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Cole v Axiam Plastics Ltd WA 132/07 (Wellington) [2007] NZERA 651 (25 September 2007)

Last Updated: 18 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 132/07 5030786

BETWEEN Jay Cole Applicant

AND Axiam Plastics Limited Respondent

Member of Authority: Denis Asher Representatives: Sharon Brennan for Mr Cole

Tim Hayes for the Company Investigation Meeting Wanganui, 6 September 2007 Submissions received: From the parties by 24 September 2007 Determination: 25 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In his statement of problem filed in the Authority on 16 April 2007 Mr Cole said he had been unjustifiably disadvantaged and then unjustifiably dismissed from his employment with the Company on 7 November 2005. He sought compensation of \$10,000 for humiliation, etc, lost income, recovery of wages for unlawful reduction of wages, a penalty in relation to a breach of his employment agreement and duty of good faith, and costs.

[2] In its statement in reply filed in the Authority on 30 April the Company denied the applicant's claims and said his dismissal was justified.

[3] The parties underwent mediation but were unable to settle their employment relationship problem.

[4] The parties subsequently agreed to a one day investigation in Wanganui on 6 September. They usefully provided witness statements in advance of the investigation. An opportunity was provided Mr Cole to resume the investigation on a later date so as to hear directly from witnesses whose written statements or anticipated evidence contradicted the applicant's claims; through his representative, Ms Brennan, the applicant declined the offer, advised he no longer wanted a continuation of the investigation but instead asked the Authority to determine his claims on the evidence already before it.

Background

[5] With one or two significant exceptions, the parties are largely agreed as to the relevant facts and events.

[6] Mr Cole was employed by the Company as a process worker in October 2002. He says he was appointed to the position of full-time supervisor around June 2005: the Company says Mr Cole was acting in the position, on a trial-basis only.

[7] Mr Cole accepts that, in October 2005, he brought an air gun into the workplace, and – he says, with others – fired “*some rounds*” (par 5 of his witness statement) including once at a steel capped boot (which at the time was worn by a co-worker; fortunately for all no injury resulted). A meeting with his employer in respect of this incident took place on 10 October.

[8] Mr Cole says that, in addition to the effects of the air gun incident and the resulting meeting with his employer, he was also “... *dealing with an amount of stress with home issues at that time, and this made me ask for 1 week off due to stress – I was unable to deal with this on top of everything else*” (par 9 of his witness statement). Around the same time Mr Cole also saw his doctor and was on anti-depressant medication as well as something for his anxiety. His doctor determined Mr Cole was not fit for work for 10 days.

[9] At about the same time Mr Cole was involved in an out of work incident, on 13 October 2005, when he became embroiled in an argument and was, he says, assaulted. His assailants, by text message, then threatened his ongoing employment and warned that charges of assault would be laid against him. Mr Cole sought more time off on stress leave. He says he was never arrested or charged by the Police.

[10] Mr Cole claims that, on two occasions after the 13 October assault incident, Mr Oskam harassed him by asking, ‘what are you doing here, why aren’t you in jail?’

[11] On 14 October Mr Cole attended a meeting with his manager, Mr Frank Oskam in respect of the air gun incident; the men have differing versions as to what occurred. Mr Cole says he was given two letters offering the choice of either a final warning with conditions including a demotion from supervisor to machine operator, and loss of various payments, or dismissal; he says he took the former. Mr Oskam says that, while he had drafted a dismissal letter so as to emphasise to the applicant the seriousness of his actions, on reflection he decided only to issue Mr Cole with a final warning as well as advising him that he was not deemed suitable as a supervisor and his acting-up to that position was therefore terminated, along with a loss of pay (including a bonus).

[12] Shortly afterward Mr Cole sought legal advice about his final warning; he was particularly unhappy about his demotion and pay losses.

[13] Acting on his representative’s advice, and on 28 October, Mr Cole approached Mr Oskam so as to obtain various documents, including his employment file. An altercation or argument blew up between the two men. Mr Cole blames Mr Oskam and says, amongst other things, it was the latter who lost his temper and shouted at him. Mr Oskam says it was Mr Cole who was the aggressor, to the point that Mr Oskam felt it necessary to issue a trespass notice (for the duration of the applicant’s medical leave) and to lock the door for an hour after Mr Cole’s final departure, because 3 women office staff were terrified by his demeanour and behaviour.

[14] As a result of the 28 October incident, the Company says it initiated a second disciplinary investigation. The applicant says the respondent’s procedure was defective: not only did it fail to investigate his allegations of harassment but it acted in breach of its own staff induction booklet guidelines by, amongst other things, not warning Mr Cole he faced dismissal or that it was convening a formal disciplinary meeting (in respect of the incident that culminated in his dismissal) and the applicant was entitled to be represented at the same.

