

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 116/10  
5165702

BETWEEN

LEON GAUT  
Applicant

A N D

BP OIL NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Tim Jackson, for Applicant  
Samantha Turner, Counsel for Respondent

Investigation Meeting: 17 March 2010 at Timaru

Determination: 11 May 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Gaut) alleges that he was unjustifiably dismissed by the respondent (BP) while BP resists that contention and says that in all the circumstances the dismissal was the action of a fair and reasonable employer.

[2] Mr Gaut was employed as a customer services representative at BP's Timaru service station and commenced his duties on 9 November 2008. Prior to his employment by BP, Mr Gaut had been employed by another service station selling BP product but that service station was not owned by BP. Mr Gaut was recruited to join the new BP owned operation and began training on 9 November and commenced dealing with the public on 16 November 2008. During the employment, a period from 9 November 2008 down to the date of dismissal on 25 March 2009, a period of roughly five months, there was a significant variation in the weekly hours worked by Mr Gaut from a low figure of 30.5 hours up to a high figure of over 60 hours.

[3] On 24 March 2009, there was an altercation between Mr Gaut and the station manager, Ms Lawrence. The altercation involved a pile of boxes which had been left in a corridor. The nature of the exchange between the parties is in dispute but BP alleges that Mr Gaut verbally abused Ms Lawrence about her failure to address the person responsible for leaving the boxes where they were and then departed the scene, effectively slamming the chiller door in Ms Lawrence's face.

[4] Mr Gaut denies abusing Ms Lawrence and also denies shutting the chiller door in her face. He said in his evidence that he went into the chiller (which is of the walk-in variety) to get away from Ms Lawrence who was pursuing him. Both protagonists offered the Authority witnesses to support their particular recollection of events.

[5] In the chiller, the conversation (if that is not too tranquil a description) continued and BP says that Ms Lawrence told Mr Gaut that the way that he was speaking to her was unacceptable and Mr Gaut allegedly said that he did not give a fuck. Ms Lawrence insisted that Mr Gaut continued the discussion in her office and he eventually complied.

[6] There was a disciplinary meeting scheduled for 25 March 2009 at which Mr Gaut was accused of using insulting or abusive language directed at Ms Lawrence. Mr Gaut denied the allegation. In the course of the meeting, Mr Gaut's cellphone rang on two occasions and on the second occasion Mr Gaut, speaking to the cellphone, is alleged to have said *piss off*. Statements were produced at the meeting by both BP and Mr Gaut about the incident in and around the chiller. Then at the end of the meeting which had traversed over five hours, BP dismissed Mr Gaut.

### **Issues**

[7] It is useful to consider the following matters in arriving at a determination of this employment relationship problem:

- (a) Is there any earlier relevant conduct?
- (b) What happened at the altercation on 24 March 2009?
- (c) Was the disciplinary meeting on 25 March 2009 properly conducted?

**Is there previous relevant conduct?**

[8] BP warned Mr Gaut after an incident on 15 January 2009. Ms Lawrence, the manager, had asked Mr Gaut to do a toilet clean and he had protested. Later on the same day, while Ms Lawrence was on the telephone, Mr Gaut could be heard swearing loudly in the background. Then, the following day, Ms Lawrence had occasion to ask Mr Gaut to move a trailer on the forecourt. Mr Gaut refused. All those matters were the subject of a disciplinary meeting on 21 January 2009 which resulted in a letter of concern being issued by BP dated 27 January 2009.

[9] It is clear that a letter of concern is not a letter of warning. Mr Gaut's representative makes just such a point. However, it cannot be legitimately claimed that the letter of concern has no force or effect. If it is relevant, then it is appropriate that I take it into account.

[10] As a matter of fact, the letter of concern is relevant. Amongst other things, Mr Gaut was told in the letter of concern *not to back chat Ms Lawrence*. Indeed, more than that, the letter of concern actually records an agreement from Mr Gaut not to do that. I am satisfied that it follows that the Authority ought to accept BP's submission that Mr Gaut was *on notice* in respect of the conduct complained about. Clearly, *back chatting* Ms Lawrence is closely analogous to *verbal abuse of Ms Lawrence*.

[11] As if to re-emphasise the importance of the letter of concern, it actually states that a failure to follow company procedures may result in further disciplinary action which could include dismissal.

**What happened at the incident on 24 March 2009?**

[12] I am not persuaded by Mr Gaut's recollection of events on 24 March. I think the truth of the matter is that Mr Gaut is so familiar with swearing as a means of communication that he may even do it unconsciously. Certainly, that is the point that BP is making to me in emphasising that during the course of the disciplinary meeting on 25 March, Mr Gaut, referring to his own cellphone and the unknown caller who interrupted the disciplinary meeting, used the expression *piss off*. Mr Gaut seemed to have no recollection of saying that, but in any event maintained that *piss off* was not a swear word.

[13] Furthermore, the events of 24 March were witnessed (in part) by three co-workers and each gave evidence before the Authority in addition to the evidence of the manager herself, Ms Lawrence. First of all, Ms Lawrence was very clear about what she heard from Mr Gaut and I preferred her recollection of events to his. Second, Ms Lawrence's evidence is supported by the evidence of Tracey Frew. She said that she was very clear about what she heard and, in giving her evidence before the Authority, was quite unshakeable in her view. Furthermore, she was very close by when Ms Lawrence and Mr Gaut had their altercation, although Mr Gaut had no recollection of her being there. Despite that latter fact, I am satisfied that she was indeed there and that her evidence on the matter was truthful.

[14] The other two witnesses who were called in aid by Mr Gaut were in the result not helpful to his cause at all. Ms Hamilton told me that she did not hear any swear words but when pressed it was clear that she actually heard nothing at all and given her physical remoteness at the time the altercation took place, that is probably not surprising. I thought her evidence was honest and truthful, but in the result I do not think that it assisted Mr Gaut at all. Ms Johnson, who was with Ms Hamilton in the same general part of the retail area, told me that she could hear parts of the conversation and occasional words, but that the words that she heard did not include any swear words. She said that she knew there was a conversation of some description going on, but she only heard occasional words or snatches of conversation. She told me that she thought Ms Frew was close to the altercation at the relevant time. Again, I accept Ms Johnson's evidence as truthful and again I must say that I do not think her evidence provided any support to Mr Gaut's recollection of the events.

[15] I am satisfied then that Mr Gaut did verbally abuse his manager and, based on Ms Frew's evidence in support of Ms Lawrence, I also think that Mr Gaut slammed the chiller door in Ms Lawrence's face.

### **Was the disciplinary meeting a fair one?**

[16] It is fair to assert at the outset that the disciplinary meeting was by no means a perfect example of a meeting of its kind. It was inordinately long (apparently over five hours) and ran well past the normal finish time for the working day. In those circumstances, it would certainly have been better for BP to have adjourned at the end of the investigation process and reconvened subsequently to consider the disposition

of the matter. However, notwithstanding those qualifications, I am not persuaded that the failure of BP to run a perfect meeting must invalidate the process. Indeed, I think it fair to say that one of the reasons the meeting took as long as it did was precisely because BP did everything in its power to provide a proper investigation. It was during the disciplinary process that Mr Gaut identified that his two witnesses (Ms Hamilton and Ms Johnson) could give the employer testimony about what they heard.

[17] The employer decided to investigate that matter on the spot and arranged to hear from Mr Gaut's witnesses so as to deal with the matter in a timely fashion while matters were still fresh in witness's minds.

[18] Then there is the allegation that BP never produced a statement from Ms Lawrence that she had been verbally abused by Mr Gaut. Ms Lawrence agreed in her oral testimony before the Authority that she did not confront Mr Gaut and say that he swore at her. Furthermore, it is clear that her written statement of the incident was prepared after the dismissal, perhaps in contemplation of these proceedings, and so was not provided to Mr Gaut at the time. But again, I am not persuaded that there is any mischief in this. There was no written statement at the time of the dismissal and so none could be provided. Furthermore, while Ms Lawrence did not specifically confront Mr Gaut, the nature and extent of the allegation against him and who he was alleged to have verbally abused was made very clear. He can have been in no doubt about the particulars of the complaint against him.

[19] The length of the meeting is commented on adversely by Mr Gaut not just in the abstract sense but also in the sense that he claims a request was made for an adjournment to enable him to obtain professional advice which at the time of the disciplinary meeting he did not have, although he had a support person. Again this aspect is disputed. Ms Popham, the human resources manager for BP who conducted the disciplinary meeting, was adamant that there was never a request for a break or an adjournment. She said that she had conducted many disciplinary meetings within her area of responsibility and BP's policy was unequivocal that if a break or adjournment was requested it would be granted. Indeed, she says that in her habitual preamble to disciplinary meetings (including at this one), she indicated that a request for an adjournment or a break would be granted because BP regarded it as an entitlement if it

was sought. On that basis then, I am not persuaded that Mr Gaut and his support person made clear their request for a break or an adjournment.

[20] Mr Gaut also contends that he was both accused of doing something that was not specifically proscribed in the BP code of conduct and that what he may have been guilty of (and that is not conceded) would be behaviour that would constitute misconduct but never serious misconduct and thus the decision to dismiss was not the decision that a fair and reasonable employer would make after the conducting of a proper investigation.

[21] Dealing with those issues now, the allegation of verbal assault is quarrelled with on the basis that there is no such thing. I am inclined to agree that the expression is a contradiction in terms but the reality is that it is an attempt to explain or describe what Mr Gaut is said to have done, namely to have verbally abused his manager. I am satisfied that Mr Gaut knew what the allegation was, however clumsily it may have been expressed by BP.

[22] The suggestion that what he did (if anything) was misconduct rather than serious misconduct also has no merit in my view. It is the same argument that says that if a code of conduct provides for three disciplinary warnings the employer has no discretion to vary that arrangement if it chooses. The fact was the employer was using its discretion to decide an appropriate response to an employee who it had found, as a fact, had verbally abused that employee's manager, having been spoken to not six weeks before by the employer about a similar allegation.

### **Determination**

[23] I am satisfied that BP conducted a thorough and comprehensive inquiry into the allegations against this young man, as a consequence of which it reached the conclusion that he had in fact done what he was alleged to have done and that, having been spoken to about not dissimilar conduct barely six weeks before.

[24] Further, I am satisfied that, having conducted that reasonable inquiry, BP made a decision to dismiss which is the decision that a fair and reasonable employer, after the conducting of a full inquiry, would have made in those circumstances. In the end, the case law is clear that abusing a manager is the sort of conduct which typically will invite the ultimate sanction.

[25] I am not satisfied that Mr Gaut has any cause for complaint with the treatment that he has received from BP and I dismiss his claim as a consequence.

**Costs**

[26] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority