

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 204
5344599

BETWEEN

MARK DEWAR
Applicant

AND

PROGRAMMED
MAINTENANCE SERVICES
(NZ) LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Daniel Vincent, counsel for the Applicant
Russell Drake, advocate for the Respondent

Investigation Meeting: 6 and 9 March 2012

Determination: 15 June 2012

DETERMINATION OF THE AUTHORITY

- A. The dismissal of Mark Dewar was unjustified.**
- B. In settlement of his personal grievance, Programmed Maintenance Services (NZ) Limited must pay Mr Dewar:**
- (i) three months salary, less earnings made by him in mitigation and less the one month salary paid to him in lieu of notice; and**
 - (ii) specified sums reimbursing him for the value over a three month period of a two per cent Kiwisaver contribution, health insurance premiums and use of a car and a petrol card; and**
 - (iii) \$5000 as compensation for injury to his feelings.**

Employment relationship problem

[1] Programmed Maintenance Services (NZ) Limited (PMS) dismissed Mark Dewar from his role as a supervisor in its Waikato Branch on 23 February 2011 while

he was under a performance management programme (PMP). The PMP formally began on 9 February when he was issued a written warning requiring him to ensure painters directly employed or contracted by the branch achieved a total of at least 1200 productive hours at various work sites for each of the remaining seven weeks in the 2011 financial year.

[2] The 9 February warning – headed “*failure to meet productive hours target*” followed a written warning issued to him two days earlier with the heading: “*Poor job control, customer complaints & health & safety compliance*”. Parts of that warning repeated (i) a warning issued to Mr Dewar on 21 January for not ensuring employees and contractors working on a painting job at Te Awamutu College complied with a work method statement (WMS) about removing lead-based paint and (ii) a warning issued on 1 December 2010 for allowing an uncertified operator to use an elevated work platform (EWP).

[3] The PMP provided for fortnightly review of objectives. At the first fortnightly review meeting with PMS Waikato Branch Manager John Boyles, held on 23 February, Mr Dewar was asked to explain why hours totalling 1069 and 1010 were recorded for the previous two weeks respectively rather than at least the target of 1200. While Mr Dewar did not recall the detail of the discussion and Mr Boyles made no detailed notes of his questions and Mr Dewar’s responses, a summary Mr Boyles prepared after the meeting suggested they also discussed customer complaints about two jobs and an allegation that Mr Dewar had joked about the presence of lead paint at the Te Awamutu College job.

[4] Following the meeting Mr Boyles spoke with PMS Northern Regional Manager Harvey Kay in Auckland by telephone and sent a copy of his summary (headed “*Performance Review notes*”) to Kevin Cameron, the General Manager-Human Resources for the PMS parent company in Australia. After speaking by telephone with Mr Cameron, Mr Boyles spoke again with Mr Dewar and asked whether anything else might be affecting his performance. On being told no, Mr Boyles advised Mr Dewar that a decision had been made to terminate his employment. In oral evidence at the Authority investigation Mr Boyles and Mr Cameron confirmed that the decision to dismiss Mr Dewar was one they had made

jointly with Mr Kay.

[5] In raising his personal grievance, through counsel, Mr Dewar alleged his dismissal was, in part, engineered so he could be replaced by someone recently employed at the Waikato branch. That person was James Darwent who had previously worked at the Whangarei branch of PMS, which was where Mr Boyles had worked before being appointed Waikato branch manager. Mr Darwent began work as a painter on the Te Awamutu College job while Mr Dewar was on holiday and was the person who first raised concerns with Mr Boyles about whether health and safety measures were properly set up by Mr Dewar before he went on leave.

The issues

[6] The issues for determination by the Authority are:

- (i) Whether the decision by PMS to dismiss Mark Dewar on 23 February 2011 was what a fair and reasonable employer would have done in all the circumstances (the s103A test of justification at the time); and
- (ii) If not, what remedies should be awarded to Mr Dewar, considering lost wages; and compensation for hurt and humiliation and lost benefits (use of motor vehicle, health care, and Kiwisaver contributions); and
- (iii) Whether any remedies awarded should be reduced for blameworthy conduct by Mr Dewar contributing to the situation giving rise to his grievance; and
- (iv) Costs (that is whether either party should contribute to costs and expenses incurred).

