IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2010] NZEMPC 82
CRC 28/09

IN THE MATTER OF	a de novo challenge to determination of the Employment Relations Authority
BETWEEN	GREGORY MARK GOODFELLOW Plaintiff
AND	BUILDING CONNEXION LIMITED TRADING AS ITM BUILDING CENTRE Defendant

Hearing: 28 and 29 June 2010
(Heard at Nelson)

Appearances: Steven Zindel, counsel for the plaintiff
Scott G Wilson, counsel for the defendant

Judgment: 29 June 2010

ORAL JUDGMENT OF JUDGE A A COUCH

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[1] The plaintiff, Mr Goodfellow, was employed by the defendant, Building Connexion Limited (the company). That relationship ended on 3 June 2008. The key issue in this case is how that relationship ended. Was Mr Goodfellow dismissed or did he resign?

[2] Mr Goodfellow believed he had been dismissed and that his dismissal was unjustifiable. He pursued a personal grievance to that effect. The Employment Relations Authority determined[1] that Mr Goodfellow had not been dismissed and rejected his claims. Mr Goodfellow challenged that determination and the matter proceeded before me in a hearing de novo.

[1] CA 170/09 9 October 2009

[3] The company owns and operates a building supplies, hardware and joinery business. It trades as ITM Building Centre. It has outlets in Nelson, Motueka and Takaka.

[4] Mr Goodfellow has a background in the building industry with some experience also in management. In 2001 he was employed by the company as a "trade representative". I understood this to mean that he liaised with the company's trade customers and promoted the company's products and services to them.

[5] At that time, and for some years previously, the Takaka branch was managed by Philip Woolf. He is a shareholder and director of the company. In December 2006, Mr Woolf became the General Manager of the company's operations and Mr Goodfellow was appointed manager of the Takaka branch. Although Mr Woolf's responsibilities then extended to overseeing all three outlets he continued to work out of an office on the Takaka premises.

[6] Mr Goodfellow alleged that, during 2007 and the first part of 2008, Mr Woolf undermined him in his position as manager of the Takaka branch. A good deal of evidence was given of specific events. Mr Zindel confirmed however, that no personal grievance based on disadvantage was being pursued and these events really only formed the background to what happened at the end of May 2008. I have taken this evidence into account but, in light of that clarification and the decision I have reached, there is no need to record that evidence in detail in this judgment or to reach any conclusions about it. The one exception to that approach is the issue of what was described as the "Andrews account".

[7] Peter Andrews is a builder in the Golden Bay area and a longstanding customer of the company through its Takaka branch. During 2007 and 2008 his account was frequently in arrears. As a result his credit was stopped on several occasions.

[8] As at April 2008, Mr Andrews' account had been delinquent for a long time and his credit was stopped. One of Mr Goodfellow's responsibilities as branch manager was to monitor accounts and to ensure overdue accounts were paid. In this

role he was supported by the company's administration manager based in Motueka. He also had authority to refer particularly difficult debtors to a debt collection agency. In that role, Mr Goodfellow had made repeated efforts to obtain payment from Mr Andrews, but to no avail.

[9] Against that background, there occurred a sequence of events involving Mr Goodfellow, another employee of the company called Luke Brown, and a man called Mark Pascoe. Luke Brown had recently been employed as a trade customer representative for the company. Prior to that he had been a builder in the Golden Bay area. In that former capacity he had been approached by Mr Pascoe who wanted a house built. When Mr Brown was employed by the company, he was no longer available to build Mr Pascoe's house. With Mr Goodfellow's approval, Mr Brown spoke to Mr Pascoe with a view to ensuring that materials required to build the house were nonetheless supplied by the company. In the course of discussion about these matters, Mr Pascoe said he had been talking to Mr Andrews about building his house and asked Mr Brown what he thought of him. Mr Brown told Mr Pascoe that Mr Andrews was on stop credit with the company and not able to purchase goods at trade discount. He also said that he could not recommend Mr Andrews as a builder. Mr Brown suggested to Mr Pascoe that he engage another builder called Darwin who had a trade account with the company and who was reliable.

[10] Mr Pascoe then apparently told Mr Andrews that he no longer wished to engage him and why. This resulted in an angry complaint by Mr Andrews to Mr Woolf.

[11] Initially, Mr Woolf thought that he had assuaged Mr Andrews' concern through discussion but he then received a letter from a solicitor acting on behalf of Mr Andrews. That letter contained various accusations, threats of further action and a claim for $5,000.

[12] Mr Woolf apparently took this seriously. He showed a copy of the letter to Mr Goodfellow and said that he would "take control and handle the matter" from that point. That gave rise to a misunderstanding. Mr Woolf thought that Mr Goodfellow would understand from what he said that he would handle everything

with respect to Mr Andrews. Mr Goodfellow took it that Mr Woolf would respond to the letter from the solicitor, but that he would carry on as usual in terms of debt collection. Given what Mr Woolf said to Mr Goodfellow, those differences in perception were understandable.

[13] In the following week or so, Mr Woolf negotiated with Mr Andrews. In the week beginning 26 May 2008, they reached what Mr Woolf described as "an agreement in principle" although it is clear from what Mr Woolf said about their discussion that it was still subject to agreement about legal costs and subject to the agreement being reduced to writing and signed.

[14] Mr Woolf said, somewhat vaguely, that this conditional agreement was reached "on or about 26 May 2008". He could not be more precise than that. Having regard to all the evidence, however, I find it more likely that this conditional agreement between Mr Woolf and Mr Andrews was reached on 28 May 2008, as that was the day Mr Woolf sent an email to Mr Goodfellow telling him that an agreement with Mr Andrews had been reached.

[15] Mr Woolf suggested in his evidence that he had told Mr Goodfellow about this agreement verbally before sending the email on 28 May but Mr Goodfellow denied this was so. On balance I find that Mr Woolf was mistaken about this. That conclusion is based, to an extent, on evidence of what Mr Goodfellow did on 28 May. It is common ground that, on that day, Mr Goodfellow went to see Mr Andrews to make a further request for payment of the outstanding account. Had he been told in advance that Mr Woolf had reached an agreement with Mr Andrews, I am sure that he would not have done that.

[16] Mr Goodfellow's evidence was that when he spoke with Mr Andrews on the afternoon of 28 May, Mr Andrews said he was in discussion with Mr Woolf about a financial settlement and that, if this came to pass, he would be able to pay his account. It was put to Mr Goodfellow that he had given a different account of this meeting in his evidence to the Employment Relations Authority. Mr Goodfellow agreed that this might be so in terms of his original written brief but that his oral evidence to the Authority was entirely consistent with his evidence to the Court. In

the absence of any record of the oral evidence given in the course of the Authority's investigation meeting, and there being no evidence to the contrary, I accept what Mr Goodfellow says. In other respects I found that Mr Goodfellow was a straightforward and credible witness and I have no other reason to disbelieve him on this issue.

[17] Mr Goodfellow was upset by the news that Mr Andrews might be getting money from the company as a result of his claim about the Pascoe matter. He felt that if this happened it would be totally unjust.

[18] Mr Goodfellow said that, after seeing Mr Andrews on 28 May he went straight back to his office, a journey of only a couple of minutes. Shortly after he arrived, he received an email from Mr Woolf timed at 4.13pm. Mr Woolf said in his evidence that he had been told by Mr Andrews that the meeting between him and Mr Goodfellow had occurred much earlier in the afternoon, but I prefer the evidence of Mr Goodfellow on this point. Mr Andrews was not called as a witness. Mr Goodfellow gave direct evidence of the matter on oath and was unmoved on it in cross-examination. I find that evidence distinctly preferable to hearsay evidence of Mr Andrews' account of the matter.

[19] I return then to the email which Mr Woolf sent to Mr Goodfellow timed at 4.13pm on 28 May 2008. It had the subject "Re Andrews Update" and said:

> We, the company have reached an agreement with Mr Andrews which has been agreed to total confidentiality with the parties.
>
> In case I don't catch you before you leave, can you ensure all staff treat Mr Andrews with the respect we do for others. There is considerable work to do to restore relationships with him and we need all players contributing.
>
> I have an appointment at 4.30 and not sure what time I will be back / away tomorrow.

