

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

CA 164/10
5280737

BETWEEN PATRICK MILLS
 Applicant

AND METRO FLOOR
 CANTERBURY (2002)
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Johnny Sanders, Counsel for the Applicant
 No appearance for the Respondent

Investigation Meeting: 27 July and 9 August 2010 at Christchurch

Determination: 20 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Patrick Mills says that he was unjustifiably dismissed from his employment with Metro Floor Canterbury (2002) Limited (Metro Floor) on or about 30 June 2009. Mr Mills seeks compensation, reimbursement of lost wages and costs.

[2] In its statement in reply, Metro Floor says that Mr Mills *quit* his job after being approached by his supervisor Bruce Selwood with some concerns about his performance and then he returned his tools and failed thereafter to attend meetings.

The investigation process

[3] Philip Mangos, a director of Metro Floor, attended a telephone conference on behalf of the respondent with the Authority and Mr Sanders on 19 April 2010.

[4] It was agreed during the telephone conference that there would be an investigation meeting on 27 July 2010 and that statements of evidence would be

provided in advance of that meeting. The Authority set a timeframe for the exchange of statements of evidence in a notice of direction dated 19 April 2010. The respondent was required to lodge with the Authority and serve its statements of evidence by 20 July 2010 at 4pm.

[5] There were no statements of evidence lodged by Metro Floor within the timeframe set out in the notice of direction. A support officer at the Authority drew the failure to comply with the timetable to Mr Mangos' attention in an email dated 22 July 2010. On 23 July 2010 by email Mr Mangos attached statements that the Authority had already received as attachments to the statement in reply. In the email Mr Mangos also advised that Metro Floor had ceased to trade and therefore no accounts were paid. He stated in the email that, for this reason, there was no purpose for anyone to attend the investigation meeting.

[6] The manager then from Mr Mangos' office, known only as Anne, then advised a support officer at the Authority by telephone that Mr Mangos was unwell. Anne then followed this up with an email to the Authority dated 26 July 2010 and requested that the Authority adjourn the meeting due to the likelihood that Mr Mangos would not be well enough to attend.

[7] An email was then sent by the Authority to Mr Mangos and Mr Sanders advising that I had taken the latest email sent on behalf of Mr Mangos as an application for an adjournment on the grounds that Mr Mangos was unwell. I set out in my email that an adjournment request on medical grounds was almost inevitably accompanied by some evidence to support it in the form of a medical certificate. I asked for one to be provided as soon as possible. I set out that if it could not be provided by the close of business that day, then it should be provided at the first opportunity the following morning so that Mr Sanders could take instructions on the application.

[8] There was no medical certificate provided that day. Shortly before 5pm, Mr Sanders wrote to the Authority and advised that he opposed an adjournment and the reasons why.

[9] There was no further communication from Mr Mangos that day. The following day on 27 July 2010 the Authority delayed the commencement of the investigation meeting for a short time but was not prepared to grant the adjournment

in the absence of a medical certificate and on the basis of the grounds set out by Mr Sanders in his opposition to an adjournment. These were that the respondent had not been communicative towards the Authority and the applicant throughout the process, and had indicated that it was unlikely to participate during the investigation process because the company had ceased trading.

[10] The meeting proceeded therefore and I heard evidence from Mr Mills. Shortly after 10am, a support officer from the Authority came into the meeting and showed me an email that had been received from Mr Mangos that morning advising that he was unable to attend the meeting and a medical certificate would be obtained that day as soon as possible and forwarded to the Authority. Although that email was sent at 9.31am, the support officer was otherwise engaged and did not receive the email until 10.03am.

[11] Having already commenced the meeting, I decided to continue to hear evidence from Mr Mills. I told Mr Sanders that I would set another date to hear evidence from Metro Floor.

[12] A new investigation meeting date was then set for 9 August 2010 and I am satisfied that a meeting notice was duly served at Metro Floor both at its address for service on its statement in reply and by email. The support officer in her email set out that a medical certificate was still required.

[13] On 9 August 2010, although Mr Sanders and Mr Mills attended, there was no appearance by Mr Mangos or any other representative for Metro Floor. Further no medical certificate had been provided. I now intend to determine this matter.

The issues

[14] The Authority is required to determine the following issues:

- Was Mr Mills dismissed from his employment or did he resign;
- If Mr Mills was dismissed from his employment, then was the dismissal justified in that under the test in s. 103A it was what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal;

- If Mr Mills was unjustifiably dismissed from his employment, then what remedies is he entitled to and are there issues of contribution and mitigation?

