IN THE EMPLOYMENT COURT
CHRISTCHURCH

[2011] NZEmpC 164
CRC 2/10

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	CHRISTOPHER JOSEPH TAYLOR Plaintiff
AND	MILBURN LIME LIMITED Defendant

Hearing: 7 & 8 December 2010
(Heard at Dunedin)

Appearances: Andrew Beck, counsel for the plaintiff
Michael Nidd and Brett Gray, counsel for the defendant

Judgment: 7 December 2011

JUDGMENT OF JUDGE A A COUCH

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[1] Mr Taylor was employed by Milburn Lime Limited as a digger driver. On 23 October 2008, there was an argument between Mr Taylor and a fellow worker. Mr Taylor left the worksite and never returned. The employment relationship clearly came to an end. The issue is how that happened. Mr Taylor says he was dismissed. Milburn Lime Limited says he resigned.

[2] Mr Taylor pursued a personal grievance alleging unjustifiable dismissal. That claim was investigated by the Employment Relations Authority which determined[1] that Mr Taylor had resigned. His claim was therefore dismissed. Mr Taylor challenged that determination and the matter proceeded before the Court by way of a hearing de novo.

[1] CA 222/09, 22 December 2009.

Events

[3] Milburn Lime Limited is a relatively small company owned and managed by Roger Mahan. It usually has between eight and ten employees. The principal business of the company is to extract lime from a quarry near Milton, south of Dunedin.

[4] At the time in question, the workforce at the quarry face comprised a foreman, Greg Manson, and five other employees, including Mr Taylor. The company's management office and workshop were on site. There was also a shipping container there used for "smoko". The quarry face was some distance away, uphill with access by a rough track. Workers travelled to and from the quarry face on an old four wheel drive ute.

[5] During the week beginning 20 October 2008, Mr Mahan was away on the West Coast. Mr Manson and Mr Taylor were both aware of this. Mr Taylor understood that Mr Mahan would return on or about Sunday 26 October 2008.

[6] On Thursday, 23 October 2008, the quarry workers stopped work as usual at about 10 am to have morning smoko. They all got aboard the ute. Mr Taylor was driving. At least three other men were standing on the deck behind the cab. When Mr Taylor went to drive off, the vehicle lurched forward and then abruptly stopped. One of the men on the back, Richard Lawlor, lost his footing and nearly fell over the cab. Mr Lawlor was angry. He banged on the roof of the cab and swore at Mr Taylor.

[7] The group continued down the track to the smoko shed. The passengers got off but Mr Taylor continued on to the workshop. Mr Manson was there. Mr Taylor believed the ute was low on clutch fluid and that this had caused the sudden movements of the ute a few minutes earlier. He mentioned this to Mr Manson who gave him some fluid to top up the reservoir in the vehicle. Mr Taylor and Mr Manson then went in separate vehicles to the smoko shed.

[8] When they got there, Mr Lawlor was still angry. He accused Mr Taylor of dangerous driving. Mr Taylor was unhappy about being blamed for what had happened and gave his explanation. A lengthy argument ensued and went on for several minutes. What then happened was the subject of a good deal of evidence from five witnesses, inconsistent with each other in many respects. I record only the conclusions I have reached after considering all of that evidence.

[9] After the argument between Mr Lawlor and Mr Taylor had been going for several minutes, Mr Manson told everyone to calm down, which they did. Following a period of tense silence, Mr Taylor said he was leaving. Each witness gave a different account of the exact words he used. It is very likely that Mr Taylor used the expression "I'm out of here" but what accompanied that statement is far from clear. He did not use the word "resign" or "quit". Mr Taylor's evidence was that he had said the situation was getting too heated and that he would sort it out when Mr Mahan got back. Mr Manson's evidence was that Mr Taylor said "I'm finished".

[10] As he was leaving, Mr Taylor spoke briefly to Mr Manson outside the smoko shed. He suggested that Mr Manson organise someone to pick up the ute that Mr Taylor was provided with to drive to and from work. Mr Taylor then went home in the ute.

[11] That day, Mr Mahan was still away from the business. He had gone to the West Coast to pick up some machinery and bring it back. Although Mr Taylor understood that Mr Mahan would be returning over the following weekend, he was in fact on his way back to Dunedin by road on 23 October 2008.

