

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 420/08  
5125984

BETWEEN                      BRIAN DUNN  
   Applicant  
  
AND                                BUCKLEY SYSTEMS  
   LIMITED  
   Respondent

Member of Authority:        R A Monaghan  
  
Representatives:              B Dunn, in person  
   S de Kock, advocate for Respondent  
  
Investigation Meeting:        4 November 2008  
  
Additional information        18 and 27 November 2008  
provided:  
  
Determination:                12 December 2008

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     Brian Dunn says he was unjustifiably dismissed by his former employer, Buckley Systems Limited (“BSL”). The dismissal followed BSL’s investigation of allegations that Mr Dunn harassed, and was abusive and aggressive towards another employee.

[2]     Mr Dunn says the allegations were false, and that the real reason for the dismissal was BSL’s wish to avoid the cost of making him redundant.

[3]     BSL says the reasons it gave were the real reasons, and that the dismissal was justified.

## **Events leading to the dismissal**

### 1. The background facts

[4] BSL is a manufacturer of large precision electromagnets and other specialised engineering equipment. Its operation includes painting the equipment.

[5] Mr Dunn was employed as a painter, on the night shift. A second painter, Brian Manderson, also worked on the night shift. Their team leader, Lucas Scott, was a day shift worker but had general oversight of the paint bay. The night shift operated from 3 pm – 1 am, Monday to Thursday.

[6] On or about Monday 3 March 2008 certain staff members reported to Mr Scott that there had been an incident involving Messrs Dunn and Manderson.

[7] On the account Mr Manderson gave at the investigation meeting, he had a piece of masking tape stuck to his fingernail and was attempting to flick it away. He was not seeking to aim it at anyone, but it hit Mr Dunn. Mr Dunn took umbrage and punched Mr Manderson several times in the side.

[8] Mr Dunn said he and Mr Manderson were having a disagreement about whether Mr Manderson had positioned a piece of equipment the right way up for painting. Mr Manderson made a ball of tape and flicked it at him. The ball hit him in the face and passed close to his eye. Mr Dunn regards that as an assault. At the time he believed Mr Manderson was about to flick another ball of tape, so he moved towards Mr Manderson to try to take the tape from him. Mr Manderson put his hands behind his back, so Mr Dunn reached around Mr Manderson in an attempt to reach the tape.

[9] At least two other staff members were said to have seen the incident, and presumably it was they who reported the matter to Mr Scott. It is not clear precisely what they told Mr Scott, but Mr Scott said in a statement prepared for the investigation meeting that the altercation ‘sounded reasonably serious to me’. He reported it to Sandra de Kock, the general - manager operations. Mr Scott provided

minimal details to Ms de Kock, indicating only that there had been an altercation and there had been raised voices.

[10] In an attempt to ascertain the details, on or about 6 March Ms de Kock held a preliminary meeting with Messrs Dunn and Manderson. She told the men she had been advised that they had an altercation and asked what had happened. She said in evidence that both were evasive regarding details. They said it was 'nothing much' and that it was a matter of 'tempers getting out of hand.'

[11] After the meeting Ms de Kock spoke to Mr Manderson separately. Mr Manderson was seriously injured in a car accident at the end of 2006. Although he had been back in full time work for some 8 months, he told Ms de Kock that he felt he was not working to the required standard and that his rehabilitation was going slowly. He told Ms de Kock he wanted to resign. He told her he believed it would be 'best for all concerned'. His resignation was accepted.

[12] After further discussion with Mr Scott and Mr Dunn, Ms de Kock gained the impression that there was a problem between the two men arising out of Mr Dunn's frustration with Mr Manderson's work. During the discussion she reminded Mr Dunn of the company's standards regarding dealing with colleagues, and of the need to escalate concerns rather than allowing them to fester. Being unaware anything more serious had occurred, she believed that was the end of the matter.

[13] However within a few days Ms de Kock began receiving anonymous messages on her mobile phone, accusing her of tolerating bullying behaviour. Then on 10 March 2008, during the course of unrelated discussions with a union, the union delegates also raised a concern that bullying was being tolerated. When Ms de Kock enquired further she was advised there was more than she had been told regarding the incident between Messrs Dunn and Manderson.

