

[3] Mr Eparaima seeks the withdrawal of the written warning and legal costs. Originally, he claimed to have been disadvantaged by a number of unjustified actions by his employer, most of which related to workplace bullying. Those matters were not pursued as separate claims in the course of the investigation meeting, but Mr Eparaima says they should be taken into account as background to the incident that led to the written warning.

[4] Armstrong Prestige Wellington Limited, which is part of the national Armstrong Prestige group, says it did take all the circumstances into account before issuing the warning to Mr Eparaima. It found the stress and pressure the employee said he was under at the time did not excuse his behaviour. It agrees swearing occurs in the workplace but says the difference with Mr Eparaima's outburst was the aggression and the level of abuse he directed at the supervisor. The impact on the supervisor was greater than any other swearing incidents he had experienced in the workplace.

[5] Armstrong Prestige says Mr Eparaima's behaviour was unacceptable in the workplace and a written warning was justified.

Background

[6] Mr Eparaima worked for Armstrong Prestige for more than three years without any matters of note arising in his employment. In June 2012 a Swedish co-worker, Anders Strandh, told Mr Eparaima he was returning suddenly to Sweden and asked if he would like to buy his tools. These were valuable specialised mechanics' tools for which Mr Strandh was seeking \$5,000. Mr Eparaima offered \$2,000 and his offer was accepted.

[7] Mr Eparaima removed some of Mr Strandh's tools to his own tool box. He later brought his vehicle into the workplace on a Saturday morning and removed the rest of the tools. A supervisor, Kieran Cannon, saw him doing this and questioned him about it, informing him the company's North Island General Manager, Nick Allan, had given an instruction no one was to touch the tools. Mr Eparaima continued to remove the tools, telling Mr Cannon they were Mr Strandh's tools and he was storing them for him.

[8] Mr Eparaima told his reporting manager, Chris Hughes, about his purchase of the tools the following Monday morning. He was asked to attend a meeting with Mr

Allan and Mr Hughes later that day. Mr Allan explained that Mr Strandh had left the company owing it money and management intended keeping the tools until it could sort out the issue and recover what was owed. Mr Allan offered to reimburse Mr Eparaima the \$2,000 he had paid for the tools if he would return them to Armstrong Prestige.

[9] Mr Allan informed Mr Eparaima the Swedish Consulate and the Police had been told of Mr Strandh's disappearance. He says he passed on this information to Mr Eparaima simply as a statement of what actions he had taken. Mr Allen says he told Mr Eparaima of the Police involvement to emphasise that foul play might be involved for all he knew and Mr Eparaima didn't really know what he was getting himself involved in.

[10] Mr Eparaima did not wish to return the tools and interpreted the mention of Police as a form of pressure on him to change his mind about returning them. Mr Allan and Mr Hughes say this meeting was quite amicable and at the end of it Mr Eparaima said he would think about returning the tools.

[11] Later the same day Mr Allan received information from the Swedish Consulate that Mr Strandh had returned to Sweden. Mr Allen called a further meeting with Mr Hughes and Mr Eparaima the following day during which Mr Allan again appealed to Mr Eparaima to return the tools to help out Armstrong Prestige which had been left out of pocket by Mr Strandh's sudden departure.

[12] The parties agreed this meeting became quite heated with voices raised all around. Mr Allan says he was very clear the reason he wanted the tools returned was to recover the money owed to the company by Mr Strandh. When Mr Eparaima refused to return the tools, Mr Allan said the company could deduct it from his wages. He says he had no intention of following through on this and Mr Eparaima did not appear to take the comment seriously. The meeting did not end well.

[13] Sometime later that day, Mr Allan announced to the workshop staff the traditional Friday night drinks that were shouted by the company would be postponed. He says he told them it was due to some items being removed from the workshop and drinks would be suspended until further notice pending the sorting out of the issue.

[14] Mr Eparaima says he felt hugely stressed by Mr Allan's action. He believed the cancellation of Friday night drinks was another tactic to pressure him to hand over

the tools he had bought from Mr Strandh. He felt he was being bullied into doing something he did not feel he should have to do. He also felt Mr Allan was implying he had done something wrong or dishonest in removing the tools.

[15] Later that afternoon there was an incident between Mr Eparaima and Mr Cannon. Part of Mr Cannon's role as Service Advisor was to allocate jobs to the workshop staff in the order he thought the jobs should be completed. That afternoon Mr Cannon allocated jobs to Mr Eparaima, including one that was quite urgent. When he noticed Mr Eparaima was doing another job ahead of the urgent one he approached him and asked why he had taken that job first. Mr Cannon says it was a normal question and he did not ask it in an accusatory manner. It is part of his job to make sure the mechanics do their jobs in the best order and he questions them about this all the time.

[16] Mr Eparaima says he was feeling completely stressed and *got at* after the meetings with Mr Allan over the tools, as well as the threat to dock his wages and the cancellation of Friday night drinks. He reacted to Mr Cannon's question by shouting loudly at Mr Cannon *f... you, you f...ing arrogant c....*

[17] Mr Eparaima says he is not proud of those words but they are not uncommon in the workshop environment. He acknowledges it is language Mr Cannon does not use. Mr Cannon says he is pretty thick-skinned but does not believe he should have to put up with abuse of this nature as part of his job. He walked away from Mr Eparaima and told a Service Manager about the incident because he was so annoyed by it. It was not the first time he had been sworn at by a mechanic but Mr Eparaima's manner was very aggressive. Mr Cannon says he used to have a good working relationship with Mr Eparaima but their relationship has soured since this incident.

[18] Two days after the incident, Mr Eparaima was asked to attend a disciplinary meeting with Mr Allan. The meeting was delayed at Mr Eparaima's request while he sought time to take legal advice and obtain further information. It eventually took place on 27 June 2012. There were three particular items of concern which Mr Eparaima was asked to address, one of which was the incident from 19 June 2012 when Mr Eparaima had reacted aggressively to Mr Cannon and sworn at him.

[19] Mr Eparaima attended the meeting with his legal representative and provided a written statement responding to the three matters of concern his employer had raised. The following day there was a further meeting in which Mr Allan informed Mr Eparaima that, having fully considered his responses to the three issues raised, no further action would be taken regarding the first two concerns. In relation to the third matter, however, Mr Allan said he had considered Mr Eparaima's explanation of feeling stressed at the time of the incident with Mr Cannon but did not think this excused his behaviour. On that basis Mr Allan had decided to issue Mr Eparaima with a written warning. In the letter confirming his decision Mr Allan noted Mr Eparaima needed to take particular care to be respectful and professional in all his interactions with other staff.

Issues

[20] Armstrong Prestige accepts a written warning could amount to a disadvantage. The issue I have to determine is whether Armstrong Prestige was justified in issuing Mr Eparaima a written warning for his conduct on 28 June 2012.

The law

[21] Whether or not an action is justifiable is determined on an objective basis by applying the test in s.103A of the Employment Relations Act 2000. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred. The Act requires me to consider the procedure followed by Armstrong Prestige in determining to issue him with a written warning. I need to consider:

- Whether Armstrong Prestige investigated the allegations against Mr Eparaima sufficiently, taking into account the resources available to it; and
- Whether the employer raised its concerns with Mr Eparaima before issuing him with a written warning; and
- Whether the employer gave Mr Eparaima a reasonable opportunity to respond to its concerns for issuing him with a written warning; and

- Whether Armstrong Prestige genuinely considered Mr Eparaima's explanation in relation to the allegations against him before issuing him with a written warning.

Discussion and Findings

[22] Mr Eparaima did not raise any specific concerns about the procedure his employer followed leading up to the issuing of the written warning. He had legal representation throughout the disciplinary process and did not deny his employer had the right to investigate the incident.

[23] Armstrong Prestige raised its concerns with Mr Eparaima and gave him a reasonable opportunity to respond, which he did both orally and in writing, before Mr Allan issued the warning. Mr Eparaima's concerns relate to the fairness of the warning in all the circumstances surrounding his outburst at Mr Cannon. Specifically, he claims his employer did not properly consider his explanation of the considerable pressure he was under at the time. That pressure arose from the meetings with Mr Allan and Mr Hughes over the Anders Strandh tools issue and the related decision to stop Friday drinks.

[24] It is Mr Allan's evidence that he did take into account Mr Eparaima's explanation of the stress he was experiencing before deciding a written warning was appropriate. He noted that of the 3 matters of concern he had originally raised he was satisfied through his investigations and after consideration of Mr Eparaima's explanations that 2 of those issues should not be pursued.

[25] Mr Allan said he viewed the abuse directed at Mr Cannon as derogatory, abusive and aggressive. He concluded as General Manager he *was not prepared to allow staff members to treat each other the way Clint treated Kieran.*

[26] Some weeks after the warning had been issued when Mr Eparaima and his lawyer were meeting with Mr Allan, they claimed similar behaviour frequently happened in the workshop. Mr Allan responded he was not aware of any behaviour as disrespectful and aggressive as Mr Eparaima's towards Mr Cannon. None of those incidents had been brought to his attention and he asked for details so he could investigate and take action where necessary. Mr Eparaima declined to provide details of any incidents.

[27] I accept Mr Allan did properly consider Mr Eparaima's explanation before concluding it did not excuse his behaviour and a written warning was warranted. I also accept Mr Allan believed it was important to make clear to Mr Eparaima that his behaviour to Mr Cannon was not acceptable and he needed to be careful to be respectful and professional in his dealings with other staff. The written warning specifically alerted Mr Eparaima to this requirement.

[28] I note that a warning is a rehabilitative tool rather than a punitive one. The Employment Court noted the purpose of a warning in *Trotter v Telecom Corporation of New Zealand*¹:

The purpose of warnings is to give the employee an opportunity to improve or otherwise allay concerns, not to create a pretext for a dismissal for which no independent reason exists. A warning is not a magic wand creating a ground for dismissal. It is rather a step fairly taken to enable a dismissal to be averted. It follows that a warning to be fair must be explicit. It should describe how an employee's behaviour is deemed to be unsatisfactory and give clear information about what improvement will meet the employer's requirements and how it will be measured.

Determination

[29] I am satisfied the warning issued to Mr Eparaima was justified in all the circumstances at the time and was within the range of actions a fair and reasonable employer could have taken. Mr Eparaima's claims for remedies do not succeed.

Costs

[30] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

¹ [1993] 2 ERNZ 659 (EmpC) at 680