[15] Following meetings between the applicant, his representative and Mr Oskam, and by letter dated, erroneously, 14 October 2005 (when, Mr Oskam says, it should have been dated 7 November), and in respect of the 28 October incident, and at a meeting on 7 November 2005, Mr Cole was dismissed for “*a shocking incidence of your behaviour (which was) totally unacceptable and is deemed an example of serious misconduct which justifies dismissal*” (above).

[16] Mr Cole was on a sickness benefit from 14 November. He attempted to return to work on 12 December but it only lasted 7 days because, Mr Cole says, he could not cope with the demands of his job as a result of the impact of his dismissal.

Discussion and Findings

[17] There is no written evidence in support of either party’s position in respect of whether Mr Cole was permanently appointed to the position of supervisor or not.

[18] Mr Cole’s employment agreement is silent on this issue, as it is in respect of his claim that he was entitled to a

bonus payment that was taken from him, following the air gun incident, as recorded in Mr Oskam's final warning letter of 14 October 2005.

[19] The parties also dispute the length of time Mr Cole undertook the supervisor's position; the applicant says he was in the position for 5/6 months, Mr Oskam says the period was 3/4 months. Neither party produced wage records in support of their claims.

[20] Oral evidence on whether Mr Cole was on a trial period or permanently appointed could have been given by another manager, Mr Derek Cook, but was not as Mr Cook was absent as a result of his wife's hospitalisation; Mr Cook did not provide a written statement, nor did the respondent explain his failure to do so. The Company says Mr Cook's evidence would support its position that the applicant was on a trial period. As is made clear above, the Authority's offer to reconvene so as to hear from Mr Cook and two other current or former office staff employees was declined by Mr Cole.

[21] In the absence of any documentary evidence by which the parties' competing positions might be resolved, a credibility finding is required: I am satisfied that Mr Cole's understanding of his appointment to the supervisor's position is wrong and that, in reality, his appointment was on an acting up or trial basis only. The Company was therefore, after investigating the air gun incident – and in light of Mr Cole's admission as to his responsibility – fairly and reasonably able to conclude he was not suitable for the

supervisor's position and remove him from it. It follows that Mr Cole's entitlement to increased pay also ceased. I am also satisfied that, as the bonus offered by the Company was at its discretion and not a contractual entitlement, the respondent was fairly and reasonably able to deny payment of the same to Mr Cole.

[22] I note here the reference by Mr Oskam in his letter to the applicant of 14 October 2005 to Mr Cole “... *at the time acting as supervisor*” (emphasis added, attachment to statement of problem, etc). It is evidence, I find, of Mr Oskam having an early view of Mr Cole's acting up status, and not an invention in response to the filing of a personal grievance.

[23] The basis of my credibility finding against Mr Cole is that he admits he was stressed at the time, was taking medication for the same as well as periods of stress leave. The Company's evidence does not have this difficulty. It is, I find, more soundly based coming as it does from a variety of direct and indirect sources, including that of Mr Oskam. Because of his admitted stress and medication for the same I am satisfied Mr Cole misunderstood the trial nature of his appointment to the supervisor's role. It follows that, as he had no contractual entitlement to the supervisor's position but occupied it on a trial-basis only, he was not unjustifiably disadvantaged by the decision to demote him and he is not lawfully entitled to recover any lost monies.

[24] For the same reasons I prefer the evidence of Mr Oskam and Ms Emma Morris to that of Mr Cole as to the latter's conduct on 28 October 2005. Ms Morris gave both affirmed oral and written evidence to the Authority. Two written statements provided to the Authority from other Company administration staff, who did not attend the investigation, fully reflect Ms Morris' (and Mr Oskam's) evidence. Mr Cole had the opportunity, but subsequently declined it, to hear directly from these two witnesses. The respondent's evidence can be simply summarised: on that day Mr Cole repeatedly spoke very loudly to Mr Oskam. The applicant was agitated, impatient and unable to sit still: he was pacing and his hands were shaking. Ms Morris' concern about Mr Cole's behaviour and demeanour was such that she tried unsuccessfully to contact another male staff member, in case physical conflict broke out. She noted the presence of another male staff member who, she understood, was waiting close by in case Mr Oskam needed his assistance. Because of the duration of the confrontation, Ms Morris was concerned for the safety of herself and others to the point she picked up the telephone and was about to call the Police. Shortly afterward, and following Mr Cole's return to the office and his demanding again that he be given certain documents, Ms Morris found the situation uncomfortable to the point she left the office: on her return, 10-15 minutes later, Mr Cole had gone and all of the doors were locked so as to prevent his

return. I have no reason to believe Ms Morris', or Mr Oskam's, impressions and reactions to be exaggerated or orchestrated.

[25] In establishing the justifiability of the Company's decision to dismiss Mr Cole, s 103A requires the Authority, while not substituting its opinion for that of the decision maker, to determine what a fair and reasonable employer, objectively measured, would have done in all the circumstances.

[26] Having regard to the two serious misconduct issues culminating in his dismissal, that is the final warning Mr

Cole was under in respect of the air gun incident only 2 weeks earlier, and his conduct on the 28th of October, when it was necessary for Mr Oskam to lock the office doors following the applicant's final departure because of the alarm experienced by himself and at least 3 women office staff, I am satisfied that the Company's decision to dismiss is what a fair and reasonable employer would have done in all of the circumstances at that time. That is because Mr Cole's behaviour on 28 October, objectively measured, was threatening. Those who were witness to his behaviour feared for their safety. Consistent with the examples of serious misconduct as set out in his employment agreement, the applicant's conduct amounted to verbal abuse of another staff member (Mr Oskam), as well as being threatening to other staff (the respondent's office-based employees).

[27] The Company was justified, I find, in evaluating the applicant's conduct in light of its freshly applied final warning, in particular the advice contained therein that "... *any repeats of wild or unsafe or dangerous acts of any kind ... will most certainly lead to summary dismissal*" (respondent's letter of 14 October 2005 attached to the statement of problem, etc), and acting accordingly.

[28] In the alternative, were I to find somehow in Mr Cole's favour (which I do not) in respect of his claim of unjustified disadvantage and dismissal, contributory fault is such that he would not receive any compensatory remedies. That is because Mr Cole's decision to bring the air gun on to the workplace, and to fire it – including at another employee – is serious misconduct which could have resulted in his justified dismissal. His behaviour on 28 October was similarly dangerous, because it was threatening. It was seriously abusive and unacceptable conduct raising significant issues of health and safety. Mr Cole's behaviour took little or no account of his co-workers or their legitimate needs and expectations. Mr Cole did not appreciate the generosity of his employer's action in response to the air gun incident and therefore is still, presumably, unable to measure the significance of his conduct on the 28th of October 2005.

[29] I note also that Mr Cole's sickness benefit would disentitle him to any claim for lost wages as he was clearly unfit to work.

[30] I make the same finding in respect of Mr Cole's claims that the Company's disciplinary process was defective and in breach of its own requirements as set out in its staff induction handbook (attached to Mr Cole's employment agreement), that contributory fault would disentitle him to any claim. It is clear the parties were at cross purposes during their meeting on 4 November 2005. The applicant's then-representative, Mr Graham Tasker, said the meeting was convened at his initiative, not Mr Oskam's, and that – contrary to Mr Oskam's claims – it was not identified by the respondent as a disciplinary meeting in respect of the events on the 28th of October and could result in his client's dismissal. Mr Tasker's witness statements makes it clear, however, at pars 16.12 – 16.16, that Mr Oskam did attempt to talk about what had happened on the 28th of October and that he made it clear the applicant's employment was at jeopardy (e.g. "*if he returns to work*"; that Mr Cole had "*breached the conditions of the final written warning*", etc: par 16.12, etc, above).

[31] Mr Tasker confirms he advised his client not to say anything as it "... *was not a disciplinary meeting*" (par 16.14, above). This was, I find, a less than satisfactory response. By hearing fully what Mr Oskam had to say Mr Cole would have been left in no doubt that his employment was at jeopardy. He would then have been better placed to put relevant argument to Mr Oskam in that regard. Mr Cole would have been better placed to obtain a clear statement from the respondent as to its concerns and to seek if necessary a fresh meeting – consistent with the process set out in the handbook.

[32] However, bearing in mind my finding above, I do not believe it necessary to make any finding as to the fairness and adequacy of the process adopted by the Company as Mr Cole's contributory fault is such he is not entitled to any remedies.

[33] Finally, I do not accept that Mr Oskam's unsubtle comments about expecting Mr Cole to be in jail amounted to harassment.

Determination

[34] For the reasons set out above I find against all of Mr Cole's claims against the Company.

[35] Costs are reserved. Subject to the parties' views, and those of the respondent in particular, I note that the

Company represented itself and it is difficult therefore, in the absence of relevant submissions, to see what if any costs it has incurred.

Denis Asher

Member of the Employment Relations Authority

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