

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 274
5350478

BETWEEN ZANE BELOE
 Applicant

A N D ECOLAB LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Anthony Stallard, Counsel for Applicant
 Susan Hornsby-Geluk, Counsel for Respondent

Investigation meeting: 6 and 7 October 2011 at Nelson

Submissions Received: 18 November 2011 from Applicant
 18 January 2012 from Respondent

Date of Determination: 14 December 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Beloe, claims he was unjustifiably dismissed by the respondent, Ecolab Limited, on 4 July 2011.

[2] Ecolab accepts it dismissed Mr Beloe but claims the decision to be justified given behaviour which amounted to gross misconduct.

Background

[3] Mr Beloe was employed by Ecolab as a territory manager for the institutional division. This was a sales position and at the time of dismissal Mr Beloe had occupied it for some 12½ years.

[4] The dismissal is attributable to Mr Beloe's interactions with his direct manager, Mr Darryn Hintz. About that Mr Hintz says:

When I first started managing Zane I found him challenging. At times he was very good and at other times difficult, he would sometimes question or challenge me and was often negative, but completed his work to a good standard. He never accepted anything without a full explanation or justification, and was very demanding if he disagreed with something. I found myself becoming anxious at times whenever I had to give a directive I thought Zane may disagree with. I would prepare my emails very carefully to ensure that every i was dotted and every t crossed. I knew if I left any loophole or anything slightly unexplained Zane would pounce on it continuously questioning and nipping away at me. I used to think of it as "Zane-ising" my emails. It took up a lot of time, effort and energy.

[5] Mr Hintz, who is Christchurch-based, started managing Mr Beloe in December 2010. He travelled to the Nelson/Blenheim area every two months or so, where he accompanied Mr Beloe on visits to customers and prospective clients. During these visits the two worked closely together and Mr Hintz provided support and mentoring as needed.

[6] As already said, Mr Hintz found Mr Beloe's behaviour attitude challenging and he is of the view it became entirely inappropriate from March 2011 on.

[7] There were a number of specific incidents. In March 2011, Mr Hintz and Mr Beloe were jointly involved in an installation project at Fairview. Difficulties arose and Mr Hintz telephoned Mr Beloe expressing disappointment with his attitude and approach to the work. It is claimed Mr Beloe responded by swearing at Mr Hintz who then stated, *Mate you can't speak to me like that*. That elicited another obscenity before Mr Beloe hung up.

[8] Mr Beloe does not deny this and acknowledges his responses may have been as claimed.

[9] There was a further incident on 30 March when Mr Beloe is said to have refused to undertake a piece of work as instructed by Mr Hintz. The incident was not resolved until Mr Hintz involved a North Island manager who confirmed the instructions he was giving were appropriate. Again, Mr Hintz describes Mr Beloe's conduct as *"aggressive and in my face"*. Again, Mr Beloe does not deny the occurrence or that it was of the nature described by Mr Hintz.

[10] On 6 April, Mr Rod Frewen, the South Island manager and Mr Hintz's superior, arranged to undertake some work in Blenheim. Upon completion he asked

Mr Beloe to remain behind and advised that Mr Hintz had voiced concerns about Mr Beloe's behaviour. Mr Frewen goes on to say:

I told him in no uncertain terms that Darryn was his manager, and that he needed to get behind Darryn and support him. I made it clear that I regarded Darryn's actions as being entirely reasonable as a manager, and that he needed to think carefully about his attitude and approach. I also indicated that it was not acceptable to swear at Darryn.

[11] On 3 June, Mr Hintz contacted Mr Beloe by telephone to advise Ecolab had issued a directive requiring staff to reduce leave balances by 30 November 2011. Mr Hintz claims the response was *get f...d it ain't going to happen*. Mr Beloe says it is more likely his response was *for f...s sake*.

[12] On 7 June, Mr Hintz again contacted Mr Beloe to remind him that there was a deadline for inputting of leave requests (10 June). Mr Hintz claims Mr Beloe replied *it isn't going to be f...ing put anywhere*. Mr Beloe denies swearing but accepts that Mr Hintz did try to convince him to input his leave and says that he told Mr Hintz leave was supposed to be arranged by mutual consent and he was *sick of bully boy tactics*.

[13] On 10 June, Mr Hintz again contacted Mr Beloe about leave. He says Mr Beloe replied *you've got my f...ing answer, what is your f...ing problem* before hanging up the phone. Mr Beloe accepts this is probably accurate but explains that he under considerable stress at the time. He had doubts about the legitimacy of the instruction and had been advised of a significant medical problem the previous day.

[14] On 22 June, Mr Hintz was in Nelson with Mr Beloe and there were further incidents. Mr Hintz says when he attempted to explain his position on a matter, Mr Beloe launched into a tirade of obscenities. Mr Beloe claims the specific allegations are *not entirely true* but accepts the exchange was tense and unpleasant. He accepts it is possible he told Mr Hintz to *f... off* and he may also have said *piss off back to Christchurch* as alleged. Mr Hintz claims Mr Beloe subsequently calmed down and proceeded with the planned work but he was, throughout, unresponsive and with only reply with *whatever* when spoken to. Again that is not denied.

[15] At the end of the day, Mr Hintz arranged to meet Mr Beloe at their hotel. He says Mr Beloe continued to be difficult and that he, Mr Hintz, closed the conversation by saying it was not working and they needed to find a way forward. He says

Mr Beloe replied *there is no f...ing way forward* and launched into a criticism of Mr Hintz's people skills which he characterised as *disgraceful*. Again there is disagreement as to the extent of swearing but there is agreement the conversation was difficult. As a result of that incident Mr Hintz concluded it was unsafe being around Mr Beloe. He cancelled the rest of the trip and returned to Christchurch.

[16] That decision saw the commencement of a disciplinary process. On 27 June 2011, Mr Frewen sent a letter to Mr Beloe advising him of his suspension. The letter includes the following:

This action has been taken as a result of events that took place on Wednesday 22 June 2011 during your day with Darryn Hintz your manager. Ecolab will investigate this incident and also interview relevant parties to be able to present evidence to you in regard to the findings. We have 5 diarised incidences leading up to Wednesday 22 June 2011 which will also be considered. You will be provided with details of these incidences and provided with the opportunity to respond. In the investigation process you will be asked to provide individuals you would like interviewed along with having an opportunity to respond to the findings.

A meeting will be held in the week commencing 4th July to discuss the actions to be taken and these will be dependent on the outcome of the investigation. These may include but are not limited to – further counselling, anger management, and mediation sessions to resolve conflicts or the termination of your employment due to serious misconduct.

[17] That was followed by a letter dated 29 June outlining Ecolab's concerns. It cites the specific events outlined and also contains observations from various people who had managed Mr Beloe in the past which included allegations that challenging behaviours were nothing new. The letter closes with advice Mr Beloe should forward his response by midday 1 July and the outcome of the investigation would be discussed during a meeting scheduled for 4 July.

[18] Mr Beloe furnished a detailed 18 page response. That was not forwarded until early afternoon on 4 July. The delay was attributable to the fact Mr Beloe had ceased to have use of his laptop when he was suspended and it took time to return it to him so he could prepare the response.

[19] The response was considered by a group of four. The 'meeting' was via a telephone conference given some participants were in Australia. The evidence also suggests two, Mr Frewen and Mr Hintz, were not active participants. The other two

were Mr Ian Elliott, the Pacific Director of the institutional division, and Ms Linda Mayer, Human Resources Director - Pacific. The evidence is the decision-maker was Mr Elliott. Once he made the decision to dismiss, he told Mr Frewen to convey it to Mr Beloe.

[20] Mr Elliott says he balanced the accusations in the letter of 29 June with Mr Beloe's response of 4 July. He says he was cognisant of the fact Mr Beloe admitted some of the alleged conduct and, in particular, admitted swearing at his manager. He adds that where Mr Beloe denied swearing he did not dispute there had been some form of altercation.

[21] In explaining his reasoning, Mr Elliott goes on to say:

Overall, it appeared that there was not a significant disagreement about what had occurred. Zane certainly admitted to conduct that I considered to be abusive, including using offensive and abusive language towards Darryn. The difference between the two accounts seemed to be more focused on whether Zane's conduct was justified. In this regard, much of Zane's responses was focused on putting the blame for his conduct on others, or seeking to justify why he had done what he had done.

Based on the conduct that Zane admitted had taken place, including repeatedly using the f word at his manager, and demonstrating an aggressive and intimidating pattern of behaviour, I felt that his conduct amounted to gross misconduct...

I gave very serious consideration to whether Zane should be dismissed, or whether there should be a lesser penalty. Zane has always been considered a good performer as a Territory Manager, and I knew that replacing him would be very difficult. However, I felt that his behaviour was of such a nature and degree that I could not fairly continue to subject Darryn to that type of conduct, nor continue to have trust and confidence in Zane as an employee. Zane's behaviour was totally out of line with the Ecolab way of doing things. It is never okay to treat a colleague or manager in the way he admitted treating his manager.

...

I also note that Zane's failure to take responsibility for his actions, in his response to the allegations, gave me considerable concern. He did not genuinely apologise or demonstrate remorse for what he had done (to the extent he admitted doing it), and blamed others for his behaviour. This was one of my chief concerns. It seemed clear to me that Zane did not believe that he was responsible for his own conduct, or that there was something seriously wrong with the way he behaved. There was no guarantee that he would not continue to behave in exactly the same way in the future.

This caused me to have serious doubts about whether Zane could be managed ...

Rod had clearly tried to put Zane on notice previously that Ecolab needed to see a change in his attitude and approach, and that his current behaviour was not acceptable, in a discussion in April. However, this instruction appeared to have been ignored by Zane, and his unacceptable conduct continued. The fact he had not respected Rod's message, when Rod was his manager's manager, caused me to consider that we would have great difficulty in managing Zane going forward. These difficulties were always going to be compounded with a remotely managed employee.

[22] Mr Frewen passed advice of dismissal as instructed and that was confirmed in writing. The letter says the dismissal is *due to gross misconduct during interactions with Darryn Hintz ...*

Determination

[23] As already said, Ecolab accepts it dismissed Mr Beloe. That means it also accepts it is required to justify the dismissal.

[24] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[25] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[26] I have considered the issue of resources. This is, by New Zealand Standards, a large employer with access to considerable resources, including an internal human resources manager.

[27] The parties provided extremely comprehensive submissions and for that I thank them. I shall not summarise those submission but suffice to say Ms Hornsby-Geluk tried to convince me that notwithstanding the fact the process applied by Ecolab was *not a council of perfection* it went far enough to tick the boxes required by (b) to (d) above (refer oral summation tendered at the completion of the investigation meeting).

[28] I do not agree. There are some significant deficiencies.

[29] That leads to a consideration of 35 (b) to (d) above. In essence the subsections summarise that which has long been required – an employer is required to put issues in its mind, allow an explanation and consider them.

[30] It is clear this did not occur in respect to some key points. According to Mr Elliott two key considerations were his conclusions that Mr Beloe failed to take responsibility for his actions, apologise or demonstrate remorse and had blamed others for his behaviour (described as a chief concern) and his doubts about whether Zane could be managed in the future. There is absolutely no evidence these concerns were put to Mr Beloe. Therefore he never had an opportunity to response and an untendered response could not be considered.

[31] Mr Elliott says he gave serious consideration to whether Zane should be dismissed, or whether there should be a lesser penalty and these were considerations that led him to decide to dismiss. As retention was an option, Mr Beloe should, as a matter of fairness, have been given an opportunity to respond and try allay the fears which led to Mr Elliott deciding to dismiss. By failing to allow that opportunity Ecolab has failed to comply with the requirements of the Act. If only for that reason, its defence must fail.

[32] There are, however, other deficiencies. Mr Beloe was told via the letter of 27 June Mr Beloe was told there would be a meeting to discuss the actions to be taken. That did not happen and Mr Beloe was simply advised of an outcome. It is well accepted an employers failure to follow a process it has set will render a subsequent

dismissal unjustified (*Nutter v Telecom NZ Ltd* [2003] 2 ERNZ 234 and *Goodman Fielder NZ Ltd v Ali* [2003] 2 ERNZ 565).

[33] More serious is the fact Mr Elliott was the decision maker yet Mr Beloe never had an opportunity to address him directly. Again it is well established an accused employee must be allowed to face the decision makers and a failure to allow this will again render a subsequent dismissal unjust (*Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424). A written submission is not enough, especially when key considerations were not raised and not, therefore, addressed

[34] For the above reasons I conclude Ecolab has failed to comply with the requirements of the Act. The dismissal is unjustified.

Remedies

[35] The conclusion the dismissal was unjustified raises the question of remedies.

[36] Mr Beloe seeks lost wages along with compensation for the loss of various other benefits and \$50,000 for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[37] In respect to wages, section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of the sum actually lost or 3 months ordinary time remuneration though a larger sum may be awarded at the discretion of the Authority. Mr Beloe asks that I exercise that discretion and award the amount he would have earned had he continue in Ecolab's employ until retirement at age 65. The amount sought is \$569,348.

[38] The claim is unsustainable as this loss has not been incurred due to the fact Mr Beloe gained alternative employment which commenced on 6 September 2011 (albeit at a lesser rate). He was paid in lieu of notice and the intervening period is 5 weeks. Five weeks pay is \$8,728.75 and that amount is payable.

[39] There is then the issue of the differential between what Mr Beloe would have received had he remained with Ecolab and the amount paid by his new employer. This is a consideration as the deficiencies which led to a conclusion the dismissal was unjustified included a failure to properly address concerns which if adequately countered by Mr Beloe may have seen his retention. The differential is \$22,776 per

annum though it may reduce given Mr Beloe is eligible for incentive payments. The differential for the period between commencement with the new employer and the date of hearing is \$2014.80. I go on further. I have no evidence as to what has subsequently occurred and it is possible there has been either a increase, an incentive payment or both. In other words I have no evidence of actual loss upon which to base an award.

[40] The total wage loss is therefore quantified as \$10743.55.

[41] Mr Beloe also seeks to recoup a superannuation subsidy Ecolab paid. The subsidy was 10% which means an additional \$1,074.36 on the wages awarded.

[42] Mr Beloe also seeks recompense for unused sick leave. Sick leave is an insurance against sickness – it is not an entitlement that must, or necessarily will, be used. It does not therefore have a cash value per-se but, in any event, one can not receive both wages for working and sick leave simultaneously. Mr Beloe's loss has already been recognised through the award of lost wages.

[43] In addition Mr Beloe seeks an award to compensate him for a life insurance policy Ecolab provided, a contribution a share purchase scheme, a car allowance and the loss of staff purchase opportunities.

[44] The insurance benefits were not provided by Ecolab and not a requirement of the employment agreement. They were attained through membership of the superannuation scheme. No award shall therefore be made.

[45] The share purchase scheme saw Ecolab subsidise staff purchases. That required considerable expenditure from the employee concerned. The evidence is Mr Beloe availed himself of this benefit twice. There is no evidence he would have continued to do so and any award would therefore be entirely speculative. None shall therefore be made.

[46] The amount claimed by Mr Beloe in respect to the vehicle reflects an allowance paid to compensate those who use their private vehicle for work use. Mr Beloe had the use of an employer provided vehicle while with Ecolab and does not appear to have received the allowance. He continues to have access to a vehicle provided by his new employer on what appear similar terms. There is no apparent loss, and definitely not one that is quantifiable.

[47] Finally there is the claim to recompense for the loss of Ecolab's staff purchase scheme. The evidence is that Mr Beloe's use was limited and averaged only \$22 per annum. This is a long way short of his claim for \$300 per annum. I consider this matter de-minimis and take it no further.

[48] Next there is the issue of compensation. Mr Beloe seeks \$50,000 as compensation pursuant to s.123(1)(c)(i). The evidence tendered in support was limited when compared to the magnitude of the claim and is also undermined to some extent. For example he claims he was stressed by the requirement to find a new job, yet managed to do so with alacrity. That stress was therefore a temporary issue and, as Mr Beloe himself says, things could have been a lot worse. Furthermore Mr Beloe is currently subject to other stressors which can not be attributed to Ecolab. Having considered the evidence I consider an award of \$8,000 to be appropriate.

[49] The conclusion remedies accrue means I must, as required by s.124 of the Act, address whether or not Mr Beloe contributed to his demise in a significant way. The answer must, I conclude, be yes. He has made a number of admissions in respect to his conduct which the evidence suggests was, at best, inappropriate, and at worst offensive. In the circumstance, and having considered the evidence, I conclude the remedies awarded should be reduced by 30% for contributory conduct.

Conclusion and Orders

[50] For the above reasons I conclude Mr Beloe has a personal grievance in that he was unjustifiably dismissed.

[51] As a result the respondent, Ecolab Limited, is ordered to pay the applicant, Mr Zane Beloe, the following:

- i. \$7520.49 (seven thousand, five hundred and twenty dollars and forty nine cents) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$752.05 (seven hundred and fifty two dollars and five cents) as recompense for the loss of the superannuation subsidy; and
- iii. A further \$5,600.00 (five thousand, six hundred dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[52] Costs are reserved.

Mike Loftus
Member of the Employment Relations Authority