

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 75
5642226

BETWEEN STEPHEN BRADLEY
Applicant

AND SMITHS CITY (SOUTHERN)
LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Greg Lloyd, Counsel for Applicant
 Kylie Dunn and Michelle Mau, Counsel for Respondent

Investigation Meeting: 26 and 27 January 2017 at Wellington

Submissions Received: 14 February and 24 February 2017 from Applicant
 21 February 2017 from Respondent

Determination: 14 August 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Bradley, alleges he was unjustifiably dismissed by the respondent (Smiths City) on 24 June 2016. He also claims to have been unjustifiably disadvantaged by virtue of the way he was suspended prior to the dismissal.

[2] Smiths City accepts it dismissed Mr Bradley but says the dismissal was justified. Similarly it says the suspension was justified.

Background

[3] Mr Bradley was initially employed by LV Martin & Son Limited at its Ngauranga store in 1996. In 2008 Smiths City purchased LV Martin's but the brand remained, as did Mr Bradley.

[4] In December 2015 Smiths City retired the LV Martin brand and Mr Bradley was, from that date, employed on a Smiths City employment agreement which contained similar terms and conditions.

[5] Mr Bradley was the subject of a series of complaints between August 2013 and May 2015 at which point there was an informal meeting between Mr Bradley and management. It culminated in an intimation further complaints about Mr Bradley's behaviour would be fully investigated and might result in disciplinary action.

[6] In late May 2016 Daniel Wilson, then manager of the Ngauranga store, received two complaints from Mr Bradley's co-workers which were similar in tone. They alleged a disrespectful attitude by Mr Bradley directed particularly at women.

[7] Three written complaints were eventually generated by three separate complainants and Mr Wilson, along with the Regional Manager (Shane Moore), then interviewed the complainants. Notes were not retained.

[8] There was a meeting between Mr Bradley and senior management on 26 May 2016 at which Mr Bradley was alerted to the fact Smiths City wished to meet and discuss the complaints. The substantive meeting took place on 2 June 2016.

[9] At the 2 June meeting, Mr Bradley was provided with a detailed letter setting out the allegations and advised Smiths City proposed suspending him on full pay to enable the allegations to be investigated. Smiths City say Mr Bradley was given the opportunity to comment on the proposal to suspend but chose not to do so. The proposal to suspend was mandated by Smiths City's code of conduct.

[10] Mr Bradley attended the 2 June 2016 meeting alone but at the commencement of the meeting was asked more than once whether he was happy to proceed notwithstanding the lack of a support person or representative. Mr Bradley chose to proceed. He says he expected the meeting to be limited to a presentation of the allegations but it continued and he was given an opportunity to respond. Amongst other things, Mr Bradley acknowledged that there had been concerns about his behaviour previously.

[11] The following day Mr Bradley arranged for his daughter, Georgia Choveaux, to assist him and Smiths City confirmed no disciplinary action would be taken until Mr Bradley had provided a comprehensive response to the allegations.

[12] Ms Choveaux sought all the documents pertaining to the matter on 7 June 2016 and some were provided the following day.

[13] On 7 June there was another complaint about Mr Bradley and that material was provided to Ms Choveaux on 20 June 2016.

[14] On 16 June 2016, there was a meeting between Smiths City and Mr Bradley who, on this occasion, was accompanied by Ms Choveaux. The employer reached a preliminary view that summary dismissal was an appropriate response given conduct that was considered serious.

[15] Mr Bradley was given the opportunity to respond to that preliminary conclusion and his response was provided via two separate documents on 21 and 22 June 2016. A decision to confirm Mr Bradley's summary dismissal for serious misconduct was communicated by letter dated 24 June 2016.

Determination

[16] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[17] There are two issues to be decided. Was the suspension lawful and can the dismissal be justified

Was the suspension lawful?

[18] When considering the propriety of a suspension the starting point must be the provisions pertaining to suspension in the relevant terms of employment. Clause 20.1 of Mr Bradley's employment agreement contemplated suspension as does Smiths City's code of conduct. Of course, the allegations must be sufficiently serious to justify the imposition of a suspension and I conclude in the circumstances of this case, they were.