[7] The justification issue includes consideration of:

- (i) whether the performance standards were fairly and reasonably set and managed (on the *Trotter v Telecom NZ* standard);¹ and
- (ii) the decision about whether Mr Dewar had failed to meet those standards was fairly reached (including whether his explanations

¹ [1993] 2 ERNZ 659.

were investigated and considered with an open mind, and whether alternatives to dismissal were considered); and

- (iii) whether the decision was made without pre-determination (referring to the allegation of an ulterior motive associated with the employment of Mr Darwent).

The investigation

[8] Written witness statements were lodged in the Authority for Mr Dewar, his wife Julie Vickers, Mr Boyles, Mr Darwent, Mr Kay and Mr Cameron. At the investigation meeting each witness under oath or affirmation, confirmed their written statement and answered any questions asked by me and the parties' representatives. Mr Cameron did so by way of Skype video conference from Australia. Following a full day of evidence from the witnesses on 6 March 2012 in Hamilton, the representatives gave oral closing (speaking to written synopses) by telephone conference on 9 March.

[9] As permitted under s174 of the Employment Relations Act 2000 this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. Those findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened.

Were the actions and decisions of PMS justified?

[10] PMS, in its statement in reply, described Mr Dewar's dismissal as occurring:

... after the completion of a procedurally fair performance management process spanning several months and only after he had previously been provided with coaching, verbal warnings, written warnings and a final written warning.

[11] It said Mr Dewar:

did not implement the corrective actions required of him, despite

significant attempts to have him correct the performance concerns, resulting in [PMS] being required to provide him with notice of termination”.

[12] It is a description I do not accept is correct. Rather I find PMS did not treat Mr Dewar fairly in how it implemented and carried out the PMP and made the decision to dismiss him. I reach that view because:

- (i) PMS did not allow enough time or provide enough support for Mr Dewar to have a reasonable opportunity to meet the performance requirements regarding branch targets; and
- (ii) other matters of concern – which formed at least part of the earlier warnings – were not fairly investigated and decided; and
- (iii) two of the three managers who made the decisions – that, firstly, Mr Dewar had not performed satisfactorily and, secondly, should be dismissed – had not heard directly from him about those matters and all three managers involved in those decisions had not properly considered alternatives to his dismissal.

[13] Having reached that view it was not necessary to determine Mr Dewar’s additional allegation that his dismissal was the result of a scheme for the preferment of Mr Darwent. There was a previous association between Mr Boyles and Mr Darwent because both had worked for PMS in Whangarei. Mr Darwent did initiate a complaint about Mr Dewar in the first few days of starting work for PMS in the Waikato. Mr Boyles and Mr Darwent were subsequently flatmates. Mr Darwent was appointed to the position of Project Manager after the previous incumbent (Cliff Norton) resigned and Mr Dewar was dismissed. They are all matters of fact but the evidence was not sufficient to establish the necessary causative chain on the balance of probabilities.

(i) Inadequate performance management over targets

[14] In *Trotter* the Court set out this non-exhaustive list of questions as a useful guide in assessing the fairness of how an employer has set and carried out a PMP:²

² [1993] 2 ERNZ 659, 681.

(1) *Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*

(2) *If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*

(3) *Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*

(4) *Was a reasonable time allowed for the attainment of those standards?*

(5) *Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*

(a) *Using an objective assessment of measurable targets;*

(b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions;*

(c) *Listening to the employee's explanation with an open mind;*

(d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*

(e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment.*

[15] In Mr Dewar's case PMS had previously been happy with his performance as demonstrated by achievement awards and commendations given to him for reaching budget targets in 2006, 2007 and 2008. However in late October 2010 Mr Dewar, Mr Norton and Mr Boyles were told by PMS chief executive Steve Taylor during a branch visit that productive hours of work recorded were too far below an increased branch target of 1200 hours a week. Mr Kay followed this up with an email a week later to Mr Dewar, Mr Norton and Mr Boyles saying he wanted to see "*a dramatic improvement*" and asking Mr Boyles to "*ensure it happens*". In a further message Mr Kay sent only to Mr Boyles he said that if his email "*didn't do it*", "*someone will be on the tools*". Two weeks later Mr Boyles reported that Mr Dewar and Mr Norton had recorded hours for November that were more than the originally budgeted figure but had not met the increased target of 1200. Mr Kay then recommended Mr Dewar and Mr Norton should be given a verbal warning about the hours target.

[16] Mr Dewar did get a warning in December – but it was about the use of the EWP by an uncertified contractor, not the hours target.

[17] While Mr Dewar was – in terms of the *Trotter* test – told of the employer's dissatisfaction and a requirement to achieve a higher standard (at least in respect of hours recorded) from late October 2010, I consider PMS did not provide him with objective criticism and information about the required standards when it formally implemented the PMP for him from 9 February.

