

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 102
5548699

BETWEEN JOHN GEMMELL
 Applicant

AND QUALITY ROADING &
 SERVICES (WAIROA) LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Paul Harman, Counsel for Applicant
 Jim Ferguson, Counsel for Respondent

Investigation Meeting: 15 & 16 July 2015 at Napier

Submissions received: 24 June, 22 and 31 July 2015 from the Applicant
 24 June and 28 July 2015 from the Respondent

Determination: 22 October 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] John Gemmell claims to have been unjustifiably disadvantaged in his employment by being unlawfully suspended on 18 February 2015 and unjustifiably dismissed on 23 February 2015.

[2] Mr Gemmell's application for interim reinstatement was rejected at an investigation meeting held in April 2015.¹ Mr Gemmell now seeks financial remedies for the grievances he alleges. He withdrew his application for permanent reinstatement on the first day of the investigation meeting.

¹ [2015] NZERA Wellington 43

[3] Quality Roding & Services (Wairoa) Limited (QRS) employed Mr Gemmell for approximately three years before dismissing him on two weeks' notice which it elected to pay out. Counsel for QRS conceded in opening submissions that the employer's action of standing down Mr Gemmell on 18 February was unlawful. The employer accepted it had not consulted Mr Gemmell or taken his views into account before suspending him.

[4] The employer denies, however, that Mr Gemmell was unjustifiably dismissed.

Relevant background to Mr Gemmell's dismissal and the evidence of the parties

[5] At the time of his dismissal Mr Gemmell was the respondent's Site Supervisor on a worksite in Campbell Street, Wairoa (the worksite). On 9 February 2015 Mr Gemmell had taken a portaloo from another QRS site and placed it on the worksite. QRS's Construction Manager, Andrew Heron, who was Mr Gemmell's immediate manager, instructed him to remove it. While there was some dispute over the date Mr Gemmell was first given the instruction, I have already found it was most likely to have been given explicitly on 14 February 2015, and repeated on 16 and 17 February 2015². In the days between 9 and 13 February Mr Heron had asked, but not instructed, Mr Gemmell to remove the portaloo.

[6] On 17 February the Chief Operations Officer (COO), Robert Beale, visited the worksite, following a request from Mr Gemmell. Mr Beale's evidence was that Mr Gemmell told him he had been directed by Mr Heron, on more than one occasion, to remove the portaloo but he had not done so because he disagreed with the instruction. Mr Beale said it was apparent that Mr Gemmell saw the matter as a debate about the merits of having a portaloo on site and not a question of his disobeying an instruction given to him by his manager. Mr Beale says he informed Mr Gemmell four or five times that, if he failed to do as he had been instructed, he risked being found insubordinate and this would lead to disciplinary proceedings.

[7] Mr Gemmell did not comply with the requests from Mr Heron or with his subsequent instructions. Mr Heron sought guidance from QRS's Human Resources (HR) Manager, Jeremy Harker and from the Chief Executive Officer (CEO), Mark Browne. Mr Gemmell's evidence was that he did not ever refuse to remove the

² n1, [8].

portaloo, but that he was "*dragging (his) heels*". He continued to argue the case for retaining the portaloo on the worksite in his evidence to the Authority.

[8] On the afternoon of Wednesday 18 February 2015 Mr Harker visited Mr Gemmell at the worksite and attempted to give him a letter. Mr Gemmell asked what was in the letter and refused to accept it. Mr Harker informed him the letter told him he was being stood down from his employment and was required to attend an investigation meeting on Friday 20 February. He informed Mr Gemmell it related to a serious concern that had been raised over Mr Gemmell's refusal to comply with lawful and reasonable instructions of a supervisor.

[9] Another QRS employee, Malcolm Tuahine, who had accompanied Mr Harker to Mr Gemmell's worksite, tried later that afternoon at the company's depot to give the letter to Mr Gemmell. Mr Gemmell refused once again to accept it. Mr Gemmell's evidence is that he refused to accept the letter because he was annoyed that he was being given it before being asked for his version of events. He also referred to the words a manager in a previous employment situation had said to him about the acceptance of a letter entailing the acceptance of a burden as it was then up to the recipient to initiate the next action.

