

carried out an essentially sales and administrative function, while Mr Webster was the technical expert.

[4] Mr Halsey was employed as a computer systems technician, commencing in March 2008.

The allegations of bullying

[5] Mr Halsey's allegations that he was bullied are based on the following:

- a. unreasonable overtime requirements, and being required to use own vehicle for mobile call-outs and own cell phone for work purposes;
- b. being compelled to do work outside his job description;
- c. regular taunting and degradation by Mr Pickett;
- d. unlawful suspensions; and
- e. an improper verbal warning.

[6] None of these matters was raised as a personal grievance in its own right, rather they were all relied on as part of a pattern of bullying.

1. Overtime, use of vehicle and use of cell phone

[7] The parties' written employment agreement, prepared in or about November 2008, contained the following relevant provisions:

'6. Hours of work

6.1 Working hours

The employee's normal hours of work shall be 40 hours per week, between the hours of 9 am – 5.30 pm on Monday to Friday. The employee may also be required to perform such overtime as may be reasonably required by the employer in order for the employee to properly perform their duties. Where extra hours are performed the employee shall be entitled to an overtime payment as set out in the wages clause below.

6.2 The employee's hours of work may be varied as follows:

- (i) by mutual agreement between the employee and the employer; or

(ii) if agreement cannot be reached, by the employer, following consultation with the employee, provided that the employee's minimum hours of work are not reduced below 44 hours and that any increase in hours of work is reasonable.

When seeking to vary the employee's hours the employer shall act reasonably, and shall take into account the employee's personal circumstances and commitments.

7 Wages/salary/allowances

7.1 Types of pay

The employee shall be paid according to an hourly rate which shall be \$12 [increased to \$13.50] per hour. ...

7.2 Overtime

The parties agree that where the employee works the requested overtime the employee shall be entitled to payment for each hour of overtime at the following rate: 12.

[changed to T 1/1/2]

...

9.2 Use of a car

The employee shall be allocated a car for work purposes, and for the purpose of the employee travelling between home and work. The employer will meet all maintenance, insurance and running costs (including fuel relating to work use). ...”

[8] At the commencement of the employment relationship Mr Halsey was paid a 'salary' of \$30,000 per annum. He said he worked very long hours and frequently worked late at night, although at that early stage he was content to work extra hours. After an argument between Messrs Mr Pickett and Halsey in or about August 2008, Mr Webster arranged for Mr Halsey to do more out-calls in an attempt to reduce the triggers for Mr Halsey's difficulties with anger management. Mr Halsey said that arrangement was satisfactory for a short period, but after a few weeks he began doing 12 hour days Monday – Friday and 8 – 10 hour days on Saturdays.

[9] CML disputed that Mr Halsey worked the week-day hours he claimed, except that from time to time Mr Halsey would visit clients at their homes after hours on his own initiative. CML acknowledged there was discussion in or about the middle of the

year about opening for business during weekends, and it was common ground that the business opened on Saturday mornings for a brief period. There was also a discussion about moving to 5-day rosters to be worked over a 7-day period, but this arrangement was not implemented. Finally, the hours of work of existing staff reduced when another employee was engaged in or about the middle of the year.

[10] The wage record CML provided identified the number of hours worked in a week, commencing with the week ending 17 September 2009. This was about the date when Mr Halsey ceased working on a salary and moved to a rate of pay of \$12 per hour. With reference to the record, if Mr Halsey worked the excessive hours he alleged, he must have done so before mid-September. Overall his evidence on the point was vague.

[11] Since Mr Halsey was willing to work the hours worked early in his employment, and the record does not support his allegations of excessive hours as they relate to the period from about September 2008, I find nothing in the allegations to support any claim of bullying.

[12] Mr Halsey alleged further that, after he renegotiated his rate of pay to \$13.50 per hour in or about November, Mr Pickett ceased offering him overtime. The record indicates that in September and October Mr Halsey worked additional hours paid at the ordinary hourly rate, but also that he worked overtime (albeit less of it) and was paid at the renegotiated overtime rate in the period December 2008 – February 2009. I am not satisfied that Mr Pickett ceased offering overtime as alleged or that any aspect of this amounted to bullying.

[13] Regarding the concern about the use of his vehicle, at times Mr Halsey used his own vehicle for work-related purposes. He complained to the Authority that he was not reimbursed for his full fuel costs. He was referring to the fact that his vehicle was diesel-fuelled and while he was reimbursed for the cost of the fuel he was not reimbursed for the associated road user charges. However he did not ask for reimbursement of the road user charges at the time. He cannot characterise any failure to reimburse him as bullying.

[14] A second concern about the vehicle arose out of Mr Pickett's alleged 'confiscation' of the work vehicle. Mr Halsey said this was done at about the time his rate of pay changed from salary to an hourly rate – or September 2008. Mr Pickett said the vehicle was never part of the remuneration package, and Mr Halsey had been permitted to take it home on a temporary basis for use in the event of a mobile call out. He took it back so it would be available when someone else needed to use it.