[19] Ms Dunn referred to *Gazeley v Oceania Group (NZ) Ltd*¹ [2012] in which the Authority determined it was not required for an employer in Smiths City's position to consult the employee before deciding upon suspension in every case and suspension

¹ [2012] NZERA Christchurch 261

may not necessarily be considered disciplinary but simply an opportunity to provide clear space for an investigation and/or the protection of witnesses so an investigation could be concluded.

[20] I am satisfied on the evidence Mr Bradley was given an opportunity to comment on the proposal to suspend. He was given the letter dated 26 May 2016 which identified Smiths City's serious concerns, noted that if proved they would amount to serious misconduct and concluded by indicating an intention to consider suspension. Mr Bradley admitted, when answering questions, that he did not respond albeit on the grounds he was not aware he could challenge the suspension. That, however, does not mean he was not given the opportunity and I note he made no comment about it during the whole process.

[21] I heard no evidence which suggested that Mr Bradley's co-workers knew of the suspension until days after it was implemented. These factors suggest to me a proper process was followed.

[22] I agree with counsel for Mr Bradley the suggestion was Mr Bradley should talk to the Store Manager about the suspension were he minded to, and that the Store Manager was not the decision maker. I am not persuaded anything turns on that. An opportunity to discuss was offered and not taken.

[23] I conclude the suspension was lawful and therefore Mr Bradley's claim for disadvantage as a consequence of unjustifiable actions of Smiths City must fail.

Was Mr Bradley unjustifiably dismissed?

[24] The law on justification for a dismissal is now well settled with the effect of s.103A of the Employment Relations Act 2000 (the Act) being comprehensively considered by the Full Bench of the Employment Court in *Angus v Ports of Auckland Ltd* and *McKean v Ports of Auckland Ltd*.² In that judgment, the Court makes it abundantly clear the Authority's task is to assess if the employer's response to the conduct complained of is within the range open to a fair and reasonable employer in the circumstance of the case. If the response is one a fair and reasonable employer might reach then the decision to dismiss is lawful.

² [2011] NZEmpC 160

[25] In the present case Mr Bradley makes much of perceived deficiencies in the investigation conducted by Smiths City. Amongst other things, it is alleged Smiths City's investigation was characterised by a closed mind as to any response Mr Bradley might offer and, in effect, Smiths City had predetermined the outcome by reaching conclusions on the alleged wrongdoing before Mr Bradley had even been given an opportunity to respond.

[26] Amidst other things I am asked to look at the written material provided by Smiths City to Mr Bradley which, it is suggested, smacks of predetermination. Moreover, especially in the evidence of Ms Choveaux, there is extensive reliance on a conviction Mr Bradley was subjected to an orchestrated attack by Smiths City's managers during the disciplinary interview (she refers to it as a *pecking party*) rather than the dispassionate request for a measured response to properly formed allegations.

[27] Smiths City resists those contentions and relies on what it says was a fairly standard process for dealing with the complaints made against Mr Bradley.

[28] In particular, Smiths City says it wrote to Mr Bradley, set out the nature of the allegations as it understood them, invited him to a meeting, made it clear that if the allegations were proved they could lead to a finding of serious misconduct which could result in disciplinary action up to and including dismissal. He was encouraged to attend the meeting with a support person.

[29] While those observations are correct as far as they go, they do not overcome the doubtful language in the letter in question which, I am satisfied, does suggest an element of predetermination. For example, the letter refers to Mr Bradley's behaviour as constituting *harassment* before going on to say *...it is our opinion that this constitutes serious misconduct*. Later on it is said *...in addition you have breached our Company Values of Integrity, Professionalism and Communication*.

[30] On the face of it, and by using words such as *it is our opinion this constitutes* and *you have*, the letter suggests a predetermined view of matters. If that were all one could find to be critical of it might not be enough to cause anxiety about the probity of the process but there is more.

[31] For instance counsel for Mr Bradley points out that the reference to Mr Bradley's behaviour allegedly being *harassment* ought to have triggered Smiths City to engage with its own harassment policy. It did not. Despite making much of

this contention in the letter of 26 May 2016, Smiths City takes no further steps to consider whether Mr Bradley's behaviour was in fact harassment in terms of its own policy. That, I am satisfied, is fundamentally unfair to Mr Bradley.