[10] Mr Gemmell attended the investigation meeting, which was chaired by Mr Harker, on 20 February accompanied by support persons. During the meeting he denied not following instructions and said he "*did not say that I wasn't going to do it*" but admitted "*dragging my feet*" and using "*passive resistance*"³. He also raised the removal of the portaloo as being a health and safety issue for the worksite which he confirmed he had not previously raised as a formal concern.

[11] The meeting took approximately an hour and a half and was then adjourned until Monday 23 February at 8.30 a.m. It was Mr Harker's evidence that he informed Mr Gemmell he would consider what had been said at the meeting over the weekend, and they would discuss the outcome when the meeting resumed on Monday. He said he told Mr Gemmell he would have the opportunity to respond if a decision was made, in accordance with company policy.

[12] Mr Harker said his reflection over the weekend led him to conclude that dismissal was the only viable option. This was because Mr Gemmell's actions had

³ From QRS' Notes of Investigation Meeting held on 20 February 2015.

been repeated, deliberate and public and had undermined the relationship between Mr Gemmell and the employer in a way that would be hard to ignore if other staff were to be given direction.

[13] Mr Gemmell arrived fifteen minutes late at the meeting of 23 February, accompanied by his wife. Five of the QRS employees he had asked to the meeting as support persons were already in attendance. Mr Gemmell's attendance was brief. He interrupted Mr Harker while he was outlining the process he intended to follow to inform him that the meeting was not going to proceed because neither the company's CEO nor its Health and Safety Advisor was present. Mr Gemmell considered them to be key personnel, although neither had been present at the meeting of 20 February.

[14] Mr Harker, who had been delegated by the CEO to manage the disciplinary process, said he felt threatened and intimidated by Mr Gemmell's words and conduct at the meeting, which he described as aggressive. Mr Gemmell denies this but acknowledges voices were raised and that he told Mr Harker he would "*deal to*" him later.

[15] Following the brief meeting Mr Harker confirmed his thinking that dismissal was the appropriate outcome. He says he did so on the basis of the explanations provided by Mr Gemmell at the meeting on Friday 20 February and did not take into account Mr Gemmell's conduct or words that morning. He communicated his decision to Mr Gemmell by telephone and couriered letter rather than in person. Mr Harker's evidence is that he did this because of concerns for himself and his family following Mr Gemmell's conduct that morning.

[16] Mr Gemmell was entitled under the QRS disciplinary and dismissal procedures to have the opportunity to speak to the CEO. He had a telephone conversation with Mr Browne that day which did not result in any change to the decision to terminate his employment. Mr Gemmell's evidence is that the CEO gave him no opportunity to discuss the penalty of dismissal.

[17] Mr Browne's evidence is that Mr Gemmell wanted to talk only about health and safety being the reason for his refusal to follow Mr Heron's instruction. He also said Mr Gemmell appeared to be accusing him of preventing 14 members of staff attending the disciplinary meeting that morning. He said Mr Gemmell talked over him and was unhelpful and aggressive during their conversation.

Issues

[18] The primary issues to be determined are whether:

- a. Mr Gemmell was unjustifiably disadvantaged in his employment;
- b. Mr Gemmell was unjustifiably dismissed.

[19] If the answers to [1] and/or [2] are affirmative the issue of remedies and contribution will arise.

Legal principles

[20] The test for whether a dismissal or other action by an employer is justifiable is to be determined on an objective basis. The test, which is specified in the Employment Relations Act 2000 (the Act), is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal or action occurred.⁴

[21] The Act sets out a number of procedural steps to be considered by the Authority in applying this test.

Was Mr Gemmell disadvantaged in his employment?

[22] This claim rests on Mr Gemmell's suspension from his employment on Wednesday 18 February 2015. While the words of the letter informing him of this referred to his being "*stood down*" on pay, it is clear this was a suspension by another name.

[23] As I have already noted, QRS accepts its suspension of Mr Gemmell was unlawful in that there was no consultation before the suspension was imposed, and no opportunity for Mr Gemmell's views to be heard. This was not in accordance with the employer's Disciplinary and Dismissal procedures which provide that the "*(r)ules of procedural fairness apply – it is necessary to give the employee an opportunity to comment on the proposed suspension and take his/her comments into account, before making a decision to suspend the employee.*"

⁴ Section 103A.