[14] Ms de Kock made an appointment for an exit interview with Mr Manderson, with a view to finding out more about what had happened. The interview went ahead on 11 March. Mr Manderson told Ms de Kock he had been experiencing incidents which he had thought of as practical jokes, but they were no longer funny and were becoming more aggressive. He reported in particular that Mr Dunn:

- a. poured yellow or brown coloured primer down the bottom half of his overalls, making it appear Mr Manderson had soiled himself and obliging him to change the overalls;
- b. caused Mr Manderson to take fright by making loud and sudden noises behind him;
- c. in a series of incidents in December 2007, knowing the smell of tuna made Mr Manderson sick, filled Mr Manderson's gloves and facemask with tuna as well as smearing it on some of Mr Manderson's equipment;
- d. threw acetone on Mr Manderson;
- e. on occasion blamed poor workmanship on Mr Manderson when Mr Dunn was the culprit;
- f. threatened to plant drugs in Mr Manderson's locker and car if Mr Manderson complained;
- g. punched him (which was a reference to the incident involving the tape); and
- h. on the night after the incident when Mr Manderson was punched, drove the fork hoist in a way that threatened Mr Manderson's safety.

[15] As Mr Manderson described it during the investigation meeting the fork hoist incident concerned Mr Dunn, who was driving the fork hoist, positioning the fork hoist in such a way as to prevent Mr Manderson from entering the paint bay. Mr Manderson was carrying some sheets of plywood. If Mr Manderson moved towards the entrance in a particular direction, Mr Dunn would drive the fork hoist into a position blocking further movement towards the entrance. Mr Dunn's last manoeuvre followed another attempt by Mr Manderson to get around the fork hoist to enter the paint bay, in the process knocking the plywood out of Mr Manderson's hands and under the wheels and narrowly avoiding serious injury to Mr Manderson's leg.

[16] Mr Dunn's account was that the incident occurred much earlier, at the start of the year. Mr Manderson was attempting to beat the fork hoist into the paint shop, and in doing so pushed the plywood under the back wheel of the fork hoist.

[17] Mr Manderson told Ms de Kock that the incident with the fork hoist was the last straw, and was the reason why he decided to resign.

[18] Ms de Kock asked Mr Manderson why he had not reported any of this. Mr Manderson told her he had mentioned concerns to Mr Scott, but nothing was done. He did not pursue the matter because Mr Scott was a friend of Mr Dunn's, he felt intimidated and he feared retribution.

## 2. The company's investigation and disciplinary process

[19] Ms de Kock began an investigation into those allegations. She approached three staff members who Mr Manderson had named as witnesses to incidents he described. She questioned Gavin Etimani, who was said to have witnessed the punching incident. Mr Etimani indicated he did not wish to get involved. Ms de Kock also spoke to Paea Tai, who said he had seen Mr Dunn throw acetone over Mr Manderson and put tuna into Mr Manderson's mask and gloves. He also said he had seen Mr Dunn give Mr Manderson 'a fright'. He told Ms de Kock that 'everyone felt sorry for the old man' (namely Mr Manderson).

[20] Mr Tai gave evidence. He was employed as a welder on the night shift. In effect he confirmed the account he had given Ms de Kock, and added that on one occasion he had seen the primer on Mr Manderson's overalls. His evidence was also that, after the incident with the acetone, he told Mr Dunn he should respect 'the old man' and told both men that they should stop 'playing around.' Finally, he said on one night Mr Manderson was upset and told Mr Tai he did not want to work any more. He was 'sick of it' - namely Mr Dunn's playing around - and wanted to walk away.

[21] The third person Ms de Kock spoke to was Karen Amoore. Ms Amoore is no longer employed by BSL and did not give evidence. According to a statement Ms de Kock took at the time, Ms Amoore said she had seen Mr Dunn:

- a. applying primer to Mr Manderson's overalls;
- b. throwing acetone at Mr Manderson;
- c. causing Mr Manderson to take fright;

- d. filling Mr Manderson's mask with tuna fish; and
- e. driving a fork hoist in a dangerous way.

[22] Ms Amore did not claim to have witnessed the punching incident, but her statement was that she had seen Mr Manderson immediately afterwards and observed his distress.

[23] In addition, Ms de Kock approached the night shift supervisor. The supervisor had no knowledge of any problems, and believed Messrs Dunn and Manderson were good friends.

