

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 49
5428641

BETWEEN MICHAEL GRAHAM
 BOSKETT-BARNES
 Applicant

A N D NEWMAN GRAPHICS LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Janette Walker, Advocate for Applicant
 Luke Radich, Counsel for Respondent

Investigation Meeting: 27 February 2014 at Blenheim

Submissions Received: At the hearing

Date of Determination: 1 April 2014

DETERMINATION OF THE AUTHORITY

- A I have found that the applicant was unjustifiably dismissed.**
- B I have ordered the respondent pay to the applicant the sum of
 \$8,800 gross being lost wages.**
- C I have ordered the respondent pay to the applicant the sum of
 \$5000 without deduction being compensation.**
- D I have dismissed the claim for unpaid wages.**
- E I have reserved the issue of costs and set a timetable for an
 exchange of submissions failing agreement.**

Employment relationship problem

[1] Michael Boskett-Barnes commenced full time employment as a sign writer and screen printer with Newman Graphics Limited (Newman Graphics) on 22 April 2012. After being offered employment with Newman Graphics and before commencing on a full time basis he had worked some limited hours while working out his notice period with his previous employer from 2 April 2013.

[2] Mr Boskett-Barnes says that he was unjustifiably dismissed from his position at Newman Graphics on 12 June 2013.

[3] Mr Radich acknowledged at the commencement of the investigation meeting there were some issues with the process adopted by Newman Graphics because the company, in terminating Mr Boskett-Barnes' employment, had relied on a 90 day trial period which was not contained in a written employment agreement.

[4] Mr Boskett-Barnes set out the remedies he was claiming in his statement of evidence. He also confirmed that he had been paid for Anzac Day which was a sum he had been seeking in his statement of problem. The remedies sought are

- 12 weeks lost wages in the sum of \$12,560;
- 6 unpaid hours at \$22 gross per hour;
- damages for penalties on financial arrangements of \$1,500;
- compensation of \$5,000; and
- costs.

The issues

[5] The issues for the Authority to determine are as follows:

- (a) Was Mr Boskett-Barnes' dismissal justified, applying the test of justification in s.103A of the Employment Relations Act 2000 (the Act)?

- (b) If the dismissal was not justified and not what a fair and reasonable employer could have done in all the circumstances, then what remedies is Mr Boskett-Barnes entitled to and is there an issue of contribution or mitigation?
- (c) Is Mr Boskett-Barnes entitled to reimbursement for an additional 6 hours' work?

Was Mr Boskett-Barnes justifiably dismissed?

[6] Allan Douglas Newman is a director and shareholder of Newman Graphics together with his wife Janelle. Newman Graphics is a small family business based in Renwick near Blenheim. The business was incorporated as a company in 2001 but has been in operation for more than twenty years. Newman Graphics specialises in sign writing, screen printing and embroidery.

[7] Mr Newman became dissatisfied with Mr Boskett-Barnes' performance, ability to undertake the role, perceived inability to work co-operatively with other employees and with him and other aspects of his behaviour. Mr Newman advised Mr Boskett-Barnes at a meeting on 12 June 2013 that he was not going to keep him on beyond the 90 day period.

[8] Mr Newman said that whilst his intention was to give Mr Boskett-Barnes some notice until the end of 90 day period there was no time for discussion about this because Mr Boskett-Barnes simply got up and left the meeting after advising that Newman Graphics was not following a proper process. A personal grievance was raised on 18 June 2013 by Mr Boskett-Barnes that he was unjustifiably dismissed.

[9] The evidence supported that there was some discussion of a trial period at the time that Mr Boskett-Barnes was appointed to the role and/or after employment commenced. It is likely that a period of 90 days was mentioned at some point. The agreed terms and conditions of employment, however, were never reduced to writing.

[10] Newman Graphics accept that a trial period, under s.67A of the Act for a period of 90 days or less must be in writing. Indeed this also applies to a probationary period under the Act. To the extent that there was some dispute about what was said regarding a trial period I do not therefore need to resolve it.