[24] The failure to consult Mr Gemmell before suspending him disadvantaged him by depriving him of the opportunity to have his views heard and considered.

Was Mr Gemmell unjustifiably dismissed?

[25] In my determination of Mr Gemmell's claim for interim reinstatement I found he had an arguable case to have been unjustifiably dismissed based on two aspects of the employer's procedure. One of those aspects concerned a possible confusion over which of the employer's disciplinary processes was applicable to the matters of concern raised with Mr Gemmell. The other aspect was the speed of the process followed by QRS from its notification of concerns to Mr Gemmell to his dismissal.

[26] The confusion over which of the disciplinary procedures in QRS's Human Resources Manual was relevant to Mr Gemmell's situation was caused by the letter in which Mr Harker informed Mr Gemmell of his suspension. I referred to this in some detail in my earlier determination and will not repeat it here. I note, however, that the letter of 18 February to Mr Gemmell suggested the issue of concern to the employer was a performance matter, while the disciplinary procedure QRS applied was that applicable to a matter of misconduct. There are some different requirements applicable to each of the procedures and there is a requirement for a letter to be sent to an employee following the first meeting over performance concerns which does not feature in the misconduct procedures.

[27] I am satisfied from the evidence obtained in the course of my investigation that there was no confusion over the applicable process other than in the heading of the 18 February letter. Apart from that one reference, QRS clearly treated Mr Gemmell's failure to carry out his manager's instruction as a matter of misconduct and not as one of performance. I am satisfied Mr Gemmell was not adversely impacted by the reference to performance concerns in the letter.

[28] My finding with regard to the speed of the process arose from the employer's notification to Mr Gemmell at 4.30 pm on Wednesday 18 February of its request for a meeting to discuss his failure to comply with a lawful and reasonable instruction. The meeting was held on Friday 20 February at 1.30 pm and later adjourned to be reconvened at 8.30 am on Monday 23 February 2015. Mr Gemmell was dismissed that day.

[29] The fact that a process has been carried out within a short timeframe does not necessarily imply a lack of procedural fairness. The pertinent question is whether the procedural requirements of s.103A(3)(a) to (d) of the Act were met or whether they were compromised by the timeframe within which they occurred.

[30] In this instance Mr Gemmell was in no doubt about his employer's concerns over his failure to comply with the instructions of his supervisor. Although he refused to take the letter of 18 February from either Mr Harker or Mr Tuahine on 18 February, Mr Harker informed him of the letter's contents, including the fact of the investigation to take place on 20 February, and his opportunity to respond. Mr Gemmell may have been in a better position to respond had he not refused to accept service of the letter which had three documents annexed to it. These comprised two notes from Mr Heron to Mr Beale and one file note by Mr Beale. Mr Gemmell was made aware of the fact of those documents on 18 February, but they were not read to him until the meeting on 20 February.

[31] Mr Harman submitted that, faced with Mr Gemmell's refusal to accept the letter, it was incumbent upon QRS to adjourn its timetable to accommodate serving the letter on Mr Gemmell at his residential address by way of registered courier delivery. I disagree with that submission. QRS tried on at least three occasions to persuade Mr Gemmell to accept the envelope containing the letter of suspension. It could not force him to take, and read, the contents of the envelope. It was not required to accommodate his refusal to accept it by using a courier service to effect delivery.

[32] It is clear from the QRS notetaker's record of the meeting of 20 February that Mr Gemmell had the opportunity to respond to his employer's concerns and to explain why he had not complied with his manager's instruction. I accept Mr Harker's evidence that he considered Mr Gemmell's responses before deciding that termination of his employment was the most appropriate outcome. Mr Gemmell was informed that he would have the opportunity in the reconvened meeting of 23 February to comment on whatever decision Mr Harker came to before it was finalised.