[20] It is important to note here that, although Mr Woolf told Mr Goodfellow in this email that an agreement with Mr Andrews had been reached, he did not tell Mr Goodfellow what the terms of that agreement were. Mr Woolf confirmed in evidence that this was deliberate and that Mr Goodfellow was never told what had been agreed. He was only told that an agreement had been reached.

[21] Mr Goodfellow was frustrated and annoyed by Mr Woolf's email. In particular he was annoyed that the company had done some sort of deal with Mr Andrews and frustrated that he did not know what the terms were. He was concerned that it might involve payment of money to Mr Andrews which he would regard as entirely unwarranted.

[22] At 4.26pm that day Mr Goodfellow sent the following email back to Mr Woolf:

> It's a pity luke had to hear on the grapevine what is going on we are going to be laughing stock of Takaka over this if we as a company have paid out on this, as manager of Takaka I don't wish to any part of this, so if we have I would like to know so I can pass on my resignation cheers greg

[23] 28 May 2008 was a Wednesday. The following Monday 2 June was Queens Birthday. Mr Goodfellow had arranged to take Friday 30 May as annual leave to have a four day weekend. He was, however, at work as usual on Thursday 29 May.

[24] After sending his email late in the afternoon of Wednesday 28 May, Mr Goodfellow heard nothing from Mr Woolf that day or on Thursday. Mr Woolf said that he left his office at Takaka before receiving Mr Goodfellow's email on Wednesday and that he was in Motueka all day on Thursday 29 May without access to emails. He said he only saw Mr Goodfellow's email for the first time on the Thursday evening. Having received it, Mr Woolf sent Mr Goodfellow's email to the chairman of the board of the company, Geoffrey Bowes, who circulated it to board members. Mr Bowes apparently interpreted the email as an actual resignation and, with the support of other board members, instructed Mr Woolf to accept it. More than that, Mr Bowes specifically instructed Mr Woolf that this was to be with immediate effect.

[25] At 6.08pm on Friday 30 May Mr Woolf sent the following email to Mr Goodfellow:

> I have received your email below and wish to advise the Board has accepted your resignation effective immediately. Could you please supply a signed resignation confirming this. The company will pay out 4 weeks salary plus any accrued holiday leave as per your employment agreement. Could you please return any company owned items.

[26] When he sent that email, Mr Woolf knew that Mr Goodfellow was on leave and that he would not receive it until the following Tuesday when he returned to work. Despite that, Mr Woolf made no effort to contact Mr Goodfellow personally.

[27] Mr Goodfellow arrived at work at about 7.30am on Tuesday 3 June. He read Mr Woolf's email. He immediately took it as a message that he was no longer wanted by the company and regarded it as a dismissal. He immediately arranged for a member of staff to drive him home and return his work vehicle to the company premises.

[28] Mr Goodfellow's evidence is that he never intended his email of 28 May to be a resignation, even though it contained that word, and that he did not think it was a resignation. Despite that, and the company's response being based on accepting his resignation, Mr Goodfellow did not immediately protest that there had been a misunderstanding. Equally, in his evidence Mr Woolf accepted that Mr Goodfellow's email was at best equivocal but agreed that he took no steps to clarify with Mr Goodfellow what he meant. Both men took the view that it was the other man's responsibility to initiate any discussion or to provide clarification.

[29] Mr Goodfellow regarded the direction that he finish work immediately, be paid in lieu of notice and return company property as the company bringing the employment relationship to an end, that is a dismissal. Mr Woolf took the view that, if Mr Goodfellow did not say otherwise, the company was entitled to treat his email as a resignation.

[30] I note here that, while it was Mr Woolf who sent the email to Mr Goodfellow on the evening of Friday 30 May, he was undoubtedly acting under the direct instructions of Mr Bowes and with the knowledge that what Mr Bowes said was supported by the board. This effectively made Mr Woolf the "meat in the sandwich" and left him with little room in which to move.

[31] Two days later, on 5 June, Mr Goodfellow received a letter dated 3 June from Mr Bowes. It appears the letter was hand delivered to his home. The letter was in formal terms confirming the termination of employment on the basis that a

resignation had been accepted. Mr Goodfellow sought advice from an employment advocate. Acting on that advice, he wrote a letter to Mr Woolf which was dated 6 June but appears not to have been posted until 9 June and which was not received by Mr Woolf until 13 June. The letter was in distinctly equivocal terms which did not advance the matter even though it ended by inviting Mr Woolf to discuss with him "where we go from here". Before Mr Woolf could respond to that letter, Mr Goodfellow's advocate wrote to the company initiating a personal grievance.

[32] In the correspondence which followed and in the briefs of evidence there was some suggestion that Mr Goodfellow was pursing two personal grievances; one of disadvantage and one of unjustifiable dismissal. As I have noted earlier, however, Mr Zindel clarified that it was only an unjustifiable dismissal claim which was before the Court.

[33] It was equally unclear from the pleadings and the briefs of evidence whether the company was seeking to justify any dismissal of Mr Goodfellow. Mr Wilson clarified in the course of his opening that this was not so. He agreed that the termination was either a resignation or an unjustifiable dismissal. The matter proceeded on that basis.

[34] The key issue is whether it was properly open to the company to regard Mr Goodfellow's email of 28 May as a resignation which it was entitled to accept. I find it was not. The email was clearly conditional. This is apparent from the repeated use of the word "if". The suggestion made in the email of resignation was specifically conditional on the company having paid money to Mr Andrews and on Mr Goodfellow being told that this was so.

[35] As to the first issue Mr Woolf eventually said in evidence that the agreement did involve some pecuniary advantage to Mr Andrews although that apparently fell short of actually paying him any money. In any event, however, the agreement with Mr Andrews was still conditional at the time Mr Woolf's email of 30 May was sent. He said in evidence that the agreement was not finalised until the following week.

[36] Of far more significance is that it was perfectly clear from Mr Woolf's evidence that Mr Goodfellow was never told what the terms of the agreement with Mr Andrews were and that he intended that Mr Goodfellow should never know what they were. Thus, the condition that the company tell Mr Goodfellow whether money had been paid to Mr Andrews was never met. That being so, there was nothing for the company to accept.

[37] Turning to Mr Woolf's email of 30 May, it was in such stark and unequivocal terms that I find Mr Goodfellow was entitled to regard it as a dismissal. That dismissal was effective on communication to Mr Goodfellow. That occurred at about 7.30am on Tuesday 3 June when Mr Goodfellow read the email. What happened or did not happen after that can be of little significance.

[38] Counsel both provided me with detailed submissions referring to a number of decided cases. In particular they both referred me to *Boobyer v Good Health Wanganui*[2], in which former Chief Judge Goddard discussed various situations in which contested resignations may arise. Counsel also both referred me to *Sadd v Iwi Transition Agency*[3] in which an ambiguous letter was treated as a resignation.

[39] This is not that sort of case. Mr Goodfellow's email was not ambiguous. Rather, on its face, it conveyed a conditional intention to resign. This case more closely resembles *NZ Public Service Assn v Land Corporation Ltd*[4] in which former Chief Judge Goddard made the following observation about the employees' communication:

> At the highest they made a conditional offer to resign. That offer was capable of being accepted on the conditions proposed. It was also capable of being rejected, either outright or by the making of a counter-offer. It was not competent for the respondent to accept part of the offer and reject the rest or to accept it on its own terms.

[40] That is effectively what the company has purported to do in this case; to accept a conditional resignation without the conditions being fulfilled and then to accept it on terms not proposed by Mr Goodfellow. That being so, and in light of

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[2] WEC3/94, 24 February 1994.
[3] [1991] 1 ERNZ 438.

the unequivocal message contained in the response that the employment relationship was at an end, the company's actions can only be seen as a dismissal.

[41] Turning to remedies, Mr Goodfellow seeks compensation for humiliation, loss of dignity and injury to his feelings arising out of the dismissal. He also seeks reimbursement of remuneration lost as a result of the personal grievance.