[12] About 11 am that day, Mr Manson called Mr Mahan on his cell phone. He told Mr Mahan that there had been an argument amongst the men and that Mr Taylor had left saying "I'm out of here. I'm finished". Mr Manson asked Mr Mahan what he should do.

[13] After that call, Mr Mahan telephoned either Mr Nidd or the Employers Association for advice. Early in the afternoon, before 2 pm, Mr Mahan telephoned

his office assistant. He dictated a letter for her to type up, sign on his behalf and post to Mr Taylor that afternoon. The letter was dated 23 October 2008 and addressed to Mr Taylor at what she understood to be his home address. It read:

> Dear Chris
>
> I was saddened to hear that you walked off the job and ceased your employment with us as of today.
>
> As you are aware I am away at present and have therefore asked Shona to arrange for your wages to be paid into your bank account today.
>
> Could you please arrange to return your Ute and any keys or property you have in your possession that belongs to Milburn Lime as soon as possible. One of our staff will be available to drive you home if required.
>
> Thank you for your time spent with us and I wish you the best for the future.
>
> Yours faithfully
>
> PP Roger Mahan
> Managing Director

[14] Mr Taylor received that letter between 9 am and 10 am the following morning, Friday 24 October 2008. He took from it that his employment was over. Mr Taylor did nothing that day but spoke to friends over the weekend. He decided to seek legal advice and was given Jenny Beck's name as someone to approach. Monday 27 October 2008 was Labour Day. On Tuesday 28 October 2008, Mr Taylor spoke with a member of Ms Beck's staff and, either that day or the following day, was advised to call Mr Mahan.

[15] Mr Taylor did that some time on Wednesday 29 October 2008. Mr Mahan then came to Mr Taylor's home to speak with him. Mr Taylor told Mr Mahan clearly he had not intended to resign the previous Thursday and had left in order to cool off after the argument. Mr Mahan said he would check with the men who had been present at the smoko shed that day and get back to Mr Taylor.

[16] Mr Mahan's evidence was that he spoke to all of the men the following day and that they confirmed to him that Mr Taylor had resigned. That evidence was contradicted by all four employees called as witnesses for the defendant. They were certain Mr Mahan did not speak to them about the issue at all. Some said that Mr

Manson had mentioned it in the smoko shed by telling them he was sure Mr Taylor had resigned and asking them if they agreed. Others said that the matter was not raised with them again by anyone.

[17] On Friday 31 October 2008, Mr Mahan telephoned Mr Taylor to say that all the other staff confirmed that he had resigned. Mr Mahan followed this up with a letter later that day, the substance of which was:

> Dear Chris
>
> This is to record that we were advised by the Foreman and other employees that you had resigned from your employment on Thursday 23 October 2008 and I did not hear from you until you phoned me six days later on 29 October 2008.
>
> Since that time you have not attended work and under the term of your employment agreement you are regarded as having abandoned your employment.
>
> We have had to employ another person in your place and we have paid you your final pay and holiday pay.
>
> Yours faithfully
>
> Roger Mahan
> Managing Director

[18] Mr Taylor's personal grievance was raised on 7 November 2008.

Discussion

[19] The case for the defendant is that, by his words and actions on 23 October 2008, Mr Taylor resigned. If that is correct, it disposes of Mr Taylor's claims.

[20] I accept Mr Taylor's evidence that, in his own mind, he did not intend to resign on 23 October 2008. However, as Chief Judge Goddard said in *Sadd v Iwi Transition Agency*:[2]

> In matters affecting contractual relationships, it is not only what the parties intend but also what they say to each other about their intentions that has an influence on the creation and termination of such relationships.

[2] [1991] 1 ERNZ 438 at 443.

[21] In employment relationships, parties frequently do not communicate their intentions accurately. A particular result may be that an employee is treated by his or her employer as having resigned when that was never the employee's intention. In *Boobyer v Good Health Wanganui Limited*,[3] Chief Judge Goddard helpfully discussed the various situations in which such a disputed resignation can arise. The first is where the employee gives an unambiguous resignation and later seeks to resile from it. In such a case, the resignation cannot be withdrawn without the employer's consent. As the Chief Judge said:[4]

> This is because the contract provides a mechanism for its termination by the employee and once that has been invoked by the employee giving the prescribed period of notice the contract comes to an end automatically when the notice given expires unless both parties agree to revive or renew it.

[22] In this case, there was a written employment agreement between the parties which provided that it could be terminated by giving two weeks' notice in writing. As Mr Taylor did not give such notice, anything he said or did on 23 October 2008 could not constitute a termination of the employment agreement on its terms. Rather, at most, it could only amount to a repudiation of the employment agreement which would have been open to Mr Mahan to accept or reject.

[23] I also find on the evidence that Mr Taylor's words and actions on 23 October 2008 were not sufficiently clear to constitute an unequivocal resignation or repudiation. He did not specifically say he was resigning. Accounts of what he did say varied considerably. The only thing the witnesses seemed to agree on was that Mr Taylor said "I'm out of here." On its own, that could only be equivocal. Mr Mahan was convinced that Mr Taylor also said "I'm finished" but even that is far from certain in its meaning. The fact that Mr Taylor then got into a vehicle and drove away must also be taken into account but that could also have been consistent with a variety of explanations.

[24] Mr Nidd invited me to place a great deal of weight on the evidence that Mr Taylor suggested to Mr Manson that he arrange someone to pick up the ute but that is also equivocal. It was common ground that Mr Taylor used the ute not only for his

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[3] WEC 3/94, 24 February 1994.
[4] At 2.

own transport but also to take another employee, Mr Kearney, to and from work. Mr Taylor was not intending to come to work the next day as he did not think Mr Mahan would be back until the weekend. Unless someone collected the ute, therefore, Mr Kearney would have been without a ride the next day.

[25] I also take into account the way in which Mr Manson reacted to what occurred and the way Mr Mahan reacted to Mr Manson's report of it. Mr Manson reported to Mr Mahan his understanding of what had happened and then asked for advice. Mr Mahan, in turn, sought legal advice and then thought about the situation for at least two hours before dictating a letter to Mr Taylor. This suggests that both men had a measure of doubt about the effect of what had happened.

[26] Another category of disputed resignation described in *Boobyer* was an employer seizing on words which were not intended to be a resignation and which were not reasonably capable of having that meaning. Where the employee promptly made it clear that no resignation was intended, an employer could not safely rely on its interpretation of what the employee had said or written. The Chief Judge went to say that words of resignation spoken in anger or when affected by strong emotion must be treated with similar caution. There are elements of this latter category in this case. There was undoubtedly a prolonged argument between Mr Taylor and Mr Lawlor which became heated and abusive. Mr Nidd submitted that this was irrelevant because Mr Manson told the men to stop, which they did, and it was a little time before Mr Taylor then left. I do not accept that submission. Several witnesses said that there was silence after the argument stopped and that the atmosphere remained tense. That could well have aggravated Mr Taylor's sense of frustration and discontent rather than diminishing it. On any reasonable view of the matter, what Mr Taylor said and did was prompted by the argument he had just had with Mr Lawlor and the strong emotions it engendered.

[27] The other category described by the Chief Judge in *Boobyer* was:[5]

> Then there is the case, exemplified by *Sadd v Iwi Transition Authority* [1991] 1 ERNZ 438, where the communication is equivocal, the employee learns that the employer has misunderstood it as a resignation contrary to the

[5] At 2.

> employee's intention but does nothing within a reasonable time to correct the employer's false impression. In such a case the employee must suffer the adverse consequences of passively standing by and letting the employer think that a resignation has taken place.

[28] In this context, Mr Nidd submitted that it was "of critical significance" that Mr Taylor was made aware on the morning of Friday 24 October 2008 that his employer regarded him as having resigned yet he did not contact Mr Mahan until Wednesday 29 October 2008, six days later. There was evidence that Mr Taylor had Mr Mahan's cell phone number and that he knew it was acceptable to Mr Mahan to call him directly about work related matters. In these circumstances, Mr Nidd submitted that, even if Mr Taylor did not intend to resign, his inaction for those six days left him bound by Mr Mahan's understanding that he had resigned. He added that this was reinforced by evidence that Milburn Lime Limited had appointed another staff member to Mr Taylor's position as digger driver before he met with Mr Mahan on 29 October 2008.

[29] There is obvious force in this submission but it does not resolve the matter. In the years since the Chief Judge made his observations in *Boobyer*, the nature of the mutual obligations which underpin the employment relationship has changed significantly. The longstanding obligations of trust and confidence have been supplemented by the mutual obligation of good faith.[6] Since the 2004 amendments to the Employment Relations Act 2000, the obligation of good faith specifically "requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative".[7] Guided by the test of justifiability in s 103A, employers must now ensure that, in taking any step which may disadvantage an employee, they do what a fair and reasonable employer would do in all the circumstances.[8]

[30] Taking those factors into account, the first question must now be whether a fair and reasonable employer in the circumstances in which Mr Mahan found himself on 23 October 2008 would have responded the way he did. In particular, the

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[6] Section 4 of the Employment Relations Act 2000.
[7] Section 4(1A)(b).
[8] This wording reflects s 103A as it was at the time of the events in question in this case.

question must be whether it was appropriate to send Mr Taylor the letter Mr Mahan sent and to do so without speaking to Mr Taylor or making further investigations.

[31] On the evidence, the information conveyed to Mr Mahan was minimal. He received one phone call from Mr Manson who told him that there had been a serious argument involving Mr Taylor, following which Mr Taylor had left saying "I'm out of here. I'm finished." Mr Mahan knew Mr Taylor well as an employee. He regarded Mr Taylor as a good worker and valued him highly. They had a good working relationship. Mr Mahan knew Mr Taylor tended to react impulsively. There was evidence that, on more than one previous occasion, Mr Taylor had said in the heat of the moment that he was leaving but changed his mind after he had cooled down. What this evidence shows is that Mr Mahan had good reason to doubt whether Mr Taylor genuinely wished to end the employment relationship.

[32] Where such doubt exists, the good faith obligation to be "active and constructive in ... maintaining a productive employment relationship" requires an employer to investigate the situation further before responding to the supposed resignation. Put another way, where there is doubt, a fair and reasonable employer will ensure that its response is based on the employee's actual intentions rather than on what might be inferred from equivocal words and conduct.

[33] When he received Mr Manson's call, Mr Mahan was on the road, not far north of Dunedin. He knew that he would be back in Milton later that day. Mr Mahan had Mr Taylor's cell phone number. He could easily have called Mr Taylor and arranged to meet with him the following day. His failure to do so, or to take other steps to communicate directly with Mr Taylor, was unjustifiable.

[34] The duty to deal in good faith is a mutual one. Employees have the same duties as employers to be active and constructive in maintaining the employment relationship. They too are required to be responsive and communicative. By waiting for several days after receiving Mr Mahan's letter of 23 October 2008 before contacting him, Mr Taylor failed in his duty of good faith. He attempted to explain this by saying that he thought he should take legal advice first but I did not find that evidence entirely convincing. Just as Mr Mahan knew Mr Taylor well, so Mr Taylor

knew Mr Mahan well. They had worked together for some time. Mr Taylor knew Mr Mahan to be a firm boss but one willing to listen to his employees. It was common ground that Mr Mahan was open to receiving telephone calls from Mr Taylor about work related matters. That this remained so was demonstrated on Wednesday 29 October 2008 when Mr Mahan went to see Mr Taylor at his home within an hour of receiving his phone call.

[35] The failure of both men to initiate effective communication for nearly a week meant that changes had been made before Mr Mahan became aware of Mr Taylor's true intentions. An occasional contractor who had been driving a truck was employed in Mr Taylor's position as the digger driver and a new man was employed as a truck driver. This made it difficult for Mr Mahan to accept that Mr Taylor had not resigned and that he remained an employee of the company. It was perhaps this difficulty which caused Mr Mahan to entrench the position he had taken in his letter of 23 October 2008 by telling Mr Taylor on 31 October 2008 that all the men had confirmed that he resigned. On the evidence, that was not true and was another unjustifiable action on Mr Mahan's part.

[36] On 31 October 2008, the end result of these events was that Mr Taylor's employment came to an end against his will. What Mr Taylor said and did on 23 October 2008 was not what brought it to an end. Rather, it was Mr Mahan's reaction to Mr Taylor's conduct, both in sending his letter of 23 October 2008 and in what he said to Mr Taylor when he telephoned him on 31 October 2008. It follows that Mr Taylor was dismissed. That dismissal was unjustifiable. At the same time, Mr Taylor must take a large measure of responsibility for the outcome. Had he been more circumspect at the smoko shed on 23 October 2008 and/or contacted Mr Mahan promptly after receiving his letter the following day, Mr Taylor might well have retained his job.

[37] Although Mr Nidd mentioned in his opening that the company would rely on abandonment as an alternative ground of defence, this was not directly pursued in his final submissions. That may well have been because, in the course of his evidence, Mr Mahan agreed that it played no part in his thinking at the time.

Remedies

[38] Mr Taylor sought reimbursement of lost earnings and compensation for distress.

[39] The evidence about loss of earnings was far from satisfactory. Mr Taylor said he obtained full time alternative employment in July 2009. He agreed that he had some paid work prior to that but was unable to say with any precision how much work or what he was paid. The best estimate he was able to give was that he worked for a matter of weeks rather than months during that period. Mr Taylor also said that he did not start looking for alternative work for a month or so after his employment at Milburn Lime Limited ended.

[40] Section 128 of the Employment Relations Act 2000 provides:

> **128 Reimbursement**
> (1) This section applies where the Authority or the court determines, in respect of any employee,—
> (a) that the employee has a personal grievance; and
> (b) that the employee has lost remuneration as a result of the personal grievance.
> (2) If this section applies then, subject to subsection (3) and section 124, the Authority must, whether or not it provides for any of the other remedies provided for in section 123, order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.
> (3) Despite subsection (2), the Authority may, in its discretion, order an employer to pay to an employee by way of compensation for remuneration lost by that employee as a result of the personal grievance, a sum greater than that to which an order under that subsection may relate.

[41] Despite the vagueness of Mr Taylor's evidence, I am satisfied that he lost at least three months' earnings as a result of his personal grievance. Pursuant to s 128(2), therefore, I am required to order reimbursement of that amount. I am not prepared to exercise the discretion conferred by s 128(3) to increase that amount.

[42] The evidence in support of Mr Taylor's claim for $10,000 compensation was even less satisfactory. The Court can only exercise its discretion to award remedies such as this on the basis of evidence. In this case, evidence of distress on Mr Taylor's part was almost non-existent. He said twice in his evidence that he was

"shocked" to receive Mr Mahan's letter of 23 October 2008 and once that he was "stunned" by the letter but that was all. He gave a good deal of evidence about losing out on subsequent employment opportunities, how he believed this may have been as a result of what Mr Mahan said about him and that he was upset by that. At best, however, this was evidence of distress as a result of subsequent events. It was not evidence of distress resulting from Mr Taylor's dismissal. Based on the evidence, an appropriate award of compensation is $1,000.

[43] Section 124 of the Employment Relations Act 2000 provides:

> **124 Remedy reduced if contributing behaviour by employee**
> Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—
> (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
> (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

[44] In this case, I have already found Mr Taylor contributed substantially to the situation giving rise to his personal grievance. I find that his actions require the remedies I would otherwise have awarded him to be reduced by half.

Summary

[45] In summary, my decision is:

(a) Mr Taylor was unjustifiably dismissed by Milburn Lime Limited.

(b) Mr Taylor contributed substantially to the situation giving rise to his personal grievance.

(c) Milburn Lime Limited is ordered to pay Mr Taylor:

(i) Half of three months' ordinary time remuneration based on his rate of earnings as at 23 October 2008.

(ii) Compensation of $500 pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

(d) The parties should be able to agree the amount of reimbursement to be paid to Mr Taylor but, if they are unable to do so, leave is reserved to have the amount fixed by the Court.

(e) By operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority which was challenged is set aside and this decision stands in its place.

(f) As the challenge has been sucessful, the Authority's costs determination[9] must also be set aside.

Comment

[46] This judgment is being delivered long after the hearing. That delay, and the resulting inconvenience to the parties, is regrettable. The principal reason for that delay is the Christchurch earthquakes, which have impacted heavily on the Court's resources and my availability to devote the time required not only to complete this judgment but also to complete judgments in other matters heard before this case.

Costs

[47] Costs are reserved. The challenge has been successful and, subject to any pre-trial offers of which I am unaware, Mr Taylor is entitled to a contribution to his costs both in the Authority and in the Court. The parties are encouraged to agree costs. If they are unable to do so, Mr Beck should file and serve a memorandum within 30 working days. Mr Nidd will then have 20 working days in which to respond.

A A Couch
Judge

Signed at 2.40 pm on 7 December 2011.

[9] CA 84/10, 9 April 2010.