

ATTENTION IS DRAWN TO
THE ORDER PROHIBITING
PUBLICATION OF CERTAIN
INFORMATION REFERRED
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 215
3010471

BETWEEN

Barnie Pitman
Applicant

AND

Robert Gillanders
First Respondent

STAFFORD IN DUNEDIN LIMITED
Second Respondent

Member of Authority: Helen Doyle

Representatives: Barnie Pitman in person
Kevin Fleury (Advocate) for first and second Respondents

Investigation Meeting: 15 November 2017 at Dunedin

Submissions On the day
Further information received from both parties on 16
November 2017.

Determination: 13 December 2017

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

**A Barnie Pitman was employed by the second respondent Stafford in
Dunedin Limited.**

- B He was unjustifiably dismissed by Stafford in Dunedin Limited.**
- C Taking contribution into account Stafford in Dunedin Limited is ordered to pay to Bernie Pitman the following:**
- (a) Reimbursement of lost wages in the sum of \$7736.55 gross under s 123 (1)(b) of the Employment Relations Act 2000.**
 - (b) Payment of compensation of \$6000 under s 123 (1)(c)(i) of the Employment Relations Act 2000.**
- D The Authority does not accept this is an appropriate case to make recommendations.**
- E There may be no issue of costs but the Authority has reserved costs and timetabled for an exchange of submissions in the event there is.**

Prohibition from Publication

[1] I prohibit from publication all details about an issue concerning the applicant that arose prior to the employment relationship with either the first or second respondent.

Withdrawal of claim of unjustified disadvantage

[2] During a telephone conference on 22 August 2017 with the Authority and the parties Bernie Pitman withdrew a claim of unjustified disadvantage leaving the employment relationship problem of unjustified dismissal for investigation.

Employment relationship problem

[3] Mr Pitman was employed by either the first or second respondent in the business trading as Greenwaste in Dunedin from 17 August 2015. Greenwaste operates premises

where members of the public dump green waste. Mr Pitman and Mr Gillanders had worked together some years prior to Mr Pitman commencing employment.

[4] On Saturday 22 April 2017 after an incident on 18 April 2017 Mr Pitman was advised that his employment had been terminated in an email from Mr Gillanders. The email provided as follows:

Barnie this is to formally notify you that your employment has been terminated. I cannot and will not tolerate your behaviour on Tuesday.

I see no point in discussions. You are aware of your legal options.

Bob Gillanders.

[5] Mr Pitman says that his dismissal was unjustified. He says that after the incident on 18 April 2017 he wrote a letter to his employer raising several matters and asking for a meeting to discuss them. He says that he further told Mr Gillanders that a meeting should take place in a telephone call on 22 April 2017. He then received the email terminating his employment. Mr Pitman seeks reimbursement of lost wages in the sum of \$140,000, compensation for humiliation, loss of dignity and injury to feelings in the sum of \$60,000 and recommendations under s 123(1)(ca) of the Employment Relations Act 2000 (“the Act”).

[6] Mr Gillanders in his statement in reply says that Mr Pitman had brooded over the Easter period because he was asked to do things differently and that he came to work [18 April 2017] full of rage, lost the plot and assaulted him. This led to the termination.

[7] On 1 November 2017 there was an application made to join the second respondent and to discontinue the claim against the first respondent. The Authority advised the parties it would hear evidence about this issue at the Authority investigation meeting.

The issues

[8] The issues for the Authority to determine in this matter are as follows:

- (a) Was Mr Pitman employed by the first or second respondent?
- (b) What happened on Tuesday 18 April 2017?
- (c) What happened between 18 April and 22 April 2017?
- (d) Was there a full and fair investigation into the event on 18 April following which a fair and reasonable employer could have justifiably made the decision to dismiss Mr Pitman?
- (e) If the dismissal was unjustified then what remedies should be awarded and are there issues of mitigation and/or contribution?
- (f) Should the Authority make the recommendations Mr Pitman seeks?

Was Mr Pitman employed by the first or second respondent?

[9] Robert Gillanders is the sole director of the second respondent Stafford in Dunedin Limited (“Stafford”). Attached to the statement of problem is a one page unsigned employment agreement headed Employment Contract 2015 between Stafford in Dunedin and Bernie Pitman. There is a space at the bottom of the page for signature for “Stafford in Dunedin Ltd” and “Barney Pitman”. The agreement refers to the date of commencement of employment of 17 August 2015 and some other terms and conditions of employment including the hourly rate. It states that Mr Pitman is employed as a machine operator, welder and handyman.