[42] There was a good measure of evidence given by Mr Goodfellow about the effect of the dismissal on him. I find that he was significantly humiliated and distressed as a result of the dismissal. In deciding the quantum of compensation he should be awarded, I must have regard to the level of awards made in other broadly comparable cases. Without setting those out in detail, I find that a just award in this case is $8,000.

[43] The remedy of reimbursement is dealt with in s 128 of the Employment Relations Act 2000. Section 128(2) directs the Court to order the employer to pay to the employee the lesser of a sum equal to the remuneration lost as a result of the personal grievance or to three months' ordinary time remuneration.

[44] There is no doubt in this case that Mr Goodfellow earned little or no income in the year following his dismissal. He gave evidence that, during that period, there were few employment opportunities in Golden Bay for a man with his characteristics. By that I mean not only his skills and experience but also his physical limitations. There is evidence that Mr Goodfellow was then suffering from a shoulder injury and, until February 2009, an unresolved hernia.

[45] These did not prevent Mr Goodfellow working for the company in the job that he had and therefore cannot be seen as an intervening factor. An employer who unjustifiably dismisses an employee who suffers from any limitation or disability must accept that those limitations will reduce that person's subsequent employment opportunities.

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[4] [1991] 1 ERNZ 741.

[46] Mr Wilson submitted that Mr Goodfellow's loss was not "as a result of the personal grievance" because he did not properly attempt to mitigate his loss. There is some weight in that submission. Mr Goodfellow gave little if any evidence of specific attempts to obtain particular jobs. Indeed, he agreed that he had not applied for any jobs. In order to establish a sufficient attempt to mitigate loss, however, it is not essential to show that jobs were actually applied for. The statutory consideration is whether the remuneration has been lost as a result of the personal grievance. The personal grievance in this case is Mr Goodfellow's dismissal. Having regard to all the evidence, I find there is a proper basis on which to infer for the purposes of s 128(2) that Mr Goodfellow's loss was the result of his dismissal. In particular I draw this inference from the evidence that Mr Goodfellow had worked all of his adult life, that he was a diligent employee, that he was humiliated by his inability to support his family, and the evidence of lack of suitable job opportunities. Mr Goodfellow was plainly ready and anxious to work and, had a suitable opportunity been available, I am sure he would have pursued it.

[47] Although I find that evidence satisfies the requirements of s128(2), I do not find that it supports a further award under s128(3). As a result, Mr Goodfellow should receive by way of reimbursement a sum equal to three months' ordinary time remuneration. As the agreed total gross value of his remuneration package was $76,280 per annum, that sum is $19,070 gross.

[48] I turn then to the issue of contribution. Section 124 of the Employment Relations Act 2000 provides that where it is determined that an employee has a personal grievance the Court must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. Mr Wilson submitted that, in this case, Mr Goodfellow must be found to have contributed to a very substantial extent to the situation giving rise to his personal grievance, being the exchange of emails at the end of May 2008.

[49] With respect, the situation is not quite that simple. The established jurisprudence surrounding s 124 is that, to be taken into account as contributing behaviour, the actions of the employee must be both causative of the outcome and blameworthy.

[50] In this case causation is quite straightforward in the sense that, but for his email of 28 May 2008, the company's response through Mr Woolf's email of 30 May 2008 would not have occurred. I find, however, that Mr Goodfellow's conduct in sending his email was not blameworthy in the sense that it involved no breach of duty by him. For that reason, I do not find that there is contribution for the purposes of s 124.

[51] In summary then my conclusions are:

a) Mr Goodfellow was dismissed.

b) That dismissal was unjustifiable.

c) The company is ordered to pay Mr Goodfellow $8,000 by way of compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

d) The company is also ordered to pay Mr Goodfellow $19,070 as reimbursement of lost remuneration.

e) The determination of the Authority is set aside and this decision stands in its place.

[52] Costs are reserved. The parties are urged to agree about costs if possible. If they are unable to do so, Mr Zindel is to file and serve a memorandum within 21 days after today. Mr Wilson is then to have a further 14 days in which to respond.

A A Couch
Judge

Oral judgment delivered at 1.28pm on 29 June 2010