

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Mr Peter Bell (Applicant)
AND Board of Trustees, Cambridge High School (Respondent)
REPRESENTATIVES Mr Bell in person
Mr [Paul Robertson for Respondent](#)
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 5 March 2007
DATE OF DETERMINATION 14 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Peter Bell was employed by the Board of Trustees, Cambridge High School ("the Board") as a Groundskeeper. His terms and conditions of employment are set out in the Secondary and Area School Groundstaff Collective Agreement.

[2] Mr Bell was dismissed after he spray-painted, with yellow line-marking paint, the windshield of a vehicle belonging to a student of the school. Mr Bell says he was justified in doing so, because the student had parked his car in such a manner that it blocked emergency vehicle access to the sports field. He claims the dismissal was unjustified and seeks remedies.

[3] The Board denies the dismissal was unjustified.

[4] I am required to examine the Board's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] The section requires me to scrutinise the Board's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

Background

[6] Mr Bell has never denied he spray painted the windshield of the student's vehicle. His complaint is that the process used by the school in investigating his actions and then coming to its conclusion to dismiss him was unfair.

[7] The collective agreement governing the employment relationship sets out the principles to be followed when dealing with disciplinary matters. Clause 4.6 of the contract states:

- (a) The employee must be advised of the right to request representation at any stage;
- (b) The employee must be advised in writing of the specific matter(s) causing concern and be given a reasonable opportunity to provide an explanation. Before making a final decision the employer may need to make further inquiries in order to be satisfied as to the facts of the specific matter(s) causing concern;
- (c) The employee must be advised of any corrective action required to amend his/her conduct and given a reasonable opportunity to do so;
- (d) If the offence is sufficiently serious an employee is to be placed on suspension with or without pay pending further enquiry under (b);
- (e) The process and any disciplinary action are to be recorded, sighted and signed by the employee and placed on his/her personal file;
- (f) The provisions in Part 7 explain the processes available under the Employment Relations Act 2000 to any employee aggrieved by any action of their employer taken under these provisions.

4.6.2 Nothing in 4.6.1 prevents instant dismissal without notice in the case of serious misconduct.

[8] On or about 27 February 2006, at about 5.00pm, Mr Bell went to the school to provide access for a friend so that his friend could get a trailer-load of firewood from the school property. When he arrived at the school he was annoyed to find a car blocking access to the gate leading onto the sports field. Mr Bell took his friend to the main entrance, unlocked the entrance to allow his friend access and then assisted his friend to gather the firewood.

[9] Mr Bell was annoyed about the car being parked in front of the gate as it blocked emergency access. He asked other students present at the school, if they knew whose car was parked at the gate. He was told it belonged to Mr Fabian Clarke, a student at the school and that Mr Clarke was in Hamilton playing basketball.

[10] Mr Bell was frustrated by the vandalism occurring in the school and having thought about the car being parked where it was, he proceeded to the storage shed where he kept the spray-paint and purposefully set about spray-painting Mr Clarke's car.

[11] On 28 August 2006 Mr Clarke, formally complained to the Principal, Mr Philip McCreery, that his car had been spray painted by Mr Bell. In his letter of complaint Mr Clarke says:

Last Tuesday I left my car outside the gym in front of the gate and my car got spray painted. It was the front window and my drivers side mirror. I had to take the paint of (sic) my car with a razor blade but still some spray paint on my mirror and on the side of my car. There is also a crack in the front window screen where he has painted which is new. Libby and Cass saw this happen while I was at basketball in Hamilton. They said it was Aussie Pete also Justin Vanderhorst saw (Aussie Pete) push the gate up against the front of my car.

[12] On 29 August 2006 Mr McCreery wrote to Mr Bell enclosing a copy of the letter of complaint and asked Mr Bell to provide a written response to the allegation that he had vandalised a student's car in that he had spray painted the front windscreen and driver's side mirror, that the windscreen was cracked and he had pushed a gate up against the front of the vehicle.

[13] Mr Bell duly responded on 31 August 2006. He says:

Late on the day concerned, young Mr. Clarke parked his car in the middle of the gates to the rugby fields, thereby completely blocking the opening. He did this in spite of a very large notice, which was about 1 metre on his right, which stated "EMERGENCY VEHICLE ACCESS – DO NOT PARK IN FRONT OF THIS GATE". He then proceeded to Hamilton (to play basketball, I believe) I was annoyed at his selfish, uncaring, action. How would we have fared if a fire truck or ambulance (there were a large number of students at rugby practice, on the field, at the time) had needed to enter the area? I then proceeded to spray part of his windscreen and rear vision mirror with yellow paint, which incidentally is easily removed from glass!

[14] In his response Mr Bell denies he either touched the windscreen or cracked it, or pushed the gate up against the car. He demanded the opportunity to confront the students who, in his view, were lying about these two issues.

[15] Mr Bell's response concludes:

To say I regret doing what I did would be a lie. As I believe he deserved all he got, and then some, and should be censured by the school for his actions.

Were the actions of the Board those of a fair and reasonable employer?

[16] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (*Mazengarb's Employment Law* (6ed, 2003) para 103.57).

[17] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZILR 176).

[18] On 11 September 2006 the chairman of the Board, Mr Greg Liddy, notified Mr Bell that the Board had convened a sub-committee to investigate Mr Clarke's complaint. Mr Liddy advised Mr Bell the matter was serious and reminded Mr Bell of his right to representation.

[19] It is well known and standard practice that an employer must tell an employee, who is summonsed to a disciplinary meeting, that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* [2004] 1 ERNZ 336).

[20] Mr Bell was never advised that a possible consequence of the meeting was dismissal. Mr Bell says if he had been told dismissal was a possibility he would have had a representative with him. When he arrived at the meeting he was under the misapprehension that the most likely penalty would, if anything, be a "...slap over the wrist."

[21] Mr Liddy says Mr Bell was always aware the matter was considered seriously. In support of this assertion Mr Liddy told me that at the stage where those present at the meeting were discussing penalties with Mr Bell, Mr Bell asked not to be dismissed as he did not consider his conduct as being serious enough to warrant such a penalty. Mr Liddy says Mr Bell could have asked to adjourn the meeting at that stage and to seek legal advice if he so desired. Mr Bell didn't know that however, because Mr Liddy never explained that to him at the time.

[22] Mr Bell says the disciplinary process was flawed in that he was never given the opportunity to confront the students who were named by Mr Clarke in his letter of complaint. Mr Bell requested to have the students available at the meeting. The Board did not agree to this request. Mr Bell says he wanted the opportunity to show the Board that the witnesses were lying and their statements could not be relied upon. The statements Mr Bell wanted the opportunity to refute relate to whether or not he caused the crack in the windscreen and the gate being pushed into the car.

[23] I am satisfied the Board did not consider Mr Bell was responsible for the crack in the windscreen nor did the Board take into account whether or not he had pushed the gate into the front of the car. The focus of the Board's enquiry was whether or not Mr Bell had conducted himself in contravention of the required standards of conduct when he spray-painted the windscreen and side mirror of Mr Clarke's car. I am supported in my conclusion by the evidence of Mr Bell when he told me he tried to get Mr Liddy to discuss the other two issues but Mr Liddy kept telling him they were there only to talk about the spray-painting.

[24] Mr Bell was also critical that he was being accused of vandalism. Mr Bell's view of vandalism is that there must be some lasting affect. In this case, says Mr Bell, the windscreen and mirror were able to be scraped clear with no long lasting effect. His actions therefore, could not be considered vandalism. Mr Bell then contradicted himself when I asked him to give me examples of the vandalism he says was occurring at the school. He gave by way of example, students breaking branches off trees, things being broken, and students pulling standards out of the ground where grass seed had been sown.

[25] Mr Bell was adamant that spray painting Mr Clarke's car was not physical damage and could not be classified as vandalism. I do not agree with him. I find that spray-painting the windscreen and side mirror of Mr Clarke's car falls squarely within a definition of vandalism which includes destruction or damage of private property which is carried out deliberately, mischievously or wilfully.

[26] In coming to my conclusions in this matter I have considered not only the process followed by the Board but I am also cognisant of the fact that the collective agreement provides for suspension where conduct is very serious. In answer to questions at the investigation meeting Mr McCreery told me he had received an undertaking from Mr Bell that he would not confront any students while the disciplinary process was in train. Mr McCreery told me he therefore did not consider it necessary to suspend Mr Bell. I am satisfied the Board has had regard to the principles set out in the collective agreement.

[27] Mr Bell's misconduct was his actions in taking it upon himself to remonstrate with a student's behaviour by purposefully spray-painting the windscreen and side-mirror of his car. Mr Bell conceded at the investigation meeting that the vehicle should not have been driven while the windscreen still had paint on it as it would be dangerous. Mr Clarke returned to the school after dark and had to spend some time scraping enough paint off the windscreen to make it driveable. He then had to scrape the remaining paint off, the following morning before driving to school.

[28] While I am satisfied the action of the board in determining Mr Bell's conduct was in the serious category, the actions of the Board in dismissing Mr Bell without providing him with fair notice that his job was on the line is so unfair as to render the dismissal unjustified.

Remedies

[29] I find the Board was correct, in all the circumstances, to conclude Mr Bell's actions amounted to serious misconduct. Mr Bell's dismissal is unjustified on the ground of procedural fairness. However, I am satisfied that even if the Board had advised Mr Bell of the possible consequence of dismissal, there was a high likelihood Mr Bell would still have been dismissed. In these circumstances, I decline to make an award for lost remuneration to Mr Bell. (*Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315; *Waitakere City Council v Ioane* [2004] 2 ERNZ 194)

[30] I am bound by section 124 of the Act to consider the extent to which Mr Bell's actions contributed towards the situation that gave rise to his personal grievance of unjustified dismissal, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[31] I am satisfied that Mr Bell must be found to have contributed significantly towards the situation that gave rise to the personal grievance. At the investigation meeting Mr Bell accepted he should not have spray-painted the car but he showed no sign of any contrition at all. In a similar fashion, the minutes of the disciplinary meeting indicate that throughout the meeting Mr Bell failed to demonstrate any remorse, until the sub-committee members asked Mr Bell what penalty should attach to his conduct.

[32] Mr Bell told me he had been told in the past that he could correct students and that this gave him the authority to teach Mr Clarke a lesson not to park in front of the gate to the school field. I find that while Mr Bell may have had permission to correct students during school hours to prevent damage to school property, he did not have the authority to punish students.

[33] I am therefore satisfied that it is just to reduce the remedies available as a result of Mr Bell's conduct. Mr Bell is entitled to an award for contribution to costs but no other remedy. This will acknowledge Mr Bell has established to my satisfaction a personal grievance based on a claim that he was dismissed unjustifiably without rewarding him for significant blameworthy conduct.

Costs

[34] Costs are reserved. While Mr Bell was unrepresented at the investigation meeting I am aware that prior to the meeting he had been in receipt of legal advice relating to this matter. Mr Bell and Board of Trustees, Cambridge High School are encouraged to discuss and resolve the matter of costs between them. If they are unable to do so, Mr Bell should file a memorandum of costs, including copies of any invoices he has paid, within 28 days of the date of this determination. Board of Trustees, Cambridge High School has a further 14 days from the date of receiving Mr Bell's memorandum in which to file a memorandum in response.

Vicki Campbell
Member of Employment Relations Authority