[33] He would also have the opportunity, as provided for in the QRS HR Manual, of discussing the penalty imposed on him with the CEO. While there was some confusion over the effect of such a discussion, it became clear in the course of the investigation meeting that the CEO retained the right to overturn a decision to dismiss

that was made by the person he had delegated as decision maker in a particular disciplinary matter.

[34] Mr Gemmell did not remain at the meeting of 23 February long enough to allow Mr Harker to convey his views about dismissal being the appropriate outcome, or to comment on those views. I understand from Mr Gemmell's evidence he was angry, not just at the absence of the CEO and the health and safety advisor, but also because only five of the fourteen QRS employees he had asked to attend the meeting to support him were present. Mr Gemmell accused Mr Harker of being responsible for keeping those employees away. He later also accused the CEO of this. I accept the evidence of both Mr Harker and Mr Browne that they had nothing to do with the non-attendance of those employees.

[35] By his own admission Mr Gemmell was angry for the short time he attended the 23 February meeting. While he denied being aggressive or threatening, his attitude to Mr Harker, particularly his statement that he would "*deal to (him) later*", was belligerent and intimidating. In those circumstances Mr Harker's use of telephone and courier later that morning to convey his decision to dismiss Mr Gemmell was understandable.

[36] The process from the notification of concerns to Mr Gemmell to his dismissal took five days, which included a weekend. While that is a relatively short time frame, the process followed the employer's disciplinary procedure for dealing with misconduct concerns, other than the acknowledged breach in respect of the suspension.

[37] The Court of Appeal considered the situation of an employee whom it referred to as "*..defending, albeit doggedly, a sincerely held position concerning his contractual rights*".⁵ The Court said the dispute "*cried out for an attempt at resolution either by resort to the disputes procedure referred to in the contract or, if that was considered too long-winded, by a speedier means*".⁶ It also agreed with Travis J's endorsement of remarks by Finnigan J in *Samuels v Transportation Auckland Corp Ltd* that "*ultimately the test is not whether there was wilful*

⁵ *Sky Network Television v Duncan* [1998] 3 ERNZ 917.

⁶ n5 at 923.

*disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal."*⁷

[38] While those cases were considered under different legislation, they remain relevant in considering whether an employer's actions were what a fair and reasonable employer could have done in all the circumstances at the time. The current situation is not one in which Mr Gemmell raised a bona fide dispute over whether the portaloos should remain on the worksite. He did not dispute or even verbally refuse to carry out the instruction: he simply ignored it. I formed the view from Mr Gemmell's evidence that he did not wish to comply with the instruction and believed his view should prevail.

[39] I find the decision reached by the employer to be one that a fair and reasonable employer could come to in all the circumstances at the time. Mr Gemmell had been asked over four days by his manager to remove an item from the worksite. When his requests were ignored the manager gave a clear instruction on at least three separate occasions for the item to be removed. The company's COO then attended the worksite and explained to Mr Gemmell this was a matter of a lawful instruction being given to him by his manager which would have disciplinary consequences if he continued to fail to comply with it.

[40] The process of investigation undertaken by the employer was in accordance with its internal policy documents. The fact that Mr Gemmell did not avail himself of the opportunity to comment on dismissal as the appropriate outcome was a direct result of his refusal to remain in the meeting on 23 February, and his abrupt departure from it. It did not detract from the fairness of the employer's process overall.

Remedies

[41] Mr Gemmell is entitled to be compensated for the grievance he suffered as a result of being suspended on 18 February 2015. This was in breach of the employer's own HR Manual requirement that employees be given the opportunity to comment on their proposed suspension, and to have their views considered, before a suspension is effected. No question of contribution on Mr Gemmell's part arises, as the process was solely in the hands of the employer.

⁷ [1995] 1 ERNZ 462.

[42] Mr Gemmell was paid throughout his period of suspension and indeed for a notice period of two weeks following his dismissal. I consider Mr Gemmell's monetary losses arose from his dismissal, which I have found to be justifiable, rather than from his suspension. Accordingly I find no reason to make an award of wages but do find a compensatory award to be appropriate.

Determination

[43] Quality Roding and Services (Wairoa) Limited is ordered to pay the sum of \$4,000 without deduction to Mr Gemmell under s. 123(1)(c)(i) of the Act.

Costs

[44] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority