

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Lindsay Burch (Applicant)
AND Sensation New Zealand Limited (Respondent)
REPRESENTATIVES Ken Nicolson for the applicant
Garry Pollak for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 4 August 2006
DATE OF DETERMINATION 12 September 2006

DETERMINATION OF THE AUTHORITY

Mr Burch's employment relationship problem

[1] In July 2002 Mr Burch commenced employment with Sensation New Zealand Ltd as a Production Coordinator. In November 2003, following some restructuring in the company, he was given a new employment agreement and given the task of "managing the mould building" for a new series of boats.

[2] Following several incidents and after a disciplinary meeting he was issued with a written warning on 12 October 2005. Mr Burch says that he disputed the contents of this letter with the then HR Manager at the time and the wording was amended slightly. The letter of warning included the following paragraph:

With regards to the outburst towards your manager we found this to be unacceptable behaviour and the explanation for this outburst was not satisfactory. The company takes discourteous and aggressive behaviour towards other employees very seriously and it has been decided to issue you with a Final warning for this misconduct. This letter serves as that warning. Further failure in meeting this requirement may result in your dismissal.

Mr Burch says he intended taking further action to dispute the warning but that, due to further restructuring, he was advised not to pursue the matter at that time but to wait until his position was confirmed.

[3] On 9 March 2006 an incident took place which resulted in another staff member complaining about Mr Burch's behaviour. Following initial discussions Mr Burch was suspended. Subsequently, following an investigation by the company and a formal disciplinary meeting, Mr Burch was dismissed. The letter of dismissal, dated 24 March 2006 referred to the earlier letter of final warning and said:

I draw to your attention to your offensive language and outburst of unacceptable behaviour toward Kelly Levi on Thursday 9th of March, 2006, as a result of this action Sensation Yachts Ltd is exercising their right to dismiss you from employment.

[4] Mr Burch says that his dismissal was unjustified and asks that the Authority award him compensation for the wages he has lost as a result of his dismissal and for the hurt and humiliation the dismissal has caused him.

The events which led to Mr Burch's dismissal

[5] Before outlining the sequence of events which led to Mr Birch's dismissal, it is necessary to canvass the attitude taken by the respective parties as to what was considered acceptable behaviour. Mr Birch accepts that his *methodology was a direct approach for setting out tasks, cajoling staff, if necessary being abrasive and firm (to) get my point across - whatever was necessary to get the job completed....It got results in a large organisation dealing at times with hard men who often had their own views on how things were done.* Mr Burch refers to his manager, Mr Gary Clark as having a *very lenient* management style and that their different approaches were *the cause of some vigorous meetings.*

[6] Mr Graeme Duffy, the General Manager at Sensation, says that he had had a number of altercations with Mr Burch over the time Mr Burch was employed. He says that he had banned Mr Burch from setting foot in the design department because Mr Burch spoke to them in a manner which was often *ill tempered and foul mouthed.* Mr Duffy says that he accepts that staff from time to time use bad language but that Mr Burch *appeared to swear with a greater degree of frequency and swear aggressively and engage in personnel, derogatory and demeaning behaviour towards others.*

[7] Mr Clark, to whom Mr Burch reported, says that within a few weeks of taking up his employment with Sensation in early 2004 he had attempted to address Mr Burch's aggressive behaviour. He says that prior to the issuing of the final written warning in October 2005 there had been a number of incidents which involved Mr Burch raising his voice at meetings. As an example Mr Clark says he remembers one meeting at which Mr Burch aggressively told him to *shut up* in front of his other managers.

[8] Mr Clark says that he recalls very clearly that, as part of the disciplinary process in October 2005 Mr Burch undertook to attend an anger management course. Mr Burch says that he had indicated that he would look at undertaking *management* courses. In any event no courses, of any description, were undertaken by Mr Burch.

[9] On 9 March 2006 (i.e. on the day of the incident which led to Mr Burch's dismissal) Mr Clark handed Mr Burch a letter dated 24 February 2006. This letter addressed Mr Burch's salary and performance review and said:

Since January 2006 you have been progressing with your job to an adequate standard, however you have been continually aggressive and dismissive of the way Quality Assurance performs within the Composite and Paint Division. You have made no effort to help resolve the situation and continue to be confrontational towards Mike Stillwell other employees and myself. As I can see no change in your attitude it concerns me as to your ability to execute the Production Coordinator role professionally.

In retrospect I have been too lenient in my approach and I must stress that confrontational and aggressive incidents will no longer be tolerated, I hope we can work together to improve the relationship you have with Quality Assurance and the rest of your team. Your contribution to the team is valuable when these issues do not overshadow your general working performance.

Sensation says that this letter was prepared on 24 February 2006 but was not delivered immediately because it had to be reviewed by the company's commercial lawyer.

[10] I turn now to the events which led to Mr Burch's dismissal. On 9 March 2006 Mr Burch briefly left the forklift he was using. When he returned he found the forklift had gone. When he inquired where it was he was advised that Mr Levi had taken it. He then approached Mr Levi and a discussion took place. Mr Burch says that while he did *lace the conversation with swear words* he did not *do anything in any way that was excessive or abusive*. However Mr Levi was apparently offended by Mr Burch's behaviour and complained to Mr Mervyn Stephens, the Group Senior Planning Manager for Sensation. Mr Stephens asked Mr Clark (Mr Burch's manager) to hear Mr Levi's account. He, accompanied by Mr Clark, then interviewed two witnesses who had observed the incident. He then approached Mr Burch and asked if he could attend a meeting with himself and Mr Clark to hear Mr Burch's version of what had transpired. Mr Burch agreed to attend a meeting but requested a formal letter. Mr Stephens drafted a letter inviting Mr Burch to a meeting. This letter briefly set out the accusations made by Mr Levi and advised Mr Burch that, as this was a serious matter, it was recommended that an associate accompany him.

[11] This initial meeting was attended by Mr Stephens and Mr Clark for the company and Mr Burch accompanied by a work colleague, Mr Andrew Johns. There is some dispute regarding what took place at this meeting. It is clear that Mr Burch was given an opportunity to outline his version of events. However Mr Burch says that, via Mr John's he asked if an apology could be made but this was refused. Mr Stephens says that when he asked Mr Burch if he would apologise Mr Burch was adamant that he would not. At the completion of the meeting Mr Stephens and Mr Clark indicated that the matter would now be referred to Mr Duffy, the General Manager. Following the meeting Mr Stephens completed a brief summary of his investigation. A copy of this summary was provided to Mr Burch.

[12] A meeting was scheduled for Monday 13 March 2006. However this meeting was postponed to allow Mr Burch to obtain representation. On that same day Mr Burch was suspended by Mr Duffy on full pay *due to the seriousness of the allegations and the possible consequences...and to stop possible disruption to production or confrontational situations arising*.

[13] A meeting was eventually convened on the 24 March 2006. This meeting was attended by Mr Duffy, Mr Clark and Mr Stephens for the company and Mr Burch was accompanied by Ms Kaur and Mr Johns. Mr Duffy outlined the issues involving Mr Levi and a brief discussion took place during which Mr Burch suggested that he had overheard Mr Duffy swearing on at least one occasion. Following an adjournment Ms Kaur made several suggestions regarding how the company might resolve the issue. One of these options was that Mr Burch received a further warning, and offer an apology to Mr Levi. Following a further adjournment Mr Duffy reached the conclusion that Mr Burch should be dismissed. Mr Burch was then advised of this decision and was subsequently given a letter of dismissal.