Background to the ending of the relationship between Mr Mills and Metro Floor

[15] Mr Mills commenced employment as a tiler with Metro Floor in early October 2008. He was not party to a written employment agreement when he commenced his employment although did enter into a written employment agreement on 10 June 2010 expressly stated to commence on 18 May 2009.

[16] There did not appear to be any issues in the employment relationship between Mr Mills and Metro Floor until mid-June 2009. Mr Mills was working for Metro Floor on a job at Club Towers Café from 15 June 2009. Mr Mills set out in some detail at the investigation meeting the difficulties that he had experienced in working at the job. Put succinctly, it appeared that a number of the difficulties came down to a lack of adequate preparation before Mr Mills could lay the tiles. It sounded like there were a large number of difficulties and frustrations for Mr Mills over that period.

[17] Mr Mills said that matters did not improve over the period that he was on site and that the tilers were not popular as other tradesmen were also attempting to complete their jobs required on the building.

[18] On 22 June 2009, Mr Mills arrived on site to see that the tiling gear had been set up but that there was no other tiler available to work with him. Mr Mills was then advised by another tiler that the person he had been working with was sick that day and he therefore would be working with him. Mr Mangos and Mr Selwood were on site that day as well. I accept that they did not raise any issues with Mr Mills. Later that same day, Mr Mills was required to attend and complete work on another job. At the time that he left which he put at about 3.25pm, there was another tiler who was able to undertake some work.

[19] On 24 June 2009, Mr Mills was in the work carpark waiting to commence his work for the day when he was approached by Mr Selwood. Mr Selwood advised Mr Mills that he had been asked by Mr Mangos to talk to him about what had happened on 22 June 2009. Mr Selwood advised Mr Mills that Mr Mangos did not think he had done enough work that day, and that he had only laid 8-10 tiles.

Mr Mills said that he immediately responded that that was not true and complained that it was not a fair way to raise issues about his work performance. I accept that there was a process for dealing with any performance concerns in clause 22 of the employment agreement.

[20] Mr Mills questioned Mr Selwood as to what it was that Mr Mangos was saying. Mr Mills asked Mr Selwood if Mr Mangos was saying *he was ripping him off*. Mr Selwood agreed that that was what Mr Mangos was saying.

[21] At this point, Mr Mills advised Mr Selwood that if that was how things were going to be, he could tell Mr Mangos *to stick his job*. Mr Mills said that he stated this as a result of the pressure he had been under and the way that he was feeling at that particular time. He said that he was frustrated because he had put in a lot of extra time and effort to get the job done and he was extremely tired and stressed.

[22] Mr Mills removed a bucket of waterproofing from his car which he was to have used that morning to waterproof some shelves at a gymnasium. As he turned towards his car, Mr Selwood asked him where he was going and Mr Mills advised him that he was not going to put up with the way he had been treated. Mr Mills said he shook hands with Mr Selwood.

[23] On 25 June 2009, Mr Mills returned to Metro Floor and spoke with the manager, Anne. Mr Mills advised her what had happened the previous day and said that he wanted to get things sorted out. Anne said that she would talk to Mr Mangos and get him to contact Mr Mills. Mr Mills advised Anne that he would prefer not to work until the matter between them had been resolved. He said he made it clear to Anne that he wanted to remain working but needed to get his concerns sorted out first. Mr Mills said that he gave Anne a few tubes of silicon that he had in a teeshirt because he did not want to be accused of taking these items. It was agreed that Mr Mills would meet Mr Mangos the following morning on 26 June 2009.

[24] Mr Mills said that before the meeting could take place, he received a telephone call from Anne advising him that Mr Mangos would be unable to meet on 26 June but that he would be at the workplace on 27 June working in the shop if Mr Mills was able to pop in or ring him to set another date if he could not make it. On that day, I accept that Mr Mills' car was at the mechanic's and he was unable to attend the

meeting and I accept that he telephoned Mr Mangos and that it was agreed that they would meet on the morning of 29 June 2009.

[25] When Mr Mills arrived at the workplace on 29 June 2009, Mr Mangos was not there and he was advised by staff that Mr Mangos was at a meeting. Mr Mills sent Mr Mangos a text message to inquire where he was and advised that he would remain in town for the next few hours to meet with him but he did not receive any response. Mr Mangos did not return to the workplace and Mr Mills returned home.

[26] On 1 July 2009, Mr Mills sent an email to Mr Mangos advising him that he had hoped they could sort out the issues and get on with things. He explained in the email that he had tried to meet with him but had had no contact with him at all. Mr Mills set out in his email that any further contact should be through his lawyer, a Mr David Hayward. Mr Mills did not receive a response to his email and then went on a pre-arranged holiday between 9 and 19 July 2009. On return from holiday Mr Mills wrote a letter to Mr Mangos on 23 July 2009 suggesting that the parties should attend mediation. There was no response to that letter and then Mr Mills instructed Mr Sanders' firm to act on his behalf.

[27] I put to Mr Mills the two statements that had been attached to the statement in reply and the contents of those statements. Mr Mills did not agree that he swore as set out in Mr Selwood's statement, when Mr Selwood raised matters with him. He did agree that he was upset, but not that he was yelling when Mr Selwood raised the concerns with him.

[28] Whilst accepting that Mr Mills said *if that is how its going to be then Phil could stick his job* but he did not accept that he said he would not be back. In terms of Mr Mangos' statement, Mr Mills did not accept that there had not been an arrangement for Mr Mills to meet with him on the morning of 29 June, rather than the afternoon. He said that he had to travel some distance for the meeting from his home and that he was unlikely to have got the time wrong as he had to pick up his children in the afternoon.

[29] Mr Mills was paid his final pay, including holiday pay, on 30 June 2009. He said that initially he was unaware of this and was attempting to resume work with Metro Floor until the end of July.

Was Mr Mills dismissed or did he resign from his employment?

[30] In *Boobyer v. Good Health Wanganui Ltd*, WEC3/94, 24 February 1994 there was reference by the then Chief Judge Goddard to a number of cases in which an employee is, against his or her will, treated by an employer as having resigned. Chief Judge Goddard set out several distinct types or categories of cases where this may arise.

[31] In my view, this case falls squarely into the type of case where words or actions of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally. It is either obvious that this is so or it would become obvious upon inquiry made soberly once *the heat of the moment* had passed and taken with it any anger or passion having the effect of impairing reasoning faculties – *Chicken & Food Distributors (1990) Ltd v. Central Clerical Workers' Union* [1991] 1 ERNZ 502, 507. The Chief Judge noted that cases like this feature rather extreme actions such as an employee using emphatic language and expressive conduct extending to actually walking out or using words of resignation only to return or recant later.

[32] Mr Mills clearly takes pride in his work and was greatly concerned by what he saw as unfair criticism. I accept that had the difficulties with the Club Towers job and the work performed in that context been put to Mr Mangos then it is very likely that he would have concluded the criticism was not justified. In other words Mr Mills performance was not, on the evidence in front of me, poor.

[33] It never got to that point unfortunately. If there had been a meeting between the parties then I would in all likelihood not have been in the position of having to determine this matter.

[34] Objectively assessed Mr Mills, even accepting his frustration and tiredness and the way the concerns were raised, overreacted during the exchange with Mr Selwood. He asked Mr Selwood if Mr Mangos was saying that *he was ripping him off*. These were his own words and had not previously been used by Mr Selwood. He then told Mr Selwood that Mr Mangos could stick his job.

[35] The following day, Mr Mills returned back to work and spoke to the manager Anne. He explained what had happened and that he wanted to sort things out at a meeting with Mr Mangos but that he would not attend work until there was a meeting.

Mr Mills said that he was advised by Anne that Mr Mangos wanted him back. There were attempts to have a meeting, but such a meeting never took place and Mr Mills did not return to work. It would have been preferable if Mr Mills, notwithstanding reservations, had simply confirmed that he was going to return to work and done so and then attempted to meet with Mr Mangos. His approach I find, in circumstances where there was no apparent opposition to him returning to work put an additional barrier up to the successful continuation of a working relationship.

[36] However, given that Mr Mills returned promptly to the workplace and then attempted on several occasions to meet with Mr Mangos, it was not a situation where Metro Floor could have concluded that Mr Mills had, because of his reaction on 24 June 2009, resigned from his employment. Metro Floor and indeed a fair and reasonable employer would have at the very least written to Mr Mills asking about his future intentions and/or instructed him to simply return to work by a particular day before concluding the relationship was at an end.

[37] I find that, by maintaining that Mr Mills had resigned from his employment, Metro Floor dismissed him.

[38] When the final pay was paid to Mr Mills on 30 June 2009, Metro Floor regarded the relationship as at an end.

Was the dismissal unjustified?

[39] I do not find that it was open to Metro Floor to maintain that Mr Mills had resigned without taking an opportunity to meet with him or even to write to him. It must have been clear to Mr Mangos that Mr Mills wanted to discuss the events of 24 June 2009 with a view to returning to work. This was not a situation where Metro Floor was able to rely on an unambiguous resignation given that Mr Mills made it plain that he did not intend to resign his employment.

[40] There was no other justification put forward in this case for the dismissal other than Mr Mills' actions on 24 June 2009 and his returning of some tools. In relation to that second matter, I accept his evidence that he did not want to be criticised for retaining items belonging to Metro Floor.

