

in terms of s 105, is not a reference to a person's seniority in an organisation¹ and nothing in the material filed was capable of supporting an argument that Mr Anderson was indirectly discriminated against.

[3] Following discussion at the investigation meeting the claims to be addressed were identified as follows, with remaining matters not proceeding:

- (a) there was an actual dismissal, which Mr Anderson said was unjustified, and accordingly there was no need to pursue allegations relating to constructive dismissal;
- (b) RAVC was said to have breached its duty of good faith in that it, -
 - . misled Mr Anderson about its possession of confidential information relating to a settlement agreement he had reached with a previous employer,
 - . left him confused about whether his work was too slow or not, and failed to adequately train and support him;
 - . set Mr Anderson up for his eventual dismissal by not addressing an incident which occurred on 7 November 2007 but using a similar incident on 21 November 2007 as a reason for the dismissal;
- (c) RAVC was said to have harassed, intimidated and bullied Mr Anderson, in particular during an incident on 17 October 2007.

[4] Mr Anderson also alleged that RAVC breached the Protected Disclosures Act 2000. The disclosure in question concerned his advice to co-workers that he was referring a problem to the Employment Relations Authority. He said his subsequent dismissal could have been retaliation for the disclosure. That kind of allegation is more appropriately addressed in the context of whether the dismissal was justified, or alternatively as a personal grievance of the kind defined in s 107 of the Employment Relations Act. In any event on the facts as I will set them out the dismissal was not retaliation for any disclosure that a matter would be filed in the Authority, or anything arising out of the fact that matters were filed in the Authority.

¹ Section 105(2) of the Employment Relations Act gives the provision the meaning it carries under the Human Rights Act, which is: being unemployed, or being a recipient of a social welfare benefit or an entitlement under the accident compensation legislation.

[5] Reinstatement was sought.

The employment relationship

[6] Mr Anderson is a very experienced electronics technician. His employment with RAVC commenced on 20 September 2007.

[7] The parties' written employment agreement included a twelve week probation period. RAVC had an informal practice of conducting 4-weekly meetings with employees during their probation periods, in order to identify any issues. It was entitled to do so. Indeed the practice would be considered good management practice. Vivian Green, the managing director of RAVC, contacted Mr Anderson early on 16 October 2007 to arrange such a meeting. Mr Anderson responded promptly, agreeing to the scheduled arrangement but indicating he did not think there would be sufficient time for the 'issues I'll be bringing up.' He said at the investigation meeting that the issues he had in mind concerned his inability to find tools and equipment he needed, and a view that he had been accused of working too slowly.

[8] Unfortunately Mr Anderson felt very threatened by RAVC's wish to meet with him. Shortly after his receipt of the notification of the meeting he commented to Grant Thorburn, the company's senior audiovisual technician, that he felt he was being set up. He told Mr Thorburn he believed RAVC would use the meeting to try to 'get rid' of him, as had happened with a previous employer.

[9] The meeting went ahead on 19 October. Most of the meeting was taken up with Mr Anderson airing his concerns.

(a) the incident of 17 October

[10] David Rees is also a director of RAVC. He has responsibility for technical and operational matters in the company.

[11] On 17 October Mr Anderson was working on an installation at the AUT, when Mr Rees conducted a site visit. Mr Rees sought to ensure that Mr Anderson had the

tools and components he needed to complete the work, since an issue had already arisen in respect of that matter. Mr Rees had also been told that a member of the AUT staff had voiced a concern about the work being done, so he was following up on that expression of concern. There was a discussion between Messrs Rees and Anderson about a number of matters including the speed of Mr Anderson's work and the adequacy of the training Mr Anderson had received.

[12] It was common ground that Mr Anderson became agitated. The reason for the agitation is not clear. Mr Rees said Mr Anderson appeared agitated at the outset, while Mr Anderson said he was agitated because he felt there was a concern about the speed at which he worked.

[13] I do not accept that anything I heard about the content of that discussion amounted to harassment or bullying by Mr Rees.

(b) the confidential settlement agreement

[14] Mr Anderson said in evidence that, during the exchange on 17 October about the speed of his work, Mr Rees commented out of the blue on a payment Mr Anderson had received from a previous employer, saying it was 'probably a pittance'. Mr Anderson said this made him more aggravated.