[11] Mr Newman accepted that because he relied on the 90 day trial period he never formally warned Mr Boskett-Barnes during his employment that his job may be at risk if performance expectations were not met.

[12] Mr Boskett-Barnes was never formally advised of the reason or reasons for his dismissal although it is likely he concluded Mr Newman was dissatisfied with his work. In his written evidence he said that several days prior to his termination he had a feeling that all was not right.

[13] There were some reasons for the dismissal set out by Mr Radich in the letter he sent to Mr Boskett-Barnes dated 1 July 2013 responding to the raising of a personal grievance. These reasons were provided the closest in time to the dismissal. The letter set out that on one occasion Mr Boskett-Barnes walked out of work and told another employee Anna Valk *to stick the fucken job up your arse*. Ms Valk is the Newman's youngest daughter and is experienced in sign writing and other areas of work that the company performs. Further Mr Radich wrote that on another occasion Mr Boskett-Barnes assaulted Mr Newman by hitting him on the arm for which he subsequently apologised. He set out in the letter that Mr Boskett-Barnes would not follow reasonable instructions such as changing computer settings when told not to and that his performance was slow, sloppy and that he did not have the skills he claimed he had.

[14] I asked Mr Newman at the investigation meeting what the reasons for Mr Boskett-Barnes' dismissal were. Some of these were the same reasons as given by Mr Radich in his letter but in addition he said that Mr Boskett-Barnes had an anger problem, was fiddling with the machinery at the business and altering it and was filing material under his own name and not under the client name. Further, he said that the company was spending a lot of time fixing Mr Boskett-Barnes' mistakes and that a *couple of staff members said that if Mr Boskett-Barnes stays then they would go*. Mr Newman said that all of the issues had become too much for the small family business and the clients and his own staff were not happy and things had to change.

[15] Under the test of justification in s.103A of the Act the Authority needs to consider both the decision made by Newman Graphics, and how that decision was arrived at. Often the process used to arrive at a decision and the reasons for the decision itself overlap. In this case there was effectively no process at all. Mr Boskett-Barnes was simply called to a meeting on 12 June 2013 with no clear idea

of what it was to be about. He was told that his employment was to end. He was not advised of the reasons for this aside from a reliance on a 90 day trial period. He was therefore not asked to and indeed could not give any explanation to the concerns which Newman Graphics had. As the concerns were not put to him for his explanation it follows that no consideration at all could therefore be given to his explanations. There was no compliance with the minimum standard required for a fair process under the s.103A test which also requires sufficient investigation of any allegations. I do not find that the procedural steps in s.103A (a)-(d) were followed in a way that satisfied the requirements of the Act.

[16] The Authority must not determine a dismissal to be unjustifiable under s.103A solely because of defects in the process if they were minor and did not result in Mr Boskett-Barnes being treated unfairly. I do not find in this case the procedural defects were minor. They were significant and went to the heart of a fair process.

[17] I will turn to the substantive justification. The substantive justification for the dismissal is advanced on both poor performance grounds and on the basis of matters that could if established be viewed as misconduct.

Performance

[18] In terms of performance concerns there were no formal warnings given to Mr Boskett-Barnes for poor performance. I accept there was informal discussion with him about the quality and speed of his work and that Mr Newman was not satisfied with that. I am not satisfied that those discussions can be taken as sufficient to put Mr Boskett-Barnes on notice that his employment was in jeopardy if his work quality and speed did not improve.

Walking out and profanities

[19] Mr Boskett-Barnes apologised for walking out to Mr Newman who agreed that he could return to work saying words to the effect that improvement needed to be made and his attitude needed to change. He denied when giving his evidence that he had used bad language towards Ms Valk. The timing of the walking out was about three to four weeks before termination. There was no meeting with Mr Boskett-Barnes at that time over the incident and the discussion took place over the telephone. There was no disciplinary action imposed at that time for use of bad language or follow up as to whether the required improvements had been met or not before termination.

Assault

[20] Mr Newman believed that he was assaulted by Mr Boskett-Barnes although Mr Boskett-Barnes denied the assault as described. Mr Boskett-Barnes said that he gave Mr Newman a reassuring tap on the shoulder and *was amazed* when Mr Newman claimed he had assaulted him and would call the police if it happened again. Mr Newman said that he was hit hard in the chest. Both agreed that there was an apology from Mr Boskett-Barnes. That matter was not taken any further and objectively assessed Mr Newman accepted the apology, and a caution about what would happen if the situation arose again, was adequate at that time. There was no evidence of another similar matter before termination.

Changing the systems

[21] There were issues about Mr Boskett-Barnes changing the computer systems and he was told not to do so. Objectively assessed it is unclear when verbal instructions were given and if after that there continued to be issues with changes being made.

Inconsiderate and inappropriate behaviour

[22] The Authority also heard evidence from another employee who said that he had to complain to Mr Newman about Mr Boskett-Barnes intentionally sneaking up behind him and disturbing him or bumping him whilst he was working on a printing job. He also complained about how Mr Boskett-Barnes referred to him as *Frankie Goes to Hollywood* or just *Frankie* and said that he found it made him uncomfortable and insecure. Mr Newman did talk to Mr Boskett-Barnes about this but did not follow up and could not tell me clearly if the behaviour continued.

Incompatibility

[23] The concerns about Mr Boskett-Barnes interaction with other staff were not addressed with him clearly. To a large part they occurred because of performance concerns.

Conclusion

[24] Newman Graphics was clearly very concerned about Mr Boskett-Barnes for a range of reasons. Mr Newman said that Mr Boskett-Barnes was difficult to deal with

and raise issues with. That is however where a formal process is beneficial. The Authority does not set the standards of the employer and would not, if there is a fair performance process by an employer, normally question an employer's standards or an assessment as to whether they have been met. There must however be a fair process and there was not in this case. The other matters relied on could not support a valid decision because of the seriously flawed process and in some cases they had been dealt with earlier.

[25] Mr Newman made the decision to dismiss Mr Boskett-Barnes for reasons I accept he felt were genuine. He simply did not believe that the employment relationship with Mr Boskett-Barnes could continue. Mr Newman said that he had never had to deal with this sort of situation before in all the years the business had operated.

[26] I find that the conduct of Newman Graphics though was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal of Mr Boskett-Barnes occurred. A fair and reasonable employer could and should, instead of relying on an unwritten trial period, have commenced a process of identifying to Mr Boskett-Barnes the deficiencies which it believed he had giving him an opportunity to improve his performance and warning him of the consequences if performance did not improve. Newman Graphics could also have raised concerns as to issues of collegiality, staff conflicts and any other issues of concerns by way of a formal disciplinary process.

[27] I find that Mr Boskett-Barnes was unjustifiably dismissed from his employment with Newman Graphics Limited and he is entitled to remedies.

Remedies

Lost Wages

[28] Mr Boskett-Barnes seeks 12 weeks lost wages. He gave evidence that he applied for a number of jobs without success. I accept that evidence. Information from the Inland Revenue Department was provided subsequent to the Authority meeting and confirmed Mr Boskett-Barnes did not receive income for that 12 week period other than a work and income benefit. A flare up of an existing condition resulted in him being unable to perform physical work that is always available in Marlborough, for example in the vineyards.

[29] Mr Boskett-Barnes claim is reasonable. I must as Mr Radich submits consider whether the wages were lost as a result of the grievance and take into account whether the employment relationship would have lasted a further 12 weeks. It is a difficult exercise. On an objective assessment I do not find it could safely be concluded employment would have continued for an extended period. On the other hand a fair process would have required a period for improvement both in work performance and in relationships with staff and Mr Newman. Balancing those factors carefully I conclude subject to any findings on contribution that Mr Boskett-Barnes should be reimbursed for 10 weeks lost wages. That is on the hourly rate of \$22 per hour for a 40 hour week in the sum of \$8800 gross.

Compensation

[30] Mr Boskett-Barnes said that he suffered stress from losing work and having to deal with people that he owed money to. He has two children to support. He said that he lost sleep and had a miserable Christmas. I accept that Mr Boskett-Barnes was surprised by the dismissal and that this led to difficulties for him in managing payment of his expenses which caused him loss of dignity and stress. He seeks the sum of \$5000. That is a reasonable claim.

[31] Subject to any findings about contribution I find that an award of \$5000 compensation would be appropriate.

Damages

[32] Mr Boskett-Barnes claimed for damages or perhaps compensation for loss of a benefit under s.123 (1)(c)(ii) of the Act in the sum of \$1500. He talked about mortgages, rates and fines but provided no evidence to support that claim as is required with every claim for a remedy before the Authority. This was a claim that required Newman Graphics be given an opportunity to respond to. Mr Boskett-Barnes was represented and I was not prepared to allow evidence of any damages to come in after the conclusion of the investigation meeting. It is important for both parties for there to be some finality to this employment relationship problem.

Contribution

[33] The Authority is required under s.124 of the Act where it determines that an employee has a personal grievance to consider the extent to which the actions of the

employee contributed towards the situation that gave rise to the grievance and if the actions require reduce the remedies that otherwise would have been awarded.

[34] I turn firstly to the performance issues. I accept that Newman Graphics became dissatisfied with Mr Boskett-Barnes' performance. An employee will not usually be found to have contributed to a dismissal for poor performance/incompetence without an earlier fair process. That is because the employer always has the ability to performance manage an employee with a proper process. Further there is always a possibility that improvement will occur if an employee is properly managed and is aware of the consequences for non-performance. In the absence of a proper process I cannot conclude that Mr Boskett-Barnes would not have improved. I do not find contribution by Mr Boskett-Barnes as a result of issues about his performance.

[35] The other matters relied on were either never put to Mr Boskett-Barnes for explanation or were dealt with before 12 June 2013 short of a disciplinary outcome. I cannot therefore conclude that those actions, all disputed, contributed towards the situation that gave rise to the personal grievance. Newman Graphics simply relied in dismissing Mr Boskett-Barnes on the ability to do so under a 90 day trial period focusing generally in doing so on both conduct and performance.

Six hours unpaid

[36] This claim is about whether Mr Boskett-Barnes had been paid out for *time banked*. The claim is for the period Mr Boskett-Barnes worked in June 2013 and is for six hours. There is no dispute that Mr Boskett-Barnes was paid for 8 hours' time-banked for the pay period ending 9 June 2013 and then another 4 hours on 16 June 2013. He says that he is owed a further 6 hours. I was not provided with an in depth analysis by either party so I have carefully considered as best I can from the time card records and the pay slips whether there is money owing. I am simply not satisfied on the balance of probabilities as I must be that there is money owing. This claim is dismissed.

Orders

[37] Newman Graphics Limited is to pay to Michael Boskett-Barnes the sum of \$8,800.00 gross being reimbursement of lost wages under s.123 (1)(b) of the Employment Relations Act 2000.

[38] Newman Graphics Limited is to pay to Michael Boskett-Barnes the sum of \$5000 without deduction being compensation under s.123 (1)(c)(i) of the Employment Relations Act 2000.

[39] The claim for unpaid wages is dismissed.

Costs

[40] I reserve the issue of costs. If agreement cannot be reached then Ms Walker is to lodge and serve submissions as to costs by 15 April 2014 and Mr Radich is to lodge and serve submissions in reply by 29 April 2014.

Helen Doyle
Member of the Employment Relations Authority