[15] In the light of clause 9.2 of the employment agreement that is not a satisfactory response. The clause is expressed very generally. If access to a vehicle was intended to be on a 'from time to time where necessary' basis, rather than any more regular basis, the clause does not make that clear. Arguably Mr Pickett's actions were in breach of it.

[16] However, Mr Halsey has raised the matter in the context of his allegation that he was bullied. While actions which breach an employment agreement can also be indicative of bullying behaviour, after assessing Mr Pickett's actions in the context of the overall employment relationship problem I do not consider they should be viewed in that way here.

[17] Finally, any difficulties regarding the use of the mobile phone appear to have been short-lived, and were addressed when Mr Webster's wife began her employment in the business. Mr Halsey very sensibly abandoned his allegations of bullying in this respect.

2. Work outside job description

[18] The requirement to carry out work outside of the job description referred to requests that Mr Halsey make coffee. Mr Halsey said Mr Pickett asked him to do this continually and it became very disruptive.

[19] The requests that Mr Halsey make coffee occurred early in the employment relationship, when Messrs Pickett, Webster and Halsey were the only staff members. All three shared coffee-making duties. Mr Pickett would ask Mr Halsey to make the

coffee by saying 'Mike, coffee' which Mr Halsey found very disruptive to his concentration. He said he was called on in this way very frequently.

[20] After some three months Mr Halsey told Mr Pickett he was not hired to make coffee and that the others could make their own. Shortly after that Mrs Webster joined the staff, and the problem disappeared.

[21] There is no merit in Mr Halsey's allegation that this is an example of bullying.

3. Taunting and degradation

[22] Mr Halsey began his account of the taunting and degradation he experienced at Mr Pickett's hands by saying: "Mr Pickett began coming regularly to the tech bay where I worked and would try to wind me up. I often heard him laughing as he walked back to his office, stating to the secretary words like 'he bites well'."

[23] Mr Pickett said he is not a technical person and is curious about the technical aspects of his company's work. Often, particularly during the early period of Mr Halsey's employment, he would ask Mr Halsey questions about these matters. In addition he would receive customer enquiries about progress on work being undertaken, to which he would seek to respond immediately. He would go through to the 'tech bay', where Mr Halsey was carrying out the work, to obtain the answer. Mr Halsey found these approaches interrupted his concentration on the work in hand, and they annoyed him.

[24] Mr Halsey also said in evidence that he had made it clear to Mr Pickett that he struggled with his temper. He believed that Mr Pickett's approaches were deliberate attempts to play on that acknowledged weakness.

[25] Obviously a personality conflict developed between Mr Pickett and Mr Halsey. It was also obvious that Mr Halsey has a very short temper, and little patience or tolerance. I do not accept that Mr Pickett's approaches to Mr Halsey for information about technical matters in general or work in progress in particular were intended as taunts, although I consider it likely that Mr Halsey's angry reactions

began to provoke responses that made Mr Halsey's temper worse. As Mr Halsey put it, he became 'sensitised'.

[26] I could accept in a general way that there were better ways of responding to Mr Halsey than Mr Pickett employed from time to time, but I do not accept that Mr Pickett was bullying Mr Halsey. Mr Halsey must take responsibility for the effect of his temper.

[27] In forming a view of the parties' employment relationship I give weight to the evidence of Mr Webster, for whom Mr Halsey appeared to have respect. Mr Webster said that in the early stages of the relationship he would attempt to calm Mr Halsey down, but 'once Mr Halsey was wound up it was difficult'. Mr Webster tried to keep out of the way when he could see things were 'blowing up', and felt he had to choose his words very carefully. In other words Mr Pickett was not the only one to be at risk of falling foul of Mr Halsey's anger, although he and Mr Webster had different ways of responding. As far as Mr Halsey was concerned, Mr Webster's approach was more effective. However I do not believe this indicated Mr Pickett's approach was bullying.

4. Unlawful suspension

[28] Mr Halsey acknowledged that he became angry on a few occasions when he believed Mr Pickett was taunting him. On at least two occasions he was asked to go home so that either he or both he and Mr Pickett could 'cool down'. Mr Halsey felt this was unfair, when Mr Pickett had been provoking him.

[29] I do not consider these actions amount to unlawful suspensions or that they were unfair. If Mr Halsey was angry, as clearly he was, then sending him home to cool down was sensible.

[30] A formal suspension was imposed in December 2008 while CML investigated a complaint against Mr Halsey from a customer. The complaint incorporated the use of inappropriate language while on a mobile call-out. The language was used in the course of a dispute with the customer, and occurred while on the premises of a third customer. The circumstances were investigated and Mr Halsey was warned about his

use of language, but not about the subject matter of the dispute itself. It was acknowledged that the customer was in the wrong in that respect.

[31] I do not consider that any of these actions amounted to bullying.

5. Improper verbal warning

[32] In or about November 2008 CML introduced a code of conduct, which included lists of actions that could constitute misconduct, and those which could constitute serious misconduct. Mr Halsey said that on or about the same day he received a verbal warning for having received a speeding ticket. He said his receipt of the ticket in question had been advised to CML, and dealt with. It was unfair to raise the matter again.