[32] Nor is it enough for Smiths City to say, as it does, that it offered to adjourn the first meeting with Mr Bradley (the meeting on 2 June 2016) to enable him to have a support person present. It is true there was more than one attempt by Smiths City staff to give Mr Bradley that opportunity but again, as counsel for Mr Bradley points out in his submissions, what Mr Bradley thought that meeting was about was no more than a presentation of the allegations. It was for that reason and given, by all accounts, Mr Bradley is perfectly articulate even in stressful situations he appears to have felt secure enough to continue on his own.

[33] However the 2 June 2016 meeting went further than a simple presentation of the allegations. Responses were sought from Mr Bradley and this concerned him. As he put it, he had stupidly gone along with *their procedures* but he felt sufficiently concerned to quickly seek the assistance of Ms Choveaux as a legal adviser. Here it should be noted she is an experienced union organiser with relevant knowledge and she acted very promptly in notifying her involvement to Smiths City.

[34] Nor is Smiths City's contention it conducted a full and proper investigation accepted by Mr Bradley. For instance and as he says, it is not correct to say all of the relevant documents about the complaint were provided at an appropriate time. While some were provided on 8 June others were not forthcoming until 20 June. By then Smiths City had already made a preliminary decision to dismiss. Moreover, the transcript of the 2 June meeting and Smiths City's notes of the 16 June meeting were not provided at all during the process and did not present themselves until these proceedings were underway.

[35] Also, and absolutely fundamental to a failure to treat Mr Bradley fairly, was the fact Smiths City made its provisional decision to dismiss before it received Mr Bradley's written submission. In effect the two documents crossed in the ether but that does not assist Smiths City in my view. It cannot be fair and just an employer, having properly allowed the employee to make final submissions, then issue its' decision without receiving or considering those submissions.

[36] Most concerning of all though is the evidence, including a transcript of the 2 June meeting which is now available, in which Smiths City personnel made a variety of statements which seem to underline the predetermination I have already commented on in the initial letter setting out Smiths City's concerns. For instance, Mr Moore is recorded as saying:

If you said what you said to us ... that these things aren't happening, this is not me, these people are mistaken, they're wrong, that wouldn't go well.

[37] Ms Wright, the HR Manager, is quoted as saying:

There have been two formal written complaints specifically about your behaviour and your attitude and your manner ... and at the moment it is our view that that behaviour is unacceptable ... We will give you time to consider it ... but I don't want the next meeting that we have to try to be a justification of your behaviour ... Come back to the next meeting and tell us what the outcome should be ... or what is going to change and how we should deal with this because this isn't going away but it has to change and it has to stop and we need to deal with this situation.

[38] It is difficult not to be extremely anxious about the sense of predetermination in these observations. That anxiety was not assisted by some of the oral evidence. For example there is undisputed evidence that during the meeting of 16 June Ms Wright observed the complainant's perception is reality and, in response to explanations offered by Mr Bradley, stated she would not allow him to invalidate their feelings.

[39] Mr Bradley is also critical of the extent of the investigation. It is apparent the employer spoke to the complainants and that is entirely appropriate. What is troubling is the eventual decision-maker, Ms Wright, did not so she had no first-hand knowledge of what they were saying. Also troubling is the lack of notes and a resulting inability to provide them to Mr Bradley thus impeding his ability to respond.

[40] In addition I note Smiths City made no effort to talk to any other staff about the allegations against Mr Bradley. That is important because while Smiths City maintains Mr Bradley was found to have been responsible for three of the four allegations made out against him (on his own admission), the allegations upon which the decision to dismiss is based (at least in the way they are expressed in the dismissal letter) are far wider and more sweeping. I have already referred to the harassment allegation made in the initial letter to Mr Bradley which was the subject of no further

follow up by Smiths City. Notwithstanding that it appears central to the conclusion as expressed in the dismissal letter of 24 June 2016. In that letter, Ms Wright concludes Mr Bradley's behaviour in the workplace *constitutes harassment*.

[41] While the decision in *Ports of Auckland Ltd* makes clear an employer need only satisfy the Authority its response to disciplinary concerns is one a fair and reasonable employer could reach, that is not the end of an employer's obligation. The employer must also conduct a full and fair investigation before reaching its conclusion. Here, I am satisfied, on the evidence before me, the investigation was deficient and accordingly the information Smiths City had before it at the point it made the decision to dismiss was insufficient.

[42] In the absence of a fair and just process, I am not persuaded there can be a substantive justification of the dismissal and on that basis I find Mr Bradley's claim of having been unjustifiably dismissed is made out.

[43] That conclusion raises the question of remedies and particularly Mr Bradley's claim for reinstatement to his old position or to an analogous one. I am not persuaded Mr Bradley can reasonably and practicably be restored to a position at Smiths City.

[44] Reasonableness and practicability are the tests I must apply when assessing a claim for reinstatement. The onus is on Mr Bradley to satisfy me on both counts.

[45] With respect to reasonableness, it is apparent from decided cases the Authority must undertake a broad inquiry into the parties' respective position. A key factor, which His Honour Judge Couch referred to in *De Bruin v Canterbury District Health Board*³, is whether conduct complained of was a *one off* or was likely to be recurring. The evidence in this case is that there have been continuing issues over time about Mr Bradley's behaviour in the workplace. To put it colloquially, I think it fair to say Mr Bradley was never *short of a word*. It is, given the evidence and the way it was presented, difficult to see how his behaviour would change.

[46] Perhaps more concerning, is evidence that when LV Martin's was sold to Smiths City, Mr Bradley resisted the changes the new employer sought to make and the evidence some of his resistance continued for a considerable time. I also note

³ [2012] NZEmpC 110

Mr Bradley admitted making some of the comments complained about though he sought to put them in a more attractive context than the complainants would.

[47] I am also persuaded reinstatement is not practicable. Two of the complainants indicated they would resign if Mr Bradley was reinstated. That is a significant factor. Despite the deficiencies I found in Smiths City's conduct of this disciplinary inquiry, it is apparent it has lost trust and confidence in Mr Bradley. In those circumstances it is difficult to see how he could practically be reinstated.

[48] Having found Mr Bradley has a personal grievance and having concluded reinstatement is not available to him for reasons already explained, I must consider whether his behaviour contributed to the circumstances giving rise to his personal grievance.⁴

[49] I think the evidence discloses Mr Bradley has contributed to the circumstances giving rise to his grievance and assess that contribution at one third or 33%. I do that because I consider comments he acknowledges he made to other staff seem to have been made in circumstances where he has little or no understanding of their effect on others. I also note the evidence discloses a pattern of such comments being made over time. Notwithstanding the fact I have found the employer's investigation to be thoroughly flawed, I am satisfied a reduction in the remedies is appropriate.

[50] Compensation and lost wages are also sought. It is submitted the compensation should be significantly higher than normal and reference is made to the Court's decision in *Hall v Dionex Pty Ltd*.⁵ I am not persuaded an award of the magnitude sought is appropriate. The evidence of hurt sustained by Mr Bradley was limited. Indeed he says he cannot describe how upsetting it was. Given the evidence I conclude a moderate award is appropriate.

[51] In the same general connection, I am not persuaded an award of wages beyond the statutory three months, reduced by one third, is appropriate.

Conclusion and Costs

[52] Mr Bradley has not persuaded me he has suffered a disadvantage by unjustifiable action and that personal grievance fails.

⁴ Section 124 of the Employment Relations Act 2000

⁵ [2015] NZEmpC 29

[53] Mr Bradley does have a personal grievance for unjustified dismissal. He seeks compensation, lost wages and reinstatement. I have rejected reinstatement as a remedy.

[54] I do however order that Smiths City pay Mr Bradley the sum of \$6,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000. That sum is then to be reduced by one third to account for his contribution as previously discussed.

[55] I also order Smith's City pay Mr Bradley three months' being wages lost as a result of the unjustified dismissal. Once again that sum is to be reduced by one third to reflect the contribution finding.

[56] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority