

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 296
3115717

BETWEEN GARTH CUNNINGHAM
 Applicant

AND HEALTHALLIANCE NZ
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Richard Upton, counsel for the Respondent

Investigation Meeting: 5 and 6 October 2022

Submissions received: 4 and 11 November 2022

Determination: 7 June 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] After eight years of service in the position of Database Administrator, the applicant Garth Cunningham was dismissed by the respondent healthAlliance NZ Ltd from his employment.

[2] Mr Cunningham raised a personal grievance of unjustified dismissal and a complaint of being bullied by his manager.

[3] The parties attended mediation but were not able to resolve the problems on their own terms. The Authority has been required to investigate and determine the

claims on their factual and legal merits, in performance of the role of the Authority under s 157 of the Employment Relations Act 2000 (the ER Act).

[4] To resolve his problems Mr Cunningham seeks the statutory remedies of reinstatement, compensation, and the reimbursement of lost wages for all or some of the extended period he was without work after his dismissal.

[5] At an investigation meeting Mr Cunningham, his former manager Gary Edwards and other witnesses who had material information, gave evidence and were questioned by the Authority, Mr Cunningham and counsel for healthAlliance, Richard Upton. Following the meeting, written submissions were received by the Authority.

[6] This determination is given in accordance with s 174E of the ER Act and does not therefore fully record all the evidence or information considered by the Authority, or submissions received.

[7] The Chief of the Authority granted an extension of time beyond the normal three-month period for giving a determination, required because of the demands of other Authority work.

Disclosure of Calderbank offer

[8] A common bundle of documents was provided by the parties to assist the Authority with its investigation and investigation meeting. One of the documents was a letter which had been created after Mr Cunningham had lodged his claims in the Authority. The letter, written by Mr Cunningham's representative at the time and addressed to healthAlliance, contained an offer which was stated to have been made for Calderbank purposes. It should not have been in the bundle of documents.

[9] The Authority asked the views of the parties as to how it should proceed in view of this inadvertent disclosure to it. Both parties were content for the Authority to put the offer and its contents aside from consideration and proceed to a determination, which the Authority has done.

Grounds for termination of employment

[10] Mr Cunningham's dismissal was confirmed to him on 17 July 2020 by letter. He was advised that following an investigation he had taken part in, his conduct and performance were considered to be misconduct and serious misconduct, as below:

Misconduct

- Breach of healthAlliance policies. Failing to perform duties to an acceptable standard
- Irresponsible or unacceptable behaviour which could cause offence

Serious Misconduct

- Refusal or failure to obey a reasonable instruction
- Conduct that could seriously damage the reputation of an individual or healthAlliance
- Negligently committing any act which seriously affects the quality or delivery of service

[11] Before dismissing Mr Cunningham, healthAlliance had investigated two incidents. They were of quite different character; 1) Mr Cunningham's personal conduct towards Ken May, a colleague Data Administrator, and 2) not following the correct change process when complying with a particular Service Request. The incidents occurred within a few days of each other, in February and March 2020.

[12] The incidents, particularly the second, were investigated by healthAlliance against a background of earlier problems in the work performance of Mr Cunningham. As a result, he had twice been given a formal Letter of Expectation and then a written warning a few months later. The first letter was issued on 15 July 2019 and the second on 27 August 2019. The written warning was given on 19 December 2019.

[13] No personal grievance or other challenge was raised by Mr Cunningham in response to either letter of expectation or the warning.

[14] healthAlliance does not regard a letter of expectation as a 'disciplinary' measure but sees it as precursor to such.

[15] In relation to the incidents occurring prior to his dismissal, Mr Cunningham took responsibility for his personal conduct towards Mr May and acknowledged a degree of fault on his part. The circumstances indicate to the Authority it is unlikely he would have been dismissed for that conduct alone. As to the alleged failure to follow correct change procedures, Mr Cunningham strongly disputes that he was at fault.

Change Management

[16] A significant part of healthAlliance's business is the provision of a wide range of specialist IT services to the four large District Health Boards of Te Tai Tokerau, Waitemata, Auckland and Counties Manukau.

[17] IT staff including Mr Cunningham were required in performing their work to follow various procedures and processes. These were designed to allow control to be kept over change whenever it had to be made in the delivery of IT service.

[18] The processes allowed environmental changes to a configuration item to be tracked, so that if there was a problem the cause could be more readily identified. The proper recording of progress as it was made through a change process - change control - was necessary to maintain the integrity of the change process. Having and using an appropriate process was also aimed at inspiring confidence on the part of healthAlliance customers.

[19] The change procedures and processes had been notified to staff and were accessible to them for reading and learning purposes. Training was periodically given, and any alterations were advised to staff.

[20] Over the years of his employment Mr Cunningham had acquired considerable knowledge and experience of the healthAlliance procedures and processes, from both regular use and organised training programmes.

[21] Staff were encouraged and expected generally by healthAlliance to avoid risk and act with caution whenever they applied the procedures and processes for controlling change.

[22] Mr Cunningham contends that the change procedures he was accused of departing from, had not applied or had been insufficiently developed to cover the IT environment he was working in on the occasion in question.

[23] During the disciplinary investigation healthAlliance conducted, it became an issue as to whether Mr Cunningham had been performing work in a 'development' environment, as he maintained, or whether it was a 'production' environment, as healthAlliance maintained.

Letters of expectation

[24] Mr Cunningham's dismissal was preceded by healthAlliance giving to him two letters of expectation. The first was received in July 2019 and the second a few weeks later in August.

[25] The first was given after healthAlliance had raised and discussed with Mr Cunningham, concerns about his management of problem tickets. The concerns were about the amount of time he had taken when trying to fix a particular problem, and about keeping notes to record his interventions in that regard.

[26] Neither in substance nor tone is the letter disciplinary. It is informative, designed to draw attention in writing to work rules and remind an employee of the employer's specific requirements to be met in certain situations.

[27] The second letter is similar in style and was given to Mr Cunningham after it appeared to healthAlliance that he had not followed an applicable change procedure or process and had compounded that situation by appearing to raise a change retrospectively. The steps of peer review and obtaining the management approval when needed under the change procedure, may become bypassed if the procedure is not closely followed.

[28] The expectation letter advised Mr Cunningham that system changes had to be covered under a formal request for change, and that they were to be raised in advance

of the change. Also, if he had any doubt, Mr Cunningham was to log a formal request for change and consult his manager. The letter stated this as below:

Any changes to our environment ... must be covered under the appropriate PFC [*process for change*] and raised in advance. If this can't be done before the change, a retrospective change must be raised. In the event that you have any doubt over whether any action is a change, as per the policy, you will log an RFC [*request for change*] and discuss with your manager

[29] Mr Cunningham was also expressly advised that he was expected to abide by the values of healthAlliance.

[30] Both letters advised Mr Cunningham that if in future he did not meet the expectations notified to him, a formal disciplinary procedure might follow.

Written warning

[31] In September 2019 an issue arose from a system change Mr Cunningham appeared to have made without consulting his manager or another colleague. A disciplinary meeting was held, as had occurred before the second letter of expectation was issued. Mr Cunningham's explanation that the situation was an emergency was rejected by healthAlliance. It viewed the change as an unauthorised system change and considered that in accordance with an earlier notified expectation, a retrospective change should have been raised and a manager should have been consulted as part of the required process.

[32] Mr Cunningham was advised of healthAlliance's conclusions and given a formal first written warning, as provided for in the company's disciplinary policy.

[33] No grievance or other challenge to the disciplinary action was raised by Mr Cunningham.

Conduct towards a colleague

[34] In February 2020, Mr Cunningham's colleague Database Administrator Ken May, expressed to healthAlliance his objection to behaviour he had experienced. This was that Mr Cunningham, while in the workplace and in the hearing of other employees,

had berated him to the point where Mr May felt he had to leave the office just to get away from Mr Cunningham.

[35] Mr May told healthAlliance that the behaviour had occurred once before and he considered it was not justified or acceptable, coming from a colleague and while at work. He said he was thinking of leaving his job because of Mr Cunningham's behaviour.

Further failure to follow change process

[36] In early March 2020 a further concern was raised by Mr Cunningham's performance. It appeared to healthAlliance that he may not have followed the required process for change to the system.

[37] At a disciplinary meeting convened by healthAlliance, Mr Cunningham accepted he had caused the heated exchange with Mr May and had unnecessarily upset him. He explained that he had apologised for his conduct before Mr May had left the workplace.

[38] As regards the change procedure and whether it had been followed, distinct positions were taken. Mr Cunningham considered that change control was not required because the change was not within a 'production' environment. healthAlliance on the other hand considered the change was not within a 'development' environment, but even if it had been he would still have been required to raise a retrospective RFC and discuss the situation with his manager, in accordance with the expectation which had earlier been expressly notified to him.

[39] healthAlliance considered that Mr Cunningham had not met the expectation expressly notified to him in the second letter of expectation issued in August 2019.

Production, or development?

[40] It was for the employer to fully and thoroughly investigate the nature of the change environment, once Mr Cunningham made it a key issue in the disciplinary enquiry.

[41] The Authority finds that a fair and objective assessment or examination of the environment was conducted, from which healthAlliance was reasonably able to conclude that the change had occurred in a production setting.

[42] Mr Cunningham was provided by healthAlliance with a detailed analysis of system mode. While he may not have agreed with it, that analysis indicates to the Authority that there was an objective exercise of judgement by healthAlliance before it concluded the environment had been production, not development. healthAlliance found that the change had been made to a procedure stored on a database which was contained within a production server.

[43] In consequence, it was reasonable for healthAlliance to find that Mr Cunningham had not adequately applied his experience and knowledge, as supplemented by training and the provision of access to information, but had fallen below a standard he had been reminded in writing he was required to meet.

[44] The inquiry conducted into Mr Cunningham's conduct, led healthAlliance to propose his dismissal with immediate effect. The reasons given for the action proposed were outlined in a letter of 27 May 2020, sent to Mr Cunningham for his consideration as to whether he wished to raise or add anything before a final decision was made.

[45] The reasons given to him were that he had not met minimum standards of conduct and behaviour of an experienced Database Administrator, and that his conduct was disruptive to the team in which he worked, impairing the trust and confidence necessary between healthAlliance and Mr Cunningham.

[46] Mr Cunningham responded to the dismissal proposal through his lawyer, who provided a detailed written reply on 11 June 2020.

[47] healthAlliance confirmed the dismissal on 17 July 2020. Mr Cunningham was required to leave immediately and was paid out the four weeks' notice period required to be given under his employment agreement.

Reasons for the dismissal – misconduct or serious misconduct or both?

[48] From the dismissal letter it is apparent that Mr Cunningham's conduct towards Mr May was not considered to be serious misconduct which by itself could justify dismissal. It was referred to as irresponsible or unacceptable behaviour which could cause offence.

[49] Mr Cunningham by his explanation and response when the 24 February 2020 conduct was enquired into, plainly and readily acknowledged that he had acted badly and unacceptably towards Mr May. Some form of disciplinary action for this conduct would have been justified.

[50] It was open to healthAlliance to take the conduct into account together with the serious misconduct finding, regarding the change process, when assessing its ability to have ongoing trust and confidence in Mr Cunningham as an employee.

[51] The predominant reason for the dismissal was expressed as below:

Of particular concern is your repeated behaviour of not following healthAlliance's policy regarding changes within a production environment. We attempted to address this with you by providing a letter of expectation seven months earlier on 27th August 2019.

Having received this letter of expectation you made another unauthorised change on 26 September 2019. This incident impacted the Asset Management Application for the Counties Manukau District Health Board for approximately 60 minutes and breached healthAlliance's service Level Agreement with the District Health Boards. It was at this point following a formal disciplinary process you were issued with a First Written Warning on 19 December 2019.

Despite numerous discussions and several disciplinary meetings we had with you since August last year, you continue to disregard healthAlliance's correct change control process.

Justification for dismissal

[52] Once a grievance was raised about his dismissal by Mr Cunningham, it fell to healthAlliance to justify that action.

[53] By applying the test of justification at s 103A of the ER Act, the Authority must determine, on an objective basis, whether healthAlliance's actions and how healthAlliance acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[54] In applying that test the Authority must consider and answer four particular questions set out at s 103A(3), and it must weigh up any other factors it considers appropriate.

[55] As a general observation of the Authority, the disciplinary investigation concluding with Mr Cunningham's dismissal was conducted thoroughly, patiently, and fairly, although its speed was hampered, inevitably, by restrictions imposed to meet the Covid crisis in 2020.

Whether the employer sufficiently investigated

[56] This is the first question set out for consideration. The Authority considers from the evidence that healthAlliance conducted a full and fair inquiry into the conduct alleged of Mr Cunningham, before reaching its decision to dismiss him.

[57] Mr Cunningham raised with the Authority a concern as to whether healthAlliance had 'solicited' from Mr May a complaint about him. Whether Mr May was invited, encouraged, or solicited, his employer had a duty to respond to intelligence put before it by an employee, Mr May, that there may have been misconduct within the workplace. It could have been criticised if it had done nothing and waited for the employee to make a request for that action to be taken.

Whether concerns were raised before dismissing

[58] This is the second question for consideration. The Authority finds that healthAlliance puts its concerns fully and plainly in front of Mr Cunningham before deciding whether there had been misconduct in Any way.

[59] The letters of expectation and the warning letter also were expressions of concern about certain conduct of Mr Cunningham occurring before those documents were given to him.

Whether a reasonable opportunity to respond given before dismissing

[60] This is the third question for consideration. The Authority finds that the employer's enquiries were not carried out in haste. Sufficient time was allowed for Mr Cunningham to prepare and have the support of a representative.

Whether the employer genuinely considered explanation before dismissing

[61] This is the fourth question. The Authority finds from the evidence that healthAlliance kept an open mind about the outcome of its disciplinary enquiry until that was completed. The decision to dismiss was supported by all the circumstances, including a recent history of letters of expectation and a formal warning given to Mr Cunningham.