[15] Mr Rees said Mr Anderson was the one who raised the fact that he had previously experienced difficulty with an employer. Because Mr Thorburn had passed on Mr Anderson's comment about a previous employer Mr Rees was aware of that much, and he passed comment on the matter. However he was not aware of the name of the employer concerned or the details of the difficulty or dispute, and his comment made no reference to any of those details.

[16] Regarding the information available to RAVC regarding any previous difficulty Mr Anderson might have experienced, Mr Green had made enquiries with the Northern Employers' and Manufacturers' Association ("the EMA") about other employment relationship problems involving Mr Anderson. A determination by the

Employment Relations Authority was identified.² That matter had no connection with the circumstances leading to the settlement agreement which has caused Mr Anderson such concern. Nor did it involve the same employer. It was simply the Authority's response to a joint request for a determination about whether the parties concerned were in an employment relationship. The information RAVC obtained from the EMA was the extent of its knowledge of the specifics of any previous problem Mr Anderson had experienced. It had no knowledge of the second matter until Mr Anderson provided the details.

[17] I consider it likely that, because to his way of thinking the matter before the Authority was not in essence a 'difficulty with an employer' (in that there was no real dispute between the parties), Mr Anderson assumed both Mr Rees and later Mr Green were referring to the second matter in which there had indeed been a difficulty. The assumption was wrong.

[18] Unfortunately on or about 17 October Mr Anderson was obliged to visit the premises of the employer party to the second matter to collect some equipment for RAVC. There was a mix up over the equipment and Mr Anderson was over-sensitive to the reception he received on his visit. However he had no reasonable grounds for assuming the former employer had discussed the settlement agreement with RAVC, and there was no evidence any such discussion occurred.

[19] The matter was raised again during the 19 October performance review. RAVC referred only to the employer involved in the matter that had been before the Authority. Nothing in the discussion was capable of indicating RAVC was aware of the second matter before Mr Anderson himself provided the details.

[20] Mr Anderson is convinced RAVC was aware of the settlement agreement before he provided the details, and considers all of its denials to be lies. He says in turn that the denials amount to breaches of good faith. I return later in this determination to place the alleged breaches of good faith in their proper legal context.

² **Anderson v CanWest Radioworks Limited** AA338/06, 3 November 2006.

(c) the incident of 7 November

[21] The daily routine at RAVC was that staff would gather at RAVC's premises early in the morning, to be given their tasks for the day.

[22] On the morning of 7 November Mr Rees informed Mr Anderson that he was to sort out the stockroom. Also present were Silvanus Naidu, and Kris O'Brien, both of whom were also employed as audiovisual technicians. These two were to go to work on a client's site. Under an arrangement RAVC reached with the client, Mr Anderson was not to be on the site if the supervisor was not present. Mr Thorburn was the designated supervisor, and he would not be on-site that day.

[23] Some 10 minutes later Mr Rees started discussing with Mr Anderson what needed to be done. Disagreement about Mr Rees' requirements began almost immediately. Rather than continuing to argue, Mr Rees decided to set Mr Anderson another task of pre-drilling metal cases and mounting hardware for electronic modules on which Mr Anderson had worked. The response was a threat to take the company to the employment court. There was a further disagreement about whether Mr Anderson had available all of the parts he needed to carry out that task.

[24] Mr Anderson became so agitated during the discussions about the availability of tools and equipment, and a subsequent discussion about why he was not being sent to the client site, that Mr Rees asked him to take 5 minutes to calm down. When Mr Anderson returned he said he wanted to take the day off, to which Mr Rees agreed. Vanessa Halverson, a member of the office staff, heard most of the exchange and prepared a detailed statement at the time. Her statement included reference to Mr Anderson's anger, and recorded that he was shouting loudly. Ms Halverson expressed embarrassment and discomfort because she felt Mr Anderson was making a scene, and she was anxious about what he would do next.

[25] The next day Mr Anderson filed his first statement of problem in the Authority, citing Mr Rees as respondent and complaining that Mr Rees had discriminated against him, breached the obligation of good faith and failed to provide him with appropriate training.

(d) the incident of 20 November

[26] On the morning of 20 November Mr Thorburn was confirming the day's work with the staff. He instructed Mr Anderson to work on alarm module construction in the workshop. Again Mr Anderson protested, saying that work was for the junior technician, not him. He said he had filed a statement of problem in the Authority against the company and Messrs Rees and Green, and said Mr Thorburn would be added to the list.

[27] Mr Thorburn referred the matter to Mr Rees, who issued the same instruction. Mr Anderson's evidence was that he told Mr Rees he 'should not have to do it' and that 'the junior audiovisual technician [meaning Mr O'Brien] should do it, not me.' Mr Rees asked him if he was refusing to do the task, and he replied that it was the junior audiovisual technician's job to do the mundane tasks. Mr Anderson went on to say that Mr Rees continued to ask him if he was refusing to do the work, and he responded it was not his job, rather it was the junior technician's job. He characterised his responses as a protest, rather than a refusal. I do not agree with that characterisation.

[28] Mr Rees referred the matter to Mr Green. Mr Green asked Mr Anderson if he was refusing to do the work. He also told Mr Anderson that the company viewed the continuing refusal as very serious. He explained it could be viewed as serious misconduct, which could result in dismissal. Although Mr Anderson disputed this, I accept his response was 'fine'. His thinking was that he was correct to view the job as one for Mr O'Brien, not him, and he was entitled to 'protest'. I accept, too, that he made derogatory comments about Mr Rees' IQ.

[29] Later that day Mr Green prepared and gave to Mr Anderson a letter advising that a formal disciplinary meeting would be convened in order to discuss Mr Anderson's:

- . behaving in an aggressive manner on 7 November;
- . refusal to perform assigned tasks on 7 November;
- . leaving assigned place of work without permission on 16 November; and
- . refusing to perform assigned tasks on 20 November.

[30] The letter attached statements from Ms Halverson and Mr Rees setting out their accounts of the 7 November incident. It also said allegations 1 and 3 were seen as misconduct which may result in a warning, and allegations 2 and 4 were seen as serious misconduct which may result in dismissal. Mr Anderson was advised he was entitled to seek legal advice. The disciplinary meeting was scheduled for 21 November 2007 at 2 pm.

[31] The allegation in respect of 16 November was not pursued, so I have not set out the background and do not refer to it again.

(e) the disciplinary meeting

[32] Mr Anderson sought to amend his first statement of problem by letter to the Authority also dated 21 November 2007. He also advised RAVC of his intention to approach the Authority again. In the letter to the Authority he alleged that the disciplinary meeting was being convened for unjustified reasons, and that he was being falsely accused and excessively demoted or disciplined. However RAVC was entitled to convene the meeting and it was not open to the Authority to act as Mr Anderson asked it to. The justification for RAVC's conclusions about whether the allegations were substantiated, and the action taken as a result, are different matters which the Authority can and does address.

[33] The 21 November meeting went ahead at 3 pm. For the most part Mr Anderson did not attempt to dispute the facts put to him. He disputed the legal basis for the company's concerns, relying largely on material he had obtained from the Department of Labour's and other websites. Unfortunately he misapplied the material, taking positions that were misconceived.

[34] Accordingly his response to the first of the concerns, namely his aggressive conduct, was that he had a right to freedom of expression and was entitled to express the views he did. In support, he cited the New Zealand Bill of Rights Act 1990, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

[35] In relying on his right to freedom of expression as he did, Mr Anderson failed to appreciate that the right to free expression carries a responsibility to exercise the right in a reasonable way, and does not give individuals carte blanche to behave entirely as they wish. In particular the right does not over-ride absolutely the social consensus regarding acceptable inter-personal behaviour. Mr Anderson's aggressive and argumentative conduct effectively breached that consensus and gave rise to RAVC's concern. RAVC was entitled to be concerned about the conduct. The conduct was aggressive and argumentative.

[36] Mr Anderson also considered it significant that RAVC had no written code of conduct. He argued that meant the company had no rules capable of being enforced, and it could not act against him in respect of his conduct. That is not the law.

[37] Regarding the second and fourth concerns, Mr Anderson repeated his view that the junior audiovisual technician was to carry out the mundane tasks. He also addressed clause 1 of his written employment agreement, which read in part:

“You will, during your employment:

- (a) You shall be employed as an Audiovisual Technician but may be required to perform any other duties in keeping with the employer's business.
- (b) You shall at all times discharge your duties in a diligent and faithful manner to the full benefit of the employer's business.

To allow flexibility in the workplace, the employer may instruct you to perform duties other than your customary duties.

...

Your general responsibilities are detailed in the job description attached.

You are required to fulfil these responsibilities and any other duties your manager may require from time to time.”

[38] Mr Anderson did not accept that the broad statements regarding ‘other duties’ covered the tasks he was asked to carry out on 7 and 20 November. He said this was because the provisions in the junior audiovisual technician's employment agreement overrode the provisions in his in that respect.

[39] The argument is not correct, but in any event there was no such agreement. Rather Mr Anderson was aware that RAVC planned to appoint a junior audiovisual technician. He had gone as far as to identify the advertisement for the position Mr O'Brien eventually filled, and considered it proof of the junior nature of the position. In that respect he was informed that, despite the advertisement, Mr O'Brien was not a junior technician and had not been employed as one.

[40] Mr Anderson also raised his belief that he had been discriminated against. I have already set out why that belief was misconceived.

[41] Mr Anderson argued further that, if the refusal to perform the assigned tasks was misconduct, then he should have been dismissed on 7 November.

[42] There was a further meeting on 22 November. Mr Green sought feedback from Mr Anderson on the proposal that a written warning would be issued for the argumentative conduct, and that dismissal was likely for the refusals to perform assigned tasks.

[43] After a further adjournment Mr Green decided to issue Mr Anderson with a written warning in respect of his aggressive conduct, and that summary dismissal was appropriate for the refusals to perform assigned tasks. He advised Mr Anderson of his conclusions at the time and confirmed them in a letter dated 22 November.

Determination

(a) justification for the dismissal

[44] The law associated with Mr Anderson's refusal to perform assigned tasks on 7 and 20 November is contained in the law concerning refusals to carry out lawful and reasonable instructions. The law addresses whether the instructions were lawful, whether they were reasonable, and whether a refusal to carry them out was wilful.

[45] The instructions in question were lawful, and were within the scope of Mr Anderson's employment agreement. Mr Anderson's argument that, in effect, that was not the case was misconceived. The instructions were also reasonable.

[46] Mr Anderson's refusals were wilful. I have considered whether the possibility of an underlying dispute about his entitlements should be taken into account in respect of the element of wilfulness, but conclude that is not appropriate here. The employment agreement was quite clear and RAVC was acting reasonably. Mr Anderson was acting on a combination of incorrect assumptions of fact and misunderstandings of law. He was insisting on an unsustainable position. Obviously that led to disagreement, but it does not amount to a reason why Mr Anderson should not have been dismissed.

[47] Finally, on 20 November Mr Green made explicit the consequences of a refusal to perform the tasks in question. Mr Anderson was so convinced of the correctness of his position that he ignored that warning. He must take the consequences of being found to be wrong.

[48] Overall I conclude that RAVC's decision to dismiss was an action a fair and reasonable employer would have taken. Accordingly I find the dismissal was justified.

[49] For the avoidance of doubt, since I have found the dismissal to be justified I cannot order Mr Anderson's reinstatement.

(b) breach of duty of good faith

[50] Mr Anderson's arguments in respect of good faith appear to have been influenced by the contents of a Department of Labour fact sheet relating to good faith. The fact sheet refers to the obligation being, at its most basic, about telling the truth. It also refers indirectly to s 4(1)(b) of the Employment Relations Act in that it says good faith involves not doing anything to mislead or deceive the other party. Mr Anderson has taken a very literal approach to that reference, so that where he has felt lied to, misled or deceived, he has alleged RAVC breached its duty of good faith.

[51] I do not accept that Mr Anderson was lied to about RAVC's possession of confidential information regarding the settlement agreement with a previous employer.

[52] Secondly, while it was apparent that Mr Anderson felt very threatened by the possibility of concern about the speed at which he worked and had issues over whether he was receiving adequate training and support, I do not accept that there was any misleading or deceptive conduct on RAVC's part over the matter.

[53] Thirdly I do not accept that RAVC's action in not addressing the 7 November incident at the time, while using what was said to be a similar incident on 20 November as a reason to dismiss him, amounted to misleading or deceptive conduct. I certainly do not accept the allegation that the action set him up for his dismissal.

(c) harassment, intimidation and bullying

[54] This allegation was not established on the evidence.

Costs

[55] Costs are reserved.

[56] If either party seeks a determination of costs there will be 28 days from the date of this determination in which to send to the Authority and the other party a statement of the party's position on the matter. There shall be a further 7 days from the date of receipt of the statement in which to provide a reply to the Authority and the other party.

R A Monaghan

Member of the Employment Relations Authority