have had such a message from Mr Gallagher, but that he had no recollection of receiving it nor any recollection of passing it on to Mr Reuben.

[37] This issue is important because Mr Reuben's evidence is that this very day (Friday, 23 May 2008), was the day that he had summoned Mr Gallagher to a meeting to discuss his timekeeping. Mr Reuben gave evidence that he had prepared a draft warning letter on Thursday, 22 May 2008 but that he actually typed it on Friday, 23 May 2008. His evidence (which I accept) was that he kept ringing Mr Gallagher that day to get him to come in for a meeting so that he could give him the verbal warning about the timekeeping problem. Mr Gallagher, of course, was sick that day and I am satisfied that Mr Reuben never got the message about that piece of information so his expectation that Mr Gallagher would be available to him that day, because he would be at work, was simply wrong but that was no fault of Mr Reuben.

[38] Mr Reuben was quite clear that the purpose of the proposed meeting on Friday, 23 May 2008 was exclusively to deal with the timekeeping issue. He did not know about the alleged intimidation until 3pm or thereabouts on that afternoon, but he was trying to arrange the meeting with Mr Gallagher well before that time.

[39] In the result, what happened was that, having prepared one warning letter, and having failed to hand it over personally to Mr Gallagher at the proposed meeting on 23 May 2008, Mr Reuben was then confronted with further and different allegations about Mr Gallagher, namely the intimidation allegation, and he got that information at around 3pm on the same day, Friday, 23 May 2008.

[40] No doubt frustrated by his inability to talk directly to Mr Gallagher, and unaware that Mr Gallagher was in fact ill, Mr Reuben then proceeded to write a letter of dismissal just as soon as the discussion with Mr Maxwell finished.

[41] Mr Reuben's evidence is that he took both letters home with him that night and got a person experienced in human resources to look over them. He was intending to send them the following week, but there was confusion about where it was exactly that Mr Gallagher lived. He had given one address when he was employed but was being collected by Mr Moir from another address. Obviously that

issue needed to be clarified and while that was happening, there was a telephone discussion between Mr Reuben and Mr Gallagher on Monday, 26 May 2008 in which Mr Reuben told Mr Gallagher that Mr Gallagher no longer had a position.

[42] Clearly, the decision to dismiss is unsafe and cannot stand. Mr Reuben made the decision in the heat of the moment and without taking any steps to inquire into the truth or otherwise of the allegations made against Mr Gallagher, he implemented the decision to dismiss by a telephone call to Mr Gallagher in which he simply advised that Mr Gallagher was dismissed and gave Mr Gallagher no opportunity whatever to answer questions or comment in any way on the allegation being made.

[43] Then, subsequent to the actual dismissal and a day apart, Mr Gallagher received in the mail first the letter of warning concerning the poor timekeeping and second the letter confirming the dismissal. Naturally, Mr Gallagher was dubious about the dates on those communications as they were so much earlier than the date of receipt in each case.

[44] However, the explanation for the delay in sending the letter is, as I have already indicated, simply a function of Interior Drywall Systems Limited's inability to be sure exactly where to send the letters and the difference in the dates of those two letters correctly reflects the different days on which the two letters were written by Mr Reuben.

[45] The point is that the dismissal is completely unfair, Mr Gallagher having had no opportunity to respond to the allegations made, no opportunity to put things right, no opportunity to seek advice or guidance and, indeed, no opportunity whatever to influence the employer to take a different approach to the problem that had arisen.

[46] It follows that the process adopted by Mr Reuben was completely unfair and bereft of any proper process.

Does Mr Gallagher have a personal grievance?

[47] I am satisfied Mr Gallagher has demonstrated that he has a personal grievance by reason of having been unjustifiably dismissed. I am also satisfied that there has been a breach of the statutory obligation to provide a written employment agreement, but I am not satisfied that Mr Gallagher has been the victim of a breach of good faith.

[48] In that connection, I think Mr Reuben did his very best to behave honourably and decently throughout, but that he simply got the process wrong and I am satisfied that, despite his experience in his trade, he is not particularly experienced at human resources and, frankly, this dismissal demonstrates that amply.

[49] Mr Gallagher also claims that Interior Drywall Systems Limited disadvantaged him by an unjustified action or series of actions, particularly in respect of the failure to provide a written employment agreement and the consequences that allegedly flowed from that.

[50] I agree that there has been a failure to provide a written employment agreement and that that is a breach of the statutory obligation, but I am not satisfied that the other grounds relied upon by Mr Gallagher are made out. I prefer to treat the matter as an unjustified dismissal (plainly it is), and to deal with it in that context. I do not think any other negative consequences flow from the failure to provide an agreed written employment agreement.

Determination

[51] Mr Gallagher has satisfied me that he has a personal grievance by reason of having suffered an unjustified dismissal and the consequences of that dismissal are, I am satisfied, plain from the evidence before the Authority. It follows that Mr Gallagher is entitled to remedies.

[52] Before considering remedies, however, I must consider the question of contribution and, in the present case, I must conclude that Mr Gallagher's actions materially contributed to the situation giving rise to the personal grievance.

[53] In saying that, I need to be clear that I have not concluded, for the purposes of contribution, that Mr Gallagher is guilty of intimidating coworkers. I am satisfied on the evidence before me that that claim is simply not made out.

[54] While it is true that the dismissal was in fact for intimidation, I think it proper for me to take into account the inadequacies I have found in respect of Mr Gallagher's timekeeping. In my opinion, his failures in that regard led inexorably to the ultimate dismissal, even although the poor timekeeping was not itself a ground for the dismissal.

[55] In my opinion, in the present case, it is fair to find that Mr Gallagher's actions in failing to adequately account for his time, materially *contributed towards the situation that gave rise to the personal grievance*, to use the express words of the statute.

[56] I consider that Mr Gallagher contributed to that situation to the tune of one third, or 33.3%, and the remedies which I allow are all rebated to that extent.

[57] To address the personal grievance, I direct that Interior Drywall Systems Limited Systems Limited is to pay to Mr Gallagher the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,000;
- (b) Lost wages of four weeks' average earnings to be quantified and agreed by the representatives.

Costs

[58] A *Calderbank* offer was filed and served by Mr Gallagher on Interior Drywall Systems Limited in the sum of \$4,000, such sum being in full settlement of issues of compensation and costs.

[59] Mr Gallagher seeks costs to be fixed based on the daily tariff at the equivalent of two half days. Interior Drywall Systems Limited, on the other hand, seeks to have costs lie where they fall.

[60] The usual rule is that costs follow the event. There is no particular reason to depart from that principle in the present case. Mr Gallagher has been successful. He is entitled to a contribution to his costs.

[61] There was nothing particularly out of the ordinary about the way that the case was conducted and there were no decisions taken by counsel which materially added to the costs of the investigation. There is nothing then which, in my judgment, ought to discourage the Authority from considering this matter on the basis of the daily tariff. A daily tariff calculation for a matter such as this might be in the region of perhaps \$2,000.

[62] The *Calderbank* offer does not come into play given my decision; that offer was made on the day after mediation, long before the parties engaged in the

preparation for the investigation meeting and accordingly, although it is expressed to be for both compensation and costs, it can only be deemed to include costs exposure up to the date that the offer was made.

[63] It follows that a costs award in all the circumstances of \$2,000 is, I consider, appropriate.

[64] Interior Drywall Systems Limited Systems Limited is directed to pay to Mr Gallagher the sum of \$2,000 as a contribution to his legal costs.

James Crichton
Member of the Employment Relations Authority