

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN John George (Applicant)
AND Datacom Engineering Services Ltd (Respondent)
REPRESENTATIVES Rohineet Sharma, Advocate for Applicant
Duncan McGill, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 24 February 2005
DATE OF DETERMINATION 29 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr George was employed by Datacom Engineering Services Limited (“Datacom”) as a computer engineer from March 1999 until 5 February 2004. He was responsible for attending customer call-outs for computer faults, daily customer interactions (either on the phone or in person), working on special IT projects for various customers, and being on-call for any emergencies. Mr George reported to Ms Sally Scarisbrick, his team leader.

[2] On Friday 30 January 2004 Datacom received a complaint about Mr George from a major client of Datacom, House of Travel (“HOT”), for being impolite when he had entered the HOT site at Onehunga that day.

[3] This was followed by a further complaint on Monday 2 February 2004 about information posted on the Datacom website. The comments were posted by Mr George and were regarding a job he had undertaken at the HOT site in Onehunga on Friday 30 January 2004. The second complaint included a criticism that Mr George had spent 30 minutes telling off an employee of HOT. HOT requested that Mr George not be sent to any more HOT sites.

[4] Following an enquiry by Datacom, Mr George was dismissed on notice for serious misconduct. Mr George claims the dismissal was unjustified.

[5] Datacom says in response, that Mr George was dismissed by Mr Andy Francis, Regional Manager, following a full enquiry and that the dismissal was justified in all the circumstances.

[6] The issues for determination in this matter are whether:

- a full and fair investigation was carried out by Datacom; and
- Mr Francis had reasonable grounds to believe there had been misconduct by Mr George of sufficient gravity to warrant his dismissal.

Did Datacom undertake a full and fair enquiry?

[7] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of Court decisions. When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus for the Authority is not whether there was misconduct but whether the employer had reasonable grounds for believing that there was misconduct.

[8] The Authority may not substitute its views for those of the employer about the adequacy of the reason shown by the employer for the dismissal.

[9] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal (*NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35).

[10] The Individual Employment Agreement between the parties deals with termination of employment by requiring four weeks notice plus extra notice to a maximum of 13 weeks based on service with Datacom. The agreement also provides for *summary termination* for non-performance of a serious nature.

[11] Datacom operate a “helpdesk” for its clients. Calls are received from clients and logged into the Datacom system and if work is needed to be undertaken a job is “opened”. Once the work has been completed the job is then “closed” in the system. Any and all contact made with the client while the job is open, is registered in the system against the appropriate job.

[12] HOT have their own in-house helpdesk. Datacom have a specific protocol in place for dealing with enquiries from HOT, which includes the following steps:

- an employee of HOT identifies a problem with their computer. They contact their own HOT “helpdesk”;
- the HOT “helpdesk” contacts the Datacom helpdesk who “open” a job and allocate it to a customer service engineer;
- the customer service engineer attends the site of the problem and fixes it if possible;
- when the problem has been fixed the job is “closed”.

[13] On Friday, 30 January 2004, Mr George attended the HOT site in Onehunga to return a monitor which had been repaired. At the time he was returning the HOT owned monitor Mr George was to pick up a Datacom monitor which had been left at the Onehunga site while the HOT monitor was being repaired.

[14] When he arrived at the Onehunga site the Datacom monitor was being used by Ms Kristina Parkinson, Manager of HOT Onehunga. Mr George was not aware of this. At first Mr George could not find the Datacom monitor so he rang the stores department at Datacom to see if he could bring in another monitor from HOT. He was told he had to bring in the monitor that belonged to Datacom. Eventually he discovered that Ms Parkinson was using the monitor. Ms Parkinson was engaged with a client.

[15] After interrupting Ms Parkinson and being told to wait, Mr George removed the monitor from Ms Parkinson’s desk and replaced it with another monitor owned by HOT. It was this interruption of Ms Parkinson’s work which was the subject of the first complaint from HOT to Datacom.

[16] After Mr George left the site, Ms Parkinson found that the monitor Mr George had put on her desk made a high pitched noise. This was a problem she had had difficulty with in the past. The problem had previously been the subject of an “open” job but subsequently “closed” when it was considered the problem had been fixed. Mr George was the engineer who had dealt with that job.

[17