[33] CML said the ticket which prompted a response from it was the second Mr Halsey had received and had not been dealt with. Moreover, it denied that a warning was given. Indeed when asked about the content of the warning, Mr Halsey said he was told he would receive a warning if he received another ticket.

[34] The circumstances do not support the allegation that an improper warning was given, and I do not consider this incident amounts to bullying behaviour.

Events leading to the dismissal

[35] The lease for CML's business premises extended to two car parks. The parks were usually used by CML's business vehicles. An additional, unallocated, parking space was part of the wider commercial premises in which the business was located. It is likely that from time to time CML staff used the unallocated parking space. CML's landlord had warned Messrs Pickett and Webster that additional payment would be sought for that space if it was used.

[36] On the morning of 19 February 2009 Mr Halsey parked his vehicle in the unallocated space. Mr Pickett arrived at work, and instructed Mr Halsey to move the vehicle. Mr Halsey believed Mr Pickett wished to park his motorbike in the space, and since he was there first he refused to move. He maintained that refusal. Mr

Halsey accepted that he was told the landlord would require payment for the park if it was used, and said he was happy to pay for the park. He also accepted that he said to Mr Webster that: "If Steve parks his bike in there there will be f- shit to pay."

[37] This behaviour was considered unacceptable and Mr Halsey was suspended. He was later asked to attend a disciplinary meeting on 20 February 2009. These matters were confirmed in a letter also dated 19 February, which contained the further advice that the outcome of the meeting could be dismissal.

[38] The meeting went ahead on 27 February. Both parties attended, together with their representatives. Mr Halsey raised his concerns about taunting in detail, and apologised for his behaviour on 19 February. He said in evidence, though, that he considered the events of 19 February amounted to another attempt to wind him up.

[39] Mr Pickett concluded there was no longer a working relationship between himself and Mr Halsey, and that Mr Halsey had no respect for him. He took into account the verbal warning of December 2008, and the frequent threats and swearing. He did not accept that he had been taunting Mr Halsey. Mr Webster regarded the working environment as a problem in terms of what was said and how it was said. There was no other position for Mr Halsey, and there had already been an unsuccessful attempt to allocate off-site work to Mr Halsey.

[40] Messrs Pickett and Webster expressed their conclusions in a letter to Mr Halsey dated 3 March 2009. They considered Mr Halsey had let his temper control his actions and had acted inappropriately. He ignored a reasonable request to move his vehicle, and used inappropriate language in a threatening way. The behaviour led to a complete absence of trust and Mr Halsey was to be dismissed with immediate effect. Mr Halsey was provided with two weeks' pay in lieu of notice and left immediately.

Whether Mr Halsey was unjustifiably disadvantaged

[41] The findings of fact as I have set them out mean I do not accept Mr Halsey was bullied in the workplace, and in turn I do not accept that he was disadvantaged in his employment by an unjustified action of CML's.

Whether the dismissal was justified

[42] The test for the justification for a dismissal is whether dismissal was the action a fair and reasonable employer would have taken in all the circumstances at the time.

[43] Viewed in isolation the incident of 19 February could be regarded as not sufficiently serious to warrant what in effect was a summary dismissal. Expectations about the use of the empty parking space should have been spelled out to the staff. Further there was an element of provocation in Mr Pickett's being seen to use a parking space not being paid for when the staff could not do the same, particularly if he purported to displace a staff member in the process. On the other hand, the responsibility for any payment required by the landlord would probably have been CML's, and the general responsibility to manage the relationship and observe the terms of the lease was CML's. It was not for Mr Halsey to assert a prior right to park in the space or to expect that an offer to pay would resolve the matter. Nor was his threatening response acceptable.

[44] The nub of the problem, and the reason for the decision to dismiss, was that Mr Halsey's threat and angry outburst on 19 February was typical of his behaviour during the course of the relationship. It was not adequately explained by his view that he was taunted and had become sensitised to Mr Pickett's conduct towards him. The 19 February incident was one incident too many.

[45] While I have reservations about the wisdom of Mr Pickett's approach during the 19 February incident, I do not accept that CML's duty to Mr Halsey was such that it was obliged to take the extreme care not to provoke him that would have been necessary in the relationship overall. Mr Pickett's manner of dealing with Mr Halsey was less than ideal, but was human. Mr Halsey's conduct, while easily provoked by Mr Pickett, was a feature of his workplace behaviour in any event.

[46] Finally, I take into account that this was a small business with few staff. In all of the circumstances the decision not to tolerate Mr Halsey's conduct any more was a one an employer acting fairly and reasonably would have made.

[47] For those reasons I find the dismissal was justified.

Costs

[48] Costs are reserved.

[49] The parties are invited to agree on the matter. If they seek a determination from the Authority any party seeking an order shall have 28 days from the date of this determination in which to file and serve a memorandum setting out what is sought and why. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority