

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 204  
5332257

BETWEEN

DION HIRA  
Applicant

A N D

BARFOOTE HOLDINGS  
LIMITED  
Respondent

Member of Authority: Rachel Larmer

Representatives: David Flaws, Advocate for Applicant  
Murray Broadbelt, Advocate for Respondent

Investigation Meeting: 19 April 2013 at Whangarei

Submissions Received: 1 May 2013 from Applicant  
7 May 2013 from Respondent  
8 May 2013 from Applicant

Date of Determination: 21 May 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. Barfoote Holdings Limited unjustifiably dismissed Mr Dion Hira. It is ordered to pay him:**
- (a) Eight weeks' ordinary time remuneration; and**
  - (b) \$5,500 distress compensation.**

**Employment relationship problem**

[1] In July 2009 Barfoote Holdings Limited (Barfoote) employed Mr Hira as a Concrete Technician. On Saturday 24 April 2010 Mr Hira approached his supervisor (the Precast Foreman, Mr Steve Bilski) and asked for another crew member to be allocated to assist Mr Hira with the job he was doing.

[2] Mr Bilski was busy pouring concrete at the time and did not believe Mr Hira needed another person to assist him. Mr Bilski also had some pre-existing issues

regarding previous attempts to accommodate Mr Hira's work preferences. Mr Hira's request angered Mr Bilski so he told Mr Hira to "*fuck off*" and "*get back to your fucking job*".

[3] Mr Hira found Mr Bilski's tone and attitude abusive and demeaning. Mr Hira also says he felt humiliated and ashamed to be spoken to like that by his boss in front of his work mates. Mr Hira says he wanted to hit Mr Bilski but instead decided to go home and cool off because he was too upset to continue working.

[4] Mr Hira drove his car up to his work locker, used bolt cutters to cut the padlock and removed his tools and belongings before leaving his shift early. When Mr Bilski saw Mr Hira leaving he told him to clock out.

[5] At the end of the shift Mr Bilski rang the then General Manager Mr Robert Malone and the Managing Director (and owner) Mr Trevor Barfoote and told them Mr Hira had "*stormed off*" his Saturday shift.

[6] Mr Hira went into work the next working day which was Monday 26 April and spoke to Mr Malone. There was a conflict about whether Mr Hira turned up at 8am or around 1pm and over what was discussed. However the upshot of that meeting was Mr Hira returned home.

[7] Mr Malone wrote to Mr Hira a letter dated 27 April which Mr Hira received the next day. Mr Malone's letter claims Mr Hira swore at the Precast Foreman and walked off the job which was viewed by the employer as serious misconduct "*and to this end, your employment has been terminated effective immediately*".

[8] Mr Hira claims that he was unjustifiably disadvantaged in his employment because:

- a. He was suspended on 26 April when he was sent home without a fair process being followed and for no good reason;
- b. His final pay was withheld until 18 June 2010; and
- c. His employer did not communicate with him in good faith from 26 April onwards.

[9] Mr Hira also claims he was unjustifiably dismissed either when he was not allowed to return to work on 26 April, or alternatively when he received Mr Malone's letter on 28 April 2010.

[10] Barfoote denies unjustifiably disadvantaging or dismissing Mr Hira. It says his employment ended when he walked off the job on 24 April, which it considers was a resignation without notice. Barfoote says the reference in Mr Malone's letter of 28 April to termination for serious misconduct was a mistake and it could not have dismissed Mr Hira because his employment had already ended.

[11] Barfoote says it was entitled to withhold Mr Hira's final pay because he did not give the two weeks' notice he was required to under his individual employment agreement.

[12] Barfoote says it could not have unjustifiably disadvantaged Mr Hira on 26 April or have breached its good faith obligations from 26 April onwards because the employment relationship had already ended by then.

### **Issues**

[13] The following issues are to be determined:

- a. Factual findings on material conflicts in the evidence.
- b. Was Mr Hira disadvantaged in his employment?
- c. If so, was that disadvantage justified?
- d. Was Mr Hira dismissed?
- e. If so, was dismissal justified?
- f. If Mr Hira establishes his personal grievance claims, what if any remedies should be awarded?