[18] The 1200 hours target was set as a measure to make up for some earlier months when budgeted targets for the branch were not met. Mr Boyles and Mr Kay considered the branch had enough work booked for the revised target to be met, provided Mr Dewar and Mr Norton could marshal enough painters – either directly employed or engaged as contractors – and deploy them efficiently.

[19] However the evidence of Mr Boyles did not establish in any convincing way that he or any other managers provided any thorough or realistic analysis of what was stopping Mr Dewar and Mr Norton getting, as PMS saw it, enough staff in the right places doing enough work to meet the targets each week. Mr Boyles had looked at the scheduling board that they used in the office and talked to both men but could not cogently describe in his evidence to me what he had done as part of Mr Dewar's PMP to consider training, review work methods or analyse objective factors (such as the availability of suitably experienced and willing painters and any barriers to recruitment and retention of them). Rather the practical assistance he provided amounted, frankly, to little more than telling them to 'just try harder'.

[20] In that light dismissing Mr Dewar two weeks after the PMP formally began was not a reasonable time to attain standards. The written warning which set out the objectives implied that the performance programme comprised a seven week period of review – which began from week 44 and then went "*up to and including week 52 of the 2011 financial year*". The branch target of 1200 hours was too broad a measure to allow for an objective assessment of Mr Dewar's individual performance distinct from the effect of any variation in effort by Mr Norton, Mr Boyles and others (such as site foremen as well as painters on the various projects). On Mr Boyles evidence of what

he did (or did not do) neither can it be said that all possible remedial steps including training, counselling and exploration of redeployment were exhausted in the two weeks allowed before the decision to dismiss was made.

(ii) Other concerns not properly investigated

[21] In making their decisions about the future of Mr Dewar's employment Mr Boyles, Mr Kay and Mr Cameron also took account of earlier instances of what was said to be poor performance – including inadequate safety measures on the Te Awamutu College job.

[22] I was not satisfied the evidence of Mr Boyles and Mr Darwent to the Authority investigation supported the conclusion Mr Boyles had reached earlier that Mr Dewar deserved a written warning for what happened at the College job.

[23] Mr Boyles' evidence was not reliable about when the supposed failures by Mr Dewar occurred. His initial evidence put these events in early January, and concurred with Mr Darwent's account, but his evidence changed when confronted with an email he wrote at the time to the PMS compliance manager and which said the problem occurred at a later date. He also insisted in his oral evidence that some safety training held soon after was scheduled in any event but the email from him to the compliance manager showed Mr Boyles, in fact, pushed the arrangements for it to be held. There were also direct conflicts in evidence – such as Mr Dewar saying he had done a site induction or 'tool box meeting' with site foreman Lauchie McLean while Mr McLean was said to have denied this occurred – which did not appear to have been properly investigated. Similarly Mr Boyles could not explain why Mr Dewar faced disciplinary action over why – when Mr Dewar was away on leave – painters on the site were using a hot gun to remove lead paint and did not have enough protective equipment but Mr McLean, an experienced foreman working on the site at the time, did not.

[24] Mr Dewar was also accused of not satisfactorily completing arrangements for the safe continuation of the College job. However Mr Boyles and Mr Darwent said the job was stopped for two days in early January – at Mr Darwent's instigation – and

only resumed once he had arranged everything necessary for compliance. If that were so, it was not clear what was left undone for Mr Dewar to do.

[25] Mr Darwent reported that WMS records on site were not properly signed by workers coming onto the site – which they should have done to confirm they were briefed on the required safety methods – but there was a conflict of evidence with what Mr Dewar recalled and what Mr Boyles said he saw in those records. I was not satisfied that PMS had adequately considered those records or, by not producing them for the Authority, had done enough to justify its actions. If the record keeping was inadequate – as reported by Mr Darwent – it should have been a disciplinary question for Mr McLean (as the onsite foreman) as much as Mr Dewar (occasionally visiting as project supervisor).

(iii) Mr Dewar not fairly heard by all decision makers

[26] Case law firmly establishes the right of an employee facing the prospect of dismissal to be heard by the decision-maker. In *Irvine Freightlines Limited v Cross* Judge Palmer stated:³

It is, I consider, of the essence of that fundamental principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with.

[27] In *Quinn v BNZ* the Court emphasised that written reports of the employee's position or explanation are not sufficient.⁴

The decision to dismiss was not made by any of the senior officers who had interviewed Mrs Quinn but by the Chief Personnel Manager who had never seen her but was relying entirely on reports. We do not think that this is a satisfactory way to proceed. The right to be heard is a right to be heard by the decision-maker.

³ [1993] 1 ERNZ 424 at 442.

⁴ [1991] 1 ERNZ 1060, 1070.

[28] Mr Dewar did not get ‘a real and purposeful hearing’ by all the people who would make the decision. Mr Kay and Mr Cameron relied solely on written and oral reports from Mr Boyles about Mr Dewar’s explanations for what had or had not happened and why. In doing so they were relying on information which was, in part, inadequately investigated and performance management measures which, in their formal stage, were rushed and insufficient.

[29] However, if I were wrong about the justifiability of those three managers coming to the decision they did about Mr Dewar’s performance as a supervisor (and the way they did so), there was the second decision made that Mr Dewar was entitled to be heard on by them – that was the decision to dismiss him at that time.

[30] It is not an academic or abstract point. Mr Dewar had worked for PMS since 1999 and in previous years was regarded as a good performer. Given the opportunity to make a ‘plea in mitigation’ directly – not only to Mr Boyles, but also Mr Kay and Mr Cameron – Mr Dewar may have persuaded them to impose a less severe sanction than dismissal. This is particularly plausible because Mr Kay had told Mr Boyles in an email in November 2010 that “*the next step*” was that “*someone will be back on the tools*”.

[31] So demotion was an option but it was not put to Mr Dewar or properly considered by the decision-makers. Mr Boyles’ evidence was that he did not raise that prospect because he had heard Mr Dewar say on a previous occasion that he would not want to return to ‘the tools’. Mr Dewar’s earlier comment was not made in the context of either going on the tools or being dismissed. The decision-makers, acting fairly, should have considered putting that to him as a potential disciplinary outcome. Mr Dewar subsequently got work elsewhere as a painting contractor so it was an option he may well have considered accepting.

[32] Having failed to hear from Mr Dewar directly on the disciplinary options, and then considering with an open mind whatever he may have said, the three decision-makers did not do what a fair and reasonable employer would have done. Because there was some reasonable prospect that their decision may have been different if they had, their action was unjustified. Mr Dewar has a personal grievance for unjustified

dismissal.

Remedies

Lost wages

[33] Mr Dewar found work as a painting contractor from 20 March and provided copies of invoices for work he had done through to mid May. At the time of the Authority investigation meeting he was continuing to work for the same company for around 40 hours a week. He had made reasonable endeavours to mitigate his loss. I assess his loss as the value of three months pay under the annual salary he received at the time of his dismissal from PMS. He is also entitled to reimbursement for loss of the benefits of a Kiwisaver contribution, health insurance and use of a car.

[34] Under s123(1)(b) PMS must pay Mr Dewar three months salary less the amount of his total earnings in the period from 20 March to 13 May 2011 (as disclosed on the eight invoices he lodged in evidence) and less the one month's salary he was paid in lieu of notice on his dismissal.

[35] Under s 123(c)(ii) of the Act PMS must also pay him:

- (i) a further sum equivalent to two percent of his salary for three months, in reimbursement of the Kiwisaver contribution PMS had previously made; and
- (ii) a further sum equivalent to health insurance premiums PMS would otherwise have paid for him and his family for the three months following his dismissal; and
- (iii) a further sum of four thousand dollars in compensation for the loss of a use of a company car and petrol card.

Compensation under s123(1)(c)(i) of the Act

[36] I accept the evidence of Mr Dewar and Mrs Dewar that he was shocked and humiliated by his dismissal. In compensation for injury to his feelings PMS must pay him \$5000 under s123(1)(c)(i) of the Act.

Contribution

[37] I consider no reduction of remedies is required as a result of any conduct by Mr Dewar contributing to the situation giving rise to his grievance. The evidence was not sufficient to establish culpability by him in respect of the matters for which he was subjected to a PMP. Neither was he responsible for the failures of fairness in how PMS went about deciding to dismiss him.

Costs

[38] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and an Authority determination of costs is sought, Mr Dewar may lodge and serve a memorandum as to costs within 28 days of the date of this determination. PMS would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[39] If a determination on costs is sought, the Authority is likely to make an award of \$3500 on its usual tariff basis for one day (treating the closing submissions made by telephone conference on 9 March as part of the 6 March investigation meeting), subject to the parties' memoranda about any factors requiring an upward or downward adjustment of the notional daily rate in the particular circumstances of the case.⁵

Robin Arthur
Member of the Employment Relations Authority

⁵ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.