[24] Ms de Kock concluded that the alleged behaviour went beyond what was acceptable. She consulted with Andrew Pearce, the manager to whom Mr Scott reported. Mr Pearce had been absent on leave during early March. He returned on 10 March. After his return Ms de Kock showed him the result of her investigation to date. Mr Pearce concluded the allegations against Mr Dunn had substance.

[25] By letter dated Thursday 13 March 2008 Mr Pearce advised Mr Dunn that a meeting was sought for Monday 17 March in order to 'investigate allegations made towards you of abuse and harassment against another member of BSL.' The letter warned of the possibility of dismissal and Mr Dunn was urged to bring a representative to the meeting.

[26] The letter ended by advising Mr Dunn he was stood down on pay for that night. I record that the parties' written employment agreement permits suspension 'where there has been a complaint regarding dishonesty, improper behaviour or alleged criminal activity'. No issue has been taken with the suspension, or standing down.

[27] Mr Scott delivered the letter to Mr Dunn. It was common ground that the two had a discussion about the fact that the meeting would cover the incident associated with the tape. It was also common ground that the possibility of dismissal was discussed, although Mr Dunn said Mr Scott told him he was to be dismissed while Mr Scott said Mr Dunn was aware of the likelihood from general conversation around the workplace. In evidence Mr Scott said further that Mr Dunn told him during their

discussion that he had hit Mr Manderson in the lower body, but had not hit him hard. Mr Dunn did not deny this.

[28] The meeting went ahead on 17 March. Mr Dunn did not bring a representative. He said he chose not to do so because he assumed the allegation that he assaulted Mr Manderson would be dealt with (meaning shown to be false) once he clarified that the incident with the tape had occurred several days earlier than was alleged. He was asked if he wanted Mr Scott to be present, and he declined.

[29] Those attending were Messrs Dunn and Pearce, and Ms de Kock.

[30] The allegations were put to Mr Dunn one at a time. Mr Dunn's replies were to:

- a. say the incident involving the tape occurred on 28 February not in early March, and otherwise to give an account materially similar to the one he gave the Authority;
- b. admit pouring primer down Mr Manderson's overall, seeming to find it funny, telling the Authority he did so on only one occasion;
- c. admit putting tuna in Mr Manderson's face mask, seeming again to find it funny, and saying he had done so in retaliation for a tasteless joke Mr Manderson had made about his girlfriend;
- d. deny positioning the fork hoist deliberately as alleged, rather Mr Manderson had walked in front of it before Mr Dunn was able to stop, again a similar account to that given to the Authority taking into account that Mr Dunn disputes the company's record of his response;
- e. say any attempts to frighten Mr Manderson were matched by Mr Manderson's attempts to do the same to Mr Dunn;
- f. deny throwing or spilling acetone over Mr Manderson;
- g. deny the allegation that he blamed Mr Manderson for his own poor workmanship; and
- h. deny the allegation that he threatened to plant drugs, as well as the associated allegations.

[31] Mr Dunn was asked whether he had any witnesses, and said he did not. He said further that he and Mr Manderson were friends.

[32] Ms de Kock and Mr Pearce then spoke to Mr Scott. Regarding the allegation of punching, Mr Scott said Mr Manderson had told him about the incident and said it was provoked because Mr Manderson had flicked a piece of tape at Mr Dunn, hitting him in the face.

### 3. The decision to dismiss

[33] Ms de Kock concluded that Mr Scott's failure to disclose any earlier the details just set out seemed to confirm that Mr Scott was protecting Mr Dunn and that Mr Manderson's fear of retribution was justified. At the time there was not enough information to support a conclusion that Mr Scott was protecting Mr Dunn, and no information about the justification for Mr Manderson's fear of retribution. Even so, having heard the evidence and observed the witnesses, I find there is room for a general concern about Mr Scott's handling of the matter.

[34] In material respects Ms de Kock preferred Mr Manderson's version of events. Regarding the incident when Mr Manderson was punched, she concluded that Mr Dunn's reaction far exceeded what was reasonable in the circumstances particularly in the light of Mr Manderson's age and state of health. She noted that Mr Dunn had admitted to some of the incidents, in particular the incidents with the tuna and the primer, and the acetone incident was supported by other witnesses. The increased level of aggression was also a concern. These matters, together with the incident with the fork hoist, amounted to serious misconduct.

[35] Ms de Kock concluded that the allegations regarding drugs were serious and required supporting evidence of a kind not available. The allegations regarding blame for poor workmanship were not pursued. Accordingly these allegations did not form part of the decision to dismiss.