### **Factual findings on material conflicts in the evidence**

[14] Conflicts in the evidence are to be resolved by the Authority on the balance of probabilities.

[15] I consider it more likely Mr Hira turned up at work on Monday around 8am instead of 1pm. I have preferred Mr Hira's evidence because it is corroborated by his wife who saw him leave dressed and ready for work. Mr Malone was also confused when giving his evidence about a number of matters.<sup>1</sup>

[16] Although Mr Hira was also at times confused about the timing of some of the matters he spoke about the meeting on Monday was of the utmost importance to him and his family's wellbeing so I consider his recall of details is likely to be more reliable than Mr Malone's. Mr Malone left Barfoote's employ three months after Mr Hira did so, apart from preparing a witness statement, he has not had to consider these matters since then.

[17] In terms of what was discussed Mr Malone says Mr Hira "*sought clarification of his pay*" which Mr Malone took to be a request by Mr Hira for his final pay. Mr Hira says he did not ask for his final pay because he had no intention of quitting, he wanted the problem sorted out so he could get back to work. Mr Hira says he had his tools in the car and was dressed for work.

[18] I consider it likely that when they met on Monday Mr Hira told Mr Malone what had happened on Saturday and asked him to get Mr Bilski up to the office to sort things out. This seems logical and has a ring of truth to it as opposed to the curious form of words Mr Malone attributes to Mr Hira.

[19] I accept Mr Hira's evidence that Mr Malone told him what he had done was a "*discipline offence*" and that he would set up a meeting with Mr Barfoote to address Mr Hira's concerns about Mr Bilski's actions. I find Mr Malone told Mr Hira to go home and await further contact from him.

[20] I have formed that view because Mr Malone's actions were consistent with him viewing the matter as a disciplinary issue rather than a resignation. He interviewed staff and sought written and signed statements from witnesses. Mr Malone also wrote to Mr Hira saying his employment had been terminated immediately due to serious misconduct. Such actions are inconsistent with Barfoote employer genuinely believing the employment relationship had ended on Saturday due to a resignation without notice.

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<sup>1</sup> Probably due to the three years that has passed since these events occurred.

[21] I find Mr Malone sent Mr Hira home on Monday on that basis that Mr Malone was going to arrange a meeting involving Mr Barfoote so that Mr Hira's concerns could be addressed.

[22] Mr Malone claims he told Mr Hira on Monday he would not be getting any further pay because he had left work without giving the required notice so would forfeit two weeks' pay. I prefer Mr Hira's evidence that was not discussed at all and the forfeiture of pay issue was first raised by Mr Malone in his letter of 27 April.

[23] I make that finding because Mr Malone demonstrated significant confusion about the timing of events when giving his evidence. His letter of 27 April did not refer to the issue of withholding pay having already been discussed on Monday and I would have expected it to if that was the sole extent of the parties' discussions that day, which is what Mr Malone's position was.

#### **Was Mr Hira disadvantaged?**

[24] Mr Hira claims he was disadvantaged because:

- a. He was suspended on 26 April;
- b. His final pay was withheld until 18 June; and
- c. Barfoote did not communicate with him in good faith from 26 April onward.

#### *Suspension*

[25] Barfoote denies disadvantaging Mr Hira. It says his employment ended when he left his shift early on 24 April so he could not have been suspended on 26 April. I find Mr Malone suspended Mr Hira on 26 April when he sent Mr Hira home. Mr Hira was at work on the Monday morning. I find Mr Hira was ready, willing and able to return to his job that day but did not do so because Mr Malone told him to go home and wait to hear from him.

[26] It was at Barfoote's initiative that Mr Hira did not work that day. I consider Mr Hira was disadvantaged because he was removed from the workplace on what would normally have been a working day solely because his employer did not want him there.

### *Final pay*

[27] Barfoote admits withholding Mr Hira's final pay until 18 June. I find that disadvantaged Mr Hira. He was the sole income earner for his family. There was no other income coming into the household so Barfoote's failure to pay his final pay upon termination clearly put him under financial pressure and stress which I find disadvantaged him.

### *Good faith*

[28] Barfoote say it did not have any good faith obligations to Mr Hira after he left his shift on 24 April. I do not accept that. I find the employment relationship did not end until 28 April. Barfoote was obliged to communicate with Mr Hira in good faith whilst he was still employed.

[29] I consider that Mr Malone's communications with Mr Hira on 26 and 27 April breached Barfoote's good faith obligations to Mr Hira. Mr Malone misled Mr Hira because he told Mr Hira he had raised the matter with Mr Barfoote when he had not done so. He also told Mr Hira that Mr Barfoote would be meeting with him when no such arrangement had been made.

[30] I find these breaches of good faith disadvantaged Mr Hira because it misled him about Mr Barfoote's knowledge of and involvement in resolving the problem which had occurred on Saturday.

### **Was the disadvantage justified?**

[31] Barfoote's actions in respect of the matters which disadvantaged Mr Hira are to be assessed in light of the section 103A justification test in the Act. This requires the Authority to determine whether Barfoote's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the actions occurred.<sup>2</sup>

### *Suspension*

[32] I find Barfoote was not justified in sending Mr Hira home on 26 April. It did not have a good reason for suspending Mr Hira and it did not follow a fair or proper process before doing so. Mr Malone just sent Mr Hira home, he did not explain why

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<sup>2</sup> Section 103A of the Act.

Mr Hira was not allowed to return to his job and he did not give Mr Hira any opportunity to have input into that decision before it was made.

#### *Final pay*

[33] Barfoote says it was entitled to under clause 31.1 of Mr Hira's individual employment agreement to withhold his final pay because he failed to give it two weeks' notice so it was entitled to deduct an amount equivalent to that from any payments due to him.

[34] I find Barfoote was not justified in withholding Mr Hira's final pay. He did not resign without notice – he was dismissed without notice. Barfoote was not entitled to rely on clause 31.1 to withhold money. Barfoote also declined Mr Hira's suggestion that he work for a further two weeks so he could be paid. Mr Hira was entitled to be paid upon termination, and that did not occur.

#### *Good faith*

[35] Barfoote's good faith obligations towards Mr Hira continued until his employment ended. I find Barfoote was not justified in misleading Mr Hira to believe that Mr Barfoote had been informed of Mr Hira's concerns and would be meeting with him to discuss the same.

#### *Outcome*

[36] I consider Barfoote's "*actions and how it acted*" were not "*what a fair and reasonable employer could have done in all the circumstances at the time*" each disadvantage action occurred.<sup>3</sup> I find Mr Hira was unjustifiably disadvantaged in his employment as a result of Barfoote:

- a. Unlawfully suspending him on 26 April 2010;
- b. Withholding his final pay until 18 June 2010; and
- c. Misleading him in its communications with him on 26 and 27 April.

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<sup>3</sup> Ibid 2.

### **Was Mr Hira dismissed?**

[37] Mr Hira bears the onus of establishing on the balance of probabilities that he was dismissed.

[38] Barfoote denies it dismissed Mr Hira. It says he resigned without notice on 24 April. Barfoote seeks to rely on a written statement given by a new employee on 26 April which alleges Mr Hira said to Mr Bilski words to the effect that he could “*stick his job.*”

[39] I do not consider the “*stick his job*” allegation is reliable because the witness who allegedly heard it did not attend the Authority’s investigation meeting so could not be questioned or cross examined. The comment allegedly overheard is hearsay evidence which is contradicted by direct evidence from other witnesses. None of the other witnesses heard Mr Hira say anything as he was leaving. Mr Hira denies saying anything to Mr Bilski and Mr Bilski says he did not hear Mr Hira say anything.

[40] The work environment was noisy and there was no explanation as to why the person who claims to have heard Mr Hira’s alleged comment to Mr Bilski could hear it when others working in the same area did not. Barfoote also never put the alleged comment to Mr Hira to respond to so he did not know it had contributed to Barfoote’s view he had resigned on Saturday.

[41] I prefer the direct evidence over the unsupported hearsay allegations so conclude on the balance of probabilities that no such comment was made. I also consider it was unfair and unreasonable for Barfoote to rely on that alleged comment as evidence Mr Hira had resigned without first giving him an opportunity to respond to the allegation about what he is supposed to have said.

[42] Barfoote says it was clear Mr Hira resigned on Saturday because he also took his tools and belongings with him. I do not consider that a determinative factor. He was annoyed and angry and letting off steam by dramatically cutting the padlock of his locker. I find a fair and reasonable employer could not have concluded from these actions Mr Hira had resigned on Saturday based on the limited and untested information available to Barfoote at the time.

[43] In the absence of a clear or express resignation, and in circumstances where Mr Hira had left work after being sworn at in front of his colleagues by his supervisor, but had attended work the next working day, it was up to Barfoote to clarify Mr Hira's intentions with him. It did not do so.

[44] Mr Malone incorrectly assumed Mr Hira had resigned. Mr Malone never put it to Mr Hira he had resigned. Mr Malone never asked Mr Hira if he had intended to resign or even if he had wanted to end his employment. A fair and reasonable employer could not have assumed "*in all the circumstances*" that existed at the time Mr Malone sent his letter dated 27 April that Mr Hira had resigned.

[45] Barfoote's actions are also inconsistent with its stated belief Mr Hira had resigned without notice so his employment had ended on Saturday. When they spoke on Monday Mr Malone never told Mr Hira his employment had already ended or that Barfoote considered he had resigned without notice by leaving his shift early on Saturday. Instead Mr Malone referred to there being a "*disciplinary issue*" and said he would get back to Mr Hira. Mr Malone's next communication to Mr Hira was the letter of 27 April which I find ended Mr Hira's employment.

[46] Mr Hira says his employment ended on 26 April 2010 when Mr Malone sent him home. I do not accept that. At the time that Mr Hira left work he did not believe his employment had ended, rather he believed Mr Malone would be getting back to him to set up a meeting with Mr Barfoote to discuss Mr Hira's concerns about Mr Bilski's actions towards him on the Saturday.

[47] I find Mr Hira's employment was terminated when he received Mr Malone's letter dated 27 April on 28 April 2010. Mr Malone's letter stated Mr Hira's actions on the Saturday were viewed as "*serious misconduct*" and that his "*employment has been terminated, effective immediately*". This was a dismissal. It was the sending away of the employee at the employer's initiative. The initiative for the ending of the employment came from Barfoote not from Mr Hira. I find Mr Hira was dismissed, he did not resign.

### **Was dismissal justified?**

[48] Justification is to be determined on an objective basis. The s.103A test of justification is whether Barfoote's "*actions and how it acted were what a fair and*

*reasonable employer could have done in all the circumstances at the time the dismissal [...] occurred.”*<sup>4</sup>

[49] I find Barfoote’s “*actions and how it acted*” were not “*what a fair and reasonable employer could have done in all the circumstances*” at the time it dismissed Mr Hira.

[50] Mr Hira raised a legitimate concern about Mr Bilski’s actions towards him. Mr Hira told Mr Malone he wanted Mr Barfoote involved in solving the problem. Mr Malone told Mr Hira he had advised Mr Barfoote of the problem and that Mr Barfoote would be meeting with Mr Hira to discuss it. That was incorrect. Mr Malone had not passed Mr Hira’s concerns on to Mr Barfoote so there was not going to be a meeting between Mr Barfoote and Mr Hira.

[51] Instead Mr Malone treated the matter as if it was a disciplinary issue. He interviewed witnesses and obtained signed statements but never put these to Mr Hira. Mr Malone unilaterally attributed blame to Mr Hira. Barfoote later (after Mr Hira had been dismissed) established Mr Bilski was the only person who had sworn and that Mr Hira had not sworn at his supervisor.

[52] Mr Malone advised Mr Hira in writing his employment had been terminated. Barfoote did not put any specific disciplinary allegations to Mr Hira to respond to nor did it have a disciplinary meeting with him to give Mr Hira an opportunity to provide his feedback on any concerns it had about his actions on the Saturday. Mr Hira was not advised of his right to representation or given time to prepare his response or any opportunity to respond to the issues of concern.

[53] A fair and reasonable employer is expected to comply with its statutory obligations but Barfoote did not do so. It did not comply with any of the four procedural fairness tests set out in section 103A(3) of the Act. Barfoote also breached its good faith obligations because it did not provide Mr Hira with access to relevant information about his ongoing employment or an opportunity to comment on it before it dismissed him contrary to s.4(1A) of the Act.

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<sup>4</sup> S.103A of the Act.

## **What remedies should be awarded?**

### *Distress compensation*

[54] I do not make separate awards of distress compensation for each of the unjustified disadvantage grievances. These all arise out of the same factual matrix as the unjustified dismissal grievance so I consider one global award of distress compensation is appropriate. Mr Hira's evidence also dealt with his distress at the overall situation rather than in terms of discrete incidents of disadvantage.

[55] Mr Hira attributes the stress of his dismissal as a key factor in his separation from his wife. He describes how the family was under extreme pressure because he was the breadwinner and they had three children and no savings. The family barely kept themselves afloat and had to rely on assistance from Mr Hira's wife's father. An aggravating factor was that Barfoote withheld Mr Hira's final pay until 18 June 2010 which put the family under additional unnecessary financial pressure.

[56] I consider an award of \$5,500 distress compensation is appropriate to compensate Mr Hira for the humiliation, loss of dignity, and injury to feelings he suffered as a result of his disadvantage and dismissal grievances.

### *Mitigation*

[57] An employee is obliged to take reasonable steps to mitigate their loss if they wish to recover lost remuneration. Mr Hira says he was so stressed and distressed by his dismissal and subsequent relationship split up that he did not apply for any jobs in the three months following his dismissal but that he did try to find work after that.

[58] I consider Mr Hira's failure to look for work in the eight weeks following his dismissal can be explained by the adverse effects dismissal had on him and because he and his wife were continuing to communicate with Barfoote in attempts to get his situation resolved. However any lost remuneration outside that eight week period can more properly be attributed to Mr Hira's failure to mitigate his loss than to his dismissal.

### *Lost remuneration*

[59] I am not prepared to award Mr Hira more than eight weeks' lost remuneration because I consider his failure to appropriately mitigate his loss after that time breaks

the chain of causation between his dismissal and his lost remuneration. Barfoote is ordered to pay Mr Hira eight weeks' ordinary time lost remuneration under s.128(2) of the Act.

### *Contribution*

[60] Having determined Mr Hira has personal grievance claims s.124 of the Act requires me to assess whether he contributed to the situation which gave rise to his grievances and if so reduce remedies accordingly. Contribution denotes blameworthy conduct by the employee which must be proved on the balance of probabilities.

[61] I do not consider a Mr Hira engaged in blameworthy conduct. He removed himself from the situation when he became so angry at inappropriate comments made by his supervisor that he felt unable to work alongside him for the remainder of his shift. Mr Hira let himself cool down before presenting at work at the next available opportunity to resolve the problem which had occurred on Saturday. I do not consider remedies should be reduced on the grounds of contribution.

### **Costs**

[62] Mr Hira as the successful party is entitled to a contribution towards his actual costs. The parties are encouraged to agree on costs. If that is not possible then costs will be determined by an exchange of memoranda. Any costs claim must be supported by proof of the costs incurred.

[63] Mr Hira has 14 days from the date of this determination within which to file a costs memorandum, Barfoote has 14 days within which to respond. This timetable will be strictly enforced.

**Rachel Larmer**  
**Member of the Employment Relations Authority**