[41] In those circumstances, I conclude that Mr Mills' dismissal was unjustified because it was not what a fair and reasonable employer would have done in all the circumstances at the time of dismissal.

Remedies

Lost wages

[42] Mr Mills seeks three months' lost wages from the date of his dismissal. I consider that because Mr Mills would not start back at work until he met with Mr Mangos and discussed matters, the lost wages should only be reimbursed for the period from 30 June 2009 and be twelve weeks instead of 13 weeks. During that period, Mr Sanders provided information that Mr Mills had net earnings of \$515.82 for jobs completed with the Salvation Army Bridge Programme.

[43] I have been provided with copies of applications for positions that Mr Mills made during the period in question. I am satisfied that Mr Mills attempted to mitigate his loss during the three month period. He is entitled to reimbursement of lost wages between 30 June 2009 and 15 September 2009, less seven working days between 9 and 17 July 2009 that he was on a pre planned holiday.

[44] For the 12 week period, the gross sum calculated on the basis of 40 hours per week at \$22 per hour is \$10,560 gross, less \$1,232 for seven days during that period within which Mr Mills was on a pre-planned holiday. That is a gross sum of \$9328. From the net of that sum there is to be deducted a further \$515.82 net received by Mr Mills for two jobs completed during the 13 week period. Subject to any findings of contribution, that is the amount of wages for which reimbursement should be made.

Compensation

[45] I accept that Mr Mills felt particularly stressed as a result of the failure by Mr Mangos to communicate with him in a way that would enable the relationship to get back on track. Mr Mills gave evidence about the difficulty he suffered financially. He explained that he had tried to get out of the holiday but was advised that if he tried to do so he would lose his money as it was so close to the date that he was to travel.

[46] Although Mr Mills gave evidence that he had heard rumours from the workplace about matters leading up to the end of his relationship, I am not satisfied

that there is sufficient evidence to establish a link between these rumours and the actions of the respondent.

[47] I also heard from Mr Mills' wife, Phillippa, who said that her husband lost confidence as a result of his dismissal and that in the weeks following his dismissal he was easily agitated and distressed.

[48] Subject to any findings I may make about contribution, I consider that a fair and reasonable award for humiliation in all the circumstances is \$6,000.

Contribution

[49] When it awards remedies, the Authority must consider whether or not the actions of an employee contributed to the circumstances that gave rise to the dismissal.

[50] In this case, I find that there was an overreaction or outburst by Mr Mills to Mr Selwood's comment that did contribute towards the circumstances of the grievance. Mr Mills left telling Mr Selwood that Mr Mangos could stick his job. A more sensible approach would have been for Mr Mills to continue at work and then have requested a meeting with Mr Mangos to discuss his concerns.

[51] There was however the opportunity to get this relationship back on track and I accept that, from that point on, the respondent did not attempt to engage in any meaningful way with the applicant to set up a meeting and talk about the issues so that the relationship could be re-established. I do find that Mr Mills not returning to work in the meantime also created a barrier to re-establishing the relationship.

[52] I find that there was contribution that I assess at 33.33%. Applying that contribution to the amounts previously set out for lost wages and compensation, I make the following orders:

- (a) I order Metro Floor Canterbury (2002) Limited to pay to Patrick Mills the sum of \$6218.98 gross less \$515.82 from the net of that amount being reimbursement of wages under s123(1)(b) of the Employment Relations Act 2000.

- (b) I order Metro Floor Canterbury (2002) Limited to pay to Patrick Mills the sum of \$4000.20 without deduction being compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[53] Mr Sanders has set out the applicant's actual costs in relation to the proceedings as \$2,940 and disbursements for photocopying and telephone calls in the sum of \$118.75 and \$70 filing fee. Mr Sanders submits that a fair and reasonable award would be \$2,500 towards costs and full reimbursement of disbursements.

[54] This matter was able to be investigated in about 2½ hours including the attendance required by the applicant's representative on the second day on 9 August 2010. The usual daily tariff in the Authority is \$3,000 and in the circumstances of this case I consider there should be a deduction from that given that the matter was able to be investigated in less than a full day. However, I do not consider that an award of \$1,500 would recognise the full extent of preparation or the requirement for the applicant's representative to attend on a second date in order to hear from the respondent.

[55] In all the circumstances I am of the view that a fair and reasonable award would be \$2,000 and disbursements in the sum of \$118.75 for photocopying and telephone calls and the \$70 filing fee.

[56] I order Metro Floor Canterbury (2002) Limited to pay to Patrick Mills the sum of \$2,000 being costs and \$188.75 being disbursements.

Helen Doyle
Member of the Employment Relations Authority