[36] On 18 March 2008 Mr Dunn was informed of the company's conclusion that he was guilty of serious misconduct and was dismissed with immediate effect.

[37] The conclusion was also set out in a letter of dismissal dated 17 March 2008.

### **The real reason for the dismissal**

[38] Although the night shift was restructured several weeks after Mr Dunn's dismissal, I have no hesitation in finding the dismissal was imposed for the reason given by BSL.

### **Whether the dismissal was justified**

[39] The test of justification for a dismissal is set out in s 103A of the Employment Relations Act 2000. Since its coming into law the provision has been commented on in several decisions of the Employment Court. Among the early decisions was that in **Air New Zealand Limited v Hudson**, where the Court said:

“[144] The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.”<sup>1</sup>

#### 1. Whether the investigation was full and fair

[40] BSL had a written disciplinary policy, which included a disciplinary procedure. The procedure in respect of misconduct and serious misconduct included the following steps:

- . the employee must be invited to a disciplinary meeting, be given reasonable notice of what the meeting is about, advised that a support person or representative may be present, and advised that the matter is serious and could result in the termination of employment;
- . the meeting must occur in a timely manner;

---

<sup>1</sup> [2006] 1 ERNZ 415, 442.

- . the allegations will be outlined at the meeting, and the employee given an opportunity to respond;
- . the employer will outline the situation as it sees it, including why the situation is unacceptable and sufficiently serious to justify disciplinary action;
- . the employee will be asked to justify the situation;
- . the employer will consider all information and decide whether further investigation is necessary;
- . if there is a further investigation and new information comes to light, this will be discussed with the employee;
- . the employer will consider all information and decide whether the employee's conduct amounts to serious misconduct.

[41] In material respects these steps were followed.

[42] The outcome was that BSL reached the conclusions set out above. Mr Dunn's accounts of the very serious punching and fork hoist incidents were unconvincing and Ms de Kock was justified in not accepting them. Further, the mere fact that the date on which the punching incident occurred may be inaccurate does not mean the incident did not occur. It did occur. The incidents involving the primer, the tuna and the acetone also occurred, and the first two were admitted.

[43] I agree, too, that there appeared to be an increasing level of aggression in Mr Dunn's conduct towards Mr Manderson.

## 2. Whether a reasonable employer would consider serious the conduct disclosed

[44] The company's disciplinary policy contained a code of conduct which included a requirement that employees conduct themselves in a socially acceptable and respectful manner towards colleagues. Examples of unacceptable behaviour included physical or verbal abuse, or threatening behaviour. The policy also provided that harassment was unacceptable.

[45] It is not necessary to rely on the contents of the policy in order to base a conclusion that Mr Dunn's conduct was serious misconduct. The conduct towards Mr Manderson amounted to bullying. It was unacceptable and well within the parameters

of the legal definition of serious misconduct, namely conduct deeply impairing the basic confidence and trust essential in an employment relationship.<sup>2</sup> A fair and reasonable employer would consider the conduct amounted to serious misconduct.

### 3. Whether there was disparity of treatment

[46] Mr Dunn said in his statement of problem that situations similar to his had different outcomes. Further discussion indicated he was referring to his view that Mr Manderson's action in flicking tape at him was an assault on him. During the investigation meeting he said both he and Mr Manderson should have been warned.

[47] In a sense the point is moot because Mr Manderson resigned. On the other hand the nature and quality of Mr Dunn's conduct was significantly more serious than Mr Manderson's. Even if Mr Manderson did flick tape deliberately at Mr Dunn, I would not have considered that any decision to treat the men differently in terms of any disciplinary consequences amounted to disparate treatment.

### 4. Whether employer acting fairly and reasonably would decide to dismiss

[48] An employer acting fairly and reasonably would decide to dismiss Mr Dunn.

### 5. Conclusion

[49] For the above reasons I find the dismissal was justified.

### **Costs**

[50] Costs are reserved. If either party seeks an order for costs there shall be 28 days from the date of this determination in which to file and copy to the other party a written statement of what costs are sought, and why. The other party shall have a further 7 days in which to file and copy any written reply.

R A Monaghan

Member of the Employment Relations Authority

---

<sup>2</sup> **Northern Distribution Union v BP Oil NZ Limited** [1992] 3 ERNZ 483