Additional factors to be considered

[62] healthAlliance considered whether there were any alternatives to dismissal. After having issued Mr Cunningham with two letters of expectation and a formal warning, it was reasonable for healthAlliance to consider it had extended to him sufficient opportunities to become familiar with the work rules and comply with them. The employer's earlier interventions had not produced change and a new element of unreasonable personal confrontation with a colleague had widened the scope of misconduct.

[63] The fundamental issue remains, whether dismissing Mr Cunningham was what a fair and reasonable employer could have done in all the circumstances. Those circumstances must be looked at when the dismissal took place and viewed objectively.

[64] healthAlliance had made sure Mr Cunningham knew and understood work rules and requirements. It reminded him of these in letters of expectation. When there was

a further problem, healthAlliance used as an incremental step a formal first written warning to reinforce its earlier approach, rather than going immediately to the ultimate sanction of dismissal.

[65] The Authority concludes that the dismissal of Mr Cunningham was what healthAlliance, acting as a fair and reasonable employer, could have done in all the circumstances. The dismissal was therefore a justified dismissal, within the meaning of s 103A of the ER Act.

Bullying complaint made against Gary Edwards

[66] This issue raised by Mr Cunningham for investigation by the Authority, came to the attention of healthAlliance in October 2019 during a disciplinary meeting. Mr Cunningham advised then that he was not on speaking terms with Gary Edwards his manager. Mr Edwards disagreed that he had withdrawn from communicating with Mr Cunningham.

[67] Given the good faith requirements in any employment relationship, it is unlikely to be a reasonable or justified action of an employee to unilaterally withdraw from communication with a manager or supervisor, unless that is approved by the employer at an appropriate level. At least Mr Cunningham should have spoken to Mr Edwards manager, Robert Hawes, if he could not bring himself to speak to his immediate manager.

[68] Mr Hawes was responsive and communicative in circumstances where bullying or similar repeated unreasonable conduct appeared to have been complained of by Mr Cunningham. He initiated enquiries and discussion in February 2020, with a view to restoring good relations between Mr Cunningham and Mr Edwards.

[69] Mr Hawes concluded from enquiries he made of other staff that there was no substance to the complaint that Mr Cunningham was being bullied by his manager. The view of other staff was that it was Mr Cunningham who had behaved unreasonably towards some staff.

[70] The complained of bullying behaviour by healthAlliance must be examined in context. The employer reasonably considered there may have been conduct by Mr

Cunningham in the performance of his job that fell below the required standard for an employee in the position of Database Administrator.

[71] His employer's enquiries into his performance would not have been welcome to Mr Cunningham but they were permitted and required, provided the employer acted reasonably. Similarly, the conveying of lawful and reasonable instructions to an employee, including by way of a letter of expectation, will not usually amount to bullying by the employer, even if there is some repetition involved.

[72] The Authority considers from the evidence that healthAlliance showed it took the complaint of bullying seriously and intended to properly investigate the matter. In doing so it removed Mr Edwards from having any decision-making role in the disciplinary process which by then had been commenced against Mr Cunningham.

[73] The investigation extended to questioning co-workers who could describe the behaviour they had seen or heard at work when in the presence of Mr Cunningham.

[74] The Authority finds that healthAlliance did not act towards Mr Cunningham in a way that gave rise to a sustainable personal grievance claim of unjustifiable disadvantage, or of any other actionable complaint under the ER Act.

Conclusion

[75] In summary, no orders are made against healthAlliance. The point has not been reached where consideration of the remedies claimed by Mr Cunningham, reinstatement, compensation, and reimbursement of lost remuneration, is required.

Respondent's non-compliance with Authority directions

[76] Mr Upton has accepted that the timetable for providing witness statements, which the Authority had fixed in the usual way after consulting counsel and Mr Cunningham, was not complied with. He provided an explanation and expressed regret at the situation.

[77] The Authority accepts from counsel that there were factors outside the control of counsel that contributed to the situation. The timetable was not simply ignored.

[78] In the circumstances, the departure from the directions did not delay or obstruct the Authority to any extent that a penalty might be considered as a response available under s 134A of the ER Act.

Costs

[79] healthAlliance is entitled to apply to the Authority for an order that Mr Cunningham contribute to the respondent's legal costs. Mr Cunningham is entitled to oppose any such application.

[80] The parties are expected to discuss the issue of costs, should that arise. If they cannot agree how that issue it is to be resolved, the Authority will determine it based on the usual daily rate awarded in cases such as this one.

[81] If an application is required, it is to be made by healthAlliance within 14 days of the date of this determination, and any reply from Mr Cunningham within a further 14 days of the application. The timetable is to be strictly complied with and the leave of the Authority must be sought in advance and obtained before there is any departure from it.

Alastair Dumbleton
Member of the Employment Relations Authority