Mr Burch's arguments

[14] Mr Nicolson, on behalf of Mr Burch has raised a number of issues which, he says, render Mr Burch's dismissal unjustified. In general terms Mr Nicolson says that Sensations' actions did not meet the test set out in section 103A of the Employment Relations Act i.e. they were not *what a fair and reasonable employer would do in all of the circumstances*. In particular Mr Nicolson says:

1. The final written warning was harsh under the circumstances and inconsistent with the notes taken during the disciplinary meeting. Mr Burch's employment agreement states that the disciplinary process should involve one verbal and two written warnings and for the employer to suddenly jump procedural steps to a final warning creates a serious disadvantage and must be justified. Mr Burch did not accept the final written warning and Sensation did not attempt to refute Mr Burch's evidence that, but for the restructuring then taking place, he would have challenged the warning. Mr Nicolson says all of this brings the validity of the final warning into serious question.
2. Despite Sensations accusations and attempts to paint Mr Burch's conduct as abusive and aggressive, there are only two actual official recordings of disciplinary processes; the final warning in October 2005 and the events leading to the dismissal in March 2006. Mr Nicolson says that Sensations' evidence was inconsistent and, he submits *they were at times clearly not telling the truth or at best were so confused about events that they became muddled and confused by their own inconsistent explanations*.
3. Glaring inconsistencies over important points tends to undermine the credibility of Sensations statements and both Ms Kaur and Mr Johns report being unhappy about the fairness of the process and what appeared to be a predetermined dismissal.
4. The actual incident which brought about Mr Burch's dismissal was not witnessed by any of the three decision makers. The deciding manager, Mr Duffy, never interviewed any of the witnesses personally. Mr Burch has always denied that he was abusive or aggressive and maintains that he never swore at Mr Levi personally but used the words he did in frustration about the situation and directed at the world at large. Mr Levi was under threat of redundancy and was in a fragile state making him susceptible to overreaction in what was a hard and tough world. The use of swear words and people talking tough is an everyday occurrence and, had Mr Levi not been under pressure he might have seen the events differently. Mr Burch did not know about Mr Levi's redundancy. Mr Levi does not smoke drink or swear and is therefore likely to be over-sensitive to actions that others might accept as normal practice. Mr Nicolson says that proper inquiries by Mr Duffy would have resulted in a different outcome. Mr Nicolson submits that Sensation took no notice of these factors in the decision but instead made an *intentional predetermined decision* to dismiss Mr Burch *following a subjective threadbare and at best incomplete investigation*.
5. Mr Nicolson says that the dismissal procedure was unfair in that Mr Burch was subjected to two unofficial investigation meetings, should have been given proper notice to allow him to get a representative, Mr Duffy did not interview all of the key witnesses himself and did not consider the offer of an apology as a means of resolving the issue.

Sensations' arguments

[15] Mr Pollak, on behalf of Sensation, says that, while Mr Burch says he intended to challenge the final written warning, he did not do so and cannot now do so. He says that the final warning is important because it came at the culmination of a series of issues relating to Mr Burch's personal behaviour and personal interrelationships. Mr Pollak points out that there is no dispute that the incident involving Mr Levi took place; the issue is, rather, regarding the seriousness of that incident.

[16] Mr Pollak suggests that even if the preliminary investigation undertaken by Mr Stephens was, in some way, procedurally irregular, any such irregularity was overcome by the fact that Mr Burch was able to make his explanations directly to the ultimate decision maker, Mr Duffy. While the incident was not witnessed by the Company's three managers, they came to the view that Mr Levi's complaint had substance. Mr Pollak says there is no evidence of a custom and practice of swearing at each other in a rude and aggressive manner. He says that while employees do swear they are not abusive to each other and that Mr Burch does not appear to understand or care about the difference. Mr Pollak says that Mr Burch's assertion that Mr Levi was in a fragile state is untenable as Mr Burch was in a position of authority and it was inappropriate for him at any time to be abusing Mr Levi or anyone else.

[17] Mr Pollak says that Mr Burch was on an unchallenged final warning for aggressive and abusive behaviour. He says that the evidence is compelling, and not challenged, that both Mr Duffy and Mr Clark had had words with Mr Burch about his behaviour and the final warning was simply a culmination of that behaviour. The other incidents, of lesser nature, occurred subsequent to the final warning and this is evidenced by Mr Clark's letter dated 24 February 2006. The incident with Mr Levi was a continuation of Mr Burch's behaviour and was of such seriousness that Sensation was entitled to regard these actions as amounting to the sort of misconduct that would justify dismissal.

Legal considerations

[18] I agree with the submissions of both representatives that I must decide whether or not Mr Burch's dismissal was justified based on the test set out in section 103A of the Employment Relations Act; i.e. were the actions of Sensation what *a fair and reasonable employer would have done in all the circumstances at the time*. How this test is to be applied was recently set out by Judge Shaw in the Employment Court in *Air NZ v Hudson* (AC 30/06 30 May 2006.) In *Hudson* the Judge said:

[141] Section 103A does not mandate a decision to dismiss or not, based on the subjective views of what the Court would have done as an employer in the same circumstances, but requires a decision to be made by reference to the objective standards of a hypothetical fair and reasonable employer. Again, the test does not license the wholesale substitution of the views of the Court for those of the employer but requires an objective evaluation of the actions of the employer against a statutorily imposed standard. The emphasis has shifted from the range of possible responses open to an individual fair and reasonable employer to an objective evaluation of the employer's response to misconduct against what a fair and reasonable employer would have done in all the circumstances.

[142] All the circumstances of the case includes not just the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer. In other words a return to the test as articulated by Williamson J.

[143] *Therefore, a particular employer, having followed proper investigative processes is justified in dismissing for misconduct it reasonably believes has occurred if the Authority or the Court finds that a fair and reasonable employer would have dismissed in all the circumstances.*

Discussion

[19] I have absolutely no doubt that Mr Burch had been clearly advised that his *abusive and aggressive* behaviour was inappropriate and that continuing to behave in this manner could lead to his dismissal. His employer tried on a number of occasions to convince him that his behaviour must change, including giving him a final warning. While Mr Burch may have intended to challenge the written warning this does not detract from the very clear message contained in that warning. Mr Burch does not appear to have accepted that his behaviour was inappropriate. On the contrary he believed that his Manager was *lenient*. He appears to have decided that, despite his employer's warnings, his management style was appropriate and that he could ignore his employer's explicit and repeated instructions.

[20] Mr Nicolson has suggested that the disciplinary process that led to Mr Burch's dismissal was unfair and that Sensation commenced its investigation having already determined the outcome. Ms Kaur, in her evidence, said that she felt that the Company had already made up its mind to dismiss Mr Burch. However she was unable to substantiate this allegation other than to say that this was her *impression*. I do not accept that any deficiencies in Sensations investigation process were of such magnitude as to render his dismissal unjustified. Mr Stephen's preliminary investigation was simply to establish that an incident had taken place before the matter was escalated to a more formal process. When a formal meeting did take place Mr Burch was fully aware of the purpose of the meeting and the range of possible outcomes and had received all of the documentation. He was represented at that meeting and was given an opportunity to comment. His employer considered all of the available material including Mr Burch's response.

Determination

[21] To use Mr Burch's own expression, his employer could be said to have been *lenient*. They attempted, over a long period, to persuade Mr Burch to change his behaviour. He did not do so and, in the incident involving Mr Levi, specifically did what he had been warned he should not do. The Company investigated Mr Levi's complaint, including giving Mr Burch a proper opportunity to put his perspective on the events. Having considered Mr Burch's explanation Mr Duffy came to the conclusion that he had no option but to dismiss. Having considered all of the evidence and the respective submissions of the parties representatives I have reached the conclusion that Sensation's decision to dismiss Mr Burch was what a fair and reasonable employer would have done in all circumstances. **Mr Burch's dismissal was justified and he has no personal grievance against his employer.**

Costs

[22] Costs are reserved and the parties are urged to reach agreement on this issue in the first instance. If they are unable to do so Sensation may file and serve submissions in respect to costs within 28 days of the date of this Determination. Mr Burch will then be given 14 days in which to respond.

James Wilson
Member of Employment Relations Authority