[10] The Authority had raised with Mr Pitman and Mr Gillanders the identity of the employer in light of the unsigned employment agreement and reference to a company at its first telephone conference. Mr Gillanders indicated he did not consider the matter a significant issue and was seemingly happy to leave matters. He then obtained some legal advice. An application was made to join the second respondent and to discontinue the proceeding against Mr Gillanders.

[11] Stafford is a duly incorporated company. It was incorporated on 14 November 2003. Mr Gillanders said in his evidence that Stafford owned and operated another business at that

time. Mr Gillanders said in his evidence that Mr Pitman's employer from the first day he started work was Stafford.

[12] Mr Pitman said that he signed an agreement that was different to the unsigned agreement before the Authority when he started work which referred to him as a digger driver. Mr Gillanders says that the only employment agreement is the unsigned version before the Authority. Mr Gillanders says that Mr Pitman did not return a signed copy of the agreement and he did not accept that the job Mr Pitman was employed to do ever changed from picking up green waste using a machine. I am satisfied the role did not evolve to include welding. I cannot be satisfied that there is another employment agreement.

[13] After the investigation meeting the Authority was provided with some information from Inland Revenue Department from both Mr Gillanders and Mr Pitman. I am satisfied from the information provided by Mr Gillanders that the Inland Revenue Department was aware as at 30 September 2015, a date shortly after the relationship commenced in mid-August 2015, that Mr Pitman was employed by Stafford. The information provided by Mr Pitman from the Inland Revenue Department confirms that he was paid by Stafford.

[14] The Employment Court in *Colosimo v Parker*¹ set out the principles that apply when considering the identity of the correct employer. These principles have been applied in a later judgment of the Employment Court in *Wilson v Bruce Wilson Painting & Decorating Limited*.²

[15] The principles can be briefly summarised as follows. The onus of proving the identity of the employer rests on the employee where the employee puts that fact in issue. The standard of proof is on the balance of probabilities and the question of who the employer was must be determined at the outset of the employment. The Authority should objectively assess the employment relationship at its outset and ask who an independent but knowledgeable

¹ *Colosimo v Parker*(2007) 8 NZELC 98, 622.

² *Wilson v Bruce Wilson Painting & Decorating Limited* [2014] NZEmpC 83 at [13], (2014) 11 NZELR 712.

observer would have said was the employer. Failure to notify or make an employee aware of the identity of the employer is not conclusive.

[16] An objective assessment of the evidence establishes the following. I am satisfied on the balance of probabilities that Mr Pitman was provided with a copy of the agreement that refers to Stafford as the employer. It remained unsigned. I accept that from Mr Pitman's perspective all of his interactions were with Mr Gillanders. A company is an unnatural person and needs to act through human agents. Often a company structure is not well understood. Employees can conclude their employer is the person they interact with on a day to day basis.

[17] When I stand back and consider matters objectively notwithstanding the employment agreement was unsigned it does support that from the outset of employment it was intended that Mr Pitman be employed by the second respondent. There was no evidence that there was a change to this from employment with the first respondent. In concluding that I have placed some weight on the communication in September 2015 from the Inland Revenue Department. I find, objectively assessed, an independent but knowledgeable observer would have said that the employer was Stafford. I find that Mr Pitman was employed by the second respondent Stafford in Dunedin Limited and his claim should properly be against that company and not Mr Gillanders.

What happened on Tuesday 18 April 2017?

[18] Mr Pitman's first work day after the Easter holiday was Tuesday 18 April 2017. Greenwaste had remained open over the Easter weekend and there was a considerable amount of green waste as a result. Mr Pitman I had left the premises to a tidy and manageable state before he left for the Easter break. He therefore returned to a different situation.

[19] I was provided with some video footage of the exchange. There is no sound and the quality is not particularly good. I have viewed it several times. The incident occurred when Mr Gillanders went to talk to Mr Pitman anticipating that he would not be happy. I accept his

doing so was with good intentions but with the benefit of hindsight it would have been preferable to have spoken to Mr Pitman during a break or at the end of the day.

[20] Mr Pitman was in the cab of the digger shifting green waste as Mr Gillanders approached him. Mr Pitman explained in his evidence that there were some factors that morning he was unhappy with. The first was the volume of green waste as a result of the Easter weekend. The second was that the Fiat vehicle had a flat tyre that had to be fixed and the third was that members of the public were already in the yard earlier than would have usually been the case. What is not apparent from the video clip is what was said between the parties. I accept however that Mr Pitman expressed when approached by Mr Gillanders when he was in the cab digger that he was unhappy and that Mr Gillanders said words to the effect “what is the problem”. Mr Gillanders said what he meant by that was shifting green waste was the business and nature of Mr Pitman’s role. I accept as likely that this triggered Mr Pitman to become heated.

[21] The video recording shows Mr Pitman coming out of the cab. It is at this point that Mr Gillanders says Mr Pitman stood very close to him in an enraged state. The video shows that Mr Pitman after he gets out of the cab put his head very close to Mr Gillanders. Mr Gillanders describes him at this point as “bellowing” and “eyes bugging.” Mr Gillanders said he felt particularly intimidated and put a hand up to put some distance between them. Mr Pitman said that Mr Gillanders placed his hand on his shoulder. Mr Pitman in his evidence said that he only pushed Mr Gillanders away because Mr Gillanders had an arm on his shoulder and that he saw Mr Gillanders with a clenched fist to the side. That aspect is quite difficult to see. Mr Pitman described that he *whacked the arm away*.

[22] Mr Gillanders said that as a result of the exchange particularly Mr Pitman getting very close to him in what he described as an enraged state he felt shocked and intimidated and moved away to a different area of the site. Mr Gillanders had been in hospital the day before the exchange and said that he was still not fully fit or in a condition to be confrontational. Both men are in their sixties although Mr Gillanders is about eight years older than Mr

Pitman. It is likely that there was a very brief discussion after the incident that day that they would need to have a talk later. Mr Pitman carried on working.

What happened between 18 April and 22 April?

[23] The evidence of Mr Gillanders and Mr Pitman supports some interactions during the days before the employment was terminated. The first time was on the day as set out above that both of them said they would talk about it later.

[24] Mr Gillanders recalls a discussion about a machine on a subsequent day. Mr Pitman says that he was advised by the office person that he was not to come in on 22 April 2017 as Mr Gillanders was training another person. Mr Gillanders said that he wanted to train up a part-time person.

[25] The third occasion that both recall some interaction was on 22 April 2017. Mr Gillanders said that he telephoned Mr Pitman with the intention of terminating his employment. Mr Pitman said in response that they needed to have a meeting. Mr Gillanders said that he stated during the conversation that “if you are in a hurry I can tell you right now.” Having heard the evidence I think it likely that initially Mr Gillanders may have indicated that he may meet at a later date. He said however that when he got off the phone he could not see what a meeting would achieve and did not want there to be a further incident.

[26] At that time Mr Gillanders was also in receipt of a letter Mr Pitman had written to him on 20 April 2017 and this I accept influenced his thinking about the benefit of a meeting. In the letter Mr Pitman sets out a number of issues that he wants to discuss at a meeting. Many of these issues are expressed to be health and safety issues. They also include some employment agreement and hours of work issues. As to the incident itself Mr Pitman says the following:

The heated discussion we had was not acceptable so I apologise for my outburst.

That appears the only reference within the letter to the incident. Mr Gillanders who received the letter before termination did not accept that there was validity to many of the matters in the letter and concerns raised. He went through a number of matter raised in the letter in his oral evidence and said they were without merit. He said that he did not want to hear “drivel”. He felt that the seriousness of the incident had been “glossed over” and replaced by alleged failures on the part of Stafford that were without merit.

Justification for dismissal

[27] Section 103A of the Act contains the test of justification. This requires the Authority to objectively consider whether the employer’s actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.

[28] There are procedural fairness factors set out in s 103A(3) that must be considered by the Authority. These require concerns to be raised before dismissal and an opportunity for an employee to respond to the concerns and time for such response to be considered. A fair and reasonable employer could be expected to comply with good faith obligations in s 4 of the Act.

Reason for dismissal

[29] The reason for the dismissal I accept was the incident on 18 April as expressed in the letter of dismissal. I accept that it was not described specifically as an assault in the letter of dismissal however Mr Gillanders had formed that view that it was both intimidation and assault by Mr Pitman.

Assault and threats

[30] Assaults and threats in the workplace have been found in cases in the employment area to amount to serious misconduct of a type that justifies dismissal. Mr Gillanders was also Mr Pitman’s manager. Mr Gillanders said he felt intimidated and shocked when Mr

Pitman on 18 April 2017 got out of the cab of the digger and put his head close to him whilst evidently very angry. He did not, he said in his evidence, immediately recall that he had been pushed reasonably forcefully on the arm until he looked at the video footage. Mr Pitman said in response when he saw the footage for the first time as part of the Authority process that he was acting in self-defence in respect of pushing the arm away. I shall go on to assess whether the conduct in this case justifies dismissal.

Was there a full and fair investigation into the actions of Mr Pitman?

[31] Mr Gillanders did not want to meet with Mr Pitman before dismissal as he did not consider there was anything to discuss and he was concerned about a possible further incident. It would certainly have been preferable if someone else had represented Stafford at a meeting or if Mr Gillanders had taken another person with him to any meeting not least because he was involved in the incident himself. I am not satisfied, objectively assessed, that there was nothing to discuss and that the absence of process can nevertheless result in a justified dismissal.

[32] Mr Gillanders did not raise with Mr Pitman specific concerns and he did not give Mr Pitman a reasonable opportunity for a response and consideration of that response before dismissing him. Mr Gillanders said when I raised the issue of procedural fairness that Mr Pitman did give an explanation because he wrote the letter which Mr Gillanders considered. There is limited reference to the incident in Mr Pitman's letter. Rather there is an extended list of issues Mr Pitman had about the workplace and his role. Many go beyond simply mitigating or explaining conduct on 18 April 2017. I could not be satisfied that Mr Pitman knew exactly what Mr Gillanders was concerned about from the incident on 18 April so that he could properly give an explanation for consideration. Clear notice of an allegation is an important factor in procedural fairness.

[33] Mr Pitman did not have the video footage to view before dismissal so that he could not comment on aspects of that as good faith obligations require. The defects in the process were not of a technical and minor nature and they did result in unfairness to Mr Pitman. The

procedural factors that must be considered in s 103A (3) in applying the test of justification were not satisfied.

[34] Mr Pitman asked for a meeting before he was dismissed. As to whether it may have made a difference to the outcome I record that Mr Gillanders said a genuine apology may have changed things. I accept that Mr Gillanders was unimpressed by the contents of Mr Pitman's letter. To an extent the significance of the apology in that letter was overtaken by the matters that followed suggesting the company was at fault. I cannot conclude however that procedural fairness may not have resulted in a different outcome than dismissal, particularly if the allegation to answer had been clearly put and footage provided. In that way Mr Pitman would have had a proper appreciation of the impact his conduct had had on Mr Gillanders.

[35] I do not find that there was a full and fair investigation into the actions of Mr Pitman.

Substantive justification

[36] I now turn to substantive justification and whether the conduct goes to the heart of the employment relationship and undermines the essential trust and confidence that the employer must have in the employee.

[37] I find that a fair and reasonable employer could conclude that Mr Pitman's behaviour was angry and therefore intimidating because he stood uncomfortably close to Mr Gillanders in an angry state. There was a forceful push although Mr Pitman's explanation that he was acting in self-defence was not heard and considered.

[38] There is an absence of procedural fairness and that overlaps particularly in terms of any conclusion about an assault, including the seriousness of that. I do find a fair and reasonable employer could conclude there was aggressive intimidating conduct on the part of Mr Pitman when he stood close to Mr Gillanders in an enraged state. That could amount to substantive justification for dismissal.

Could a fair and reasonable employer have reached the decision to dismiss?

[39] I have found that there was not a full and fair investigation in good faith into the conduct of Mr Pitman. For that reason the decision to dismiss was not one that a fair and reasonable employer could have reached in all the circumstances.

[40] Mr Pitman has a personal grievance that he was unjustifiably dismissed and he is entitled to an assessment of remedies.

Remedies

Lost wages

[41] Mr Pitman seeks the sum of \$140,000. I have been provided with Inland Revenue Department details of his income from Stafford for the period 1 April 2016 to 31 March 2017 and for the period from 1 April to 30 April 2017. Gross income for the full financial year ending 31 March 2017 was \$51,577. Mr Pitman therefore is seeking 2.7 years loss of income.

[42] He accepted that he has not really undertaken any search for employment concluding that it would be too difficult for him to find another job although I do not find all the responsibility for that lies with Stafford. He said that he had undertaken some very limited work in an employment advocacy business that he operates but that does not have appeared to generate significant income. Mr Pitman said that he has been living off his savings.

[43] I do not consider this is a matter where I should exercise my discretion under s 128 (3) of the Act and order payment of a sum greater than 3 months ordinary time remuneration. I have concluded that because there has been no real attempt to mitigate and I could not say with certainty that the relationship would have continued beyond that period even with procedural fairness. Equally I do not conclude as certain that even with procedural fairness the relationship would have ended.

[44] Subject to issues of contribution I have assessed 3 months lost remuneration on the basis of the gross earnings for the financial year 1 April 2016 to 31 March 2017 of \$51,577. That sum divided by 52 weeks is \$991.87. That weekly amount of \$991.87 multiplied by 13 weeks is \$12,894.25 gross.

Compensation

[45] Mr Pitman seeks the sum of \$60,000 under this head. I accept that the effect of the dismissal was significant for Mr Pitman but an award of that amount is too high. He put it rather eloquently in his evidence that he was not dealt with fairly, had asked for a meeting without success on two occasions and that he was “worth more than that”. He said he had given his heart and soul for the business. There was no dispute that Mr Pitman was a hard worker and enjoyed his job. As a result of his dismissal he has lost work that was particularly important to him.

[46] Subject to contribution a fair and reasonable award for compensation would be the sum of \$12,000.

Contribution

[47] The Authority is required under s 124 of the Act where it determines there is a personal grievance to consider the extent to which the actions of Mr Pitman contributed to the situation that gave rise to the grievance and if required reduce the remedies that would otherwise have been awarded.

[48] At this point the Authority is required to decide on the balance of probabilities whether Mr Pitman did what is alleged to have been done. There is no real dispute that Mr Pitman was angry. The video confirms he stood for a short time after exiting his cab exceedingly close to Mr Gillanders and on the balance of probabilities he was yelling. I accept that was intimidating. Mr Pitman may well have considered Mr Gillanders lifting or

placing his arm to be provocation but his forceful pushing of the arm away was equally telling about the angry state he was in.

[49] Mr Gillanders was clearly upset, intimidated and shocked by the outburst. I find that there was blameworthy conduct on the part of Mr Pitman that contributed to the situation that gave rise to the personal grievance. Many people are upset and frustrated about workplace issues from time to time. There are more appropriate ways to deal with that than with anger and rage. I weigh with this conduct the absence of any process and find that the remedies above should be reduced by 50%.

Orders

[50] Taking contribution into account I order Stafford in Dunedin Limited to pay to Bernie Pitman the sum of \$7736.55 gross being reimbursement of lost wages under s 123 (1) (b) of the Act.

[51] Taking contribution into account I order Stafford in Dunedin Limited to pay to Bernie Pitman the sum of \$6000 being compensation under s 123 (1)(c)(i) of the Act.

Recommendations

[52] The Authority may make recommendations under s 123 (1)(ca) of the Act to the employer if any workplace conducts or practices are a significant factor in the personal grievance. Mr Pitman focussed on and was critical of aspects of health and safety. Mr Gillanders said that the company always had health and safety meetings and now has written policies. Whilst Mr Pitman considered these issues caused him to behave the way he did on 18 April the focus for the Authority was on the reasons for dismissal which was the interaction itself. I do not find that the workplace conduct or practices were a significant factor in the personal grievance when the matter is considered in that way but rather factors of mitigation/explanation for the behaviour. I do not consider it appropriate to make recommendations to Stafford in this matter.

Costs

[53] Mr Pitman was unrepresented and I would not expect there to be an issue of costs in those circumstances beyond reimbursement of the filing fee and any other disbursement paid to a third party. I will however as a precautionary measure reserve costs. Any submission by Mr Pitman about costs should be lodged and served by the end of December 2017 and any response should be lodged and served by Mr Fleury by 31 January 2018.

Helen Doyle
Member of the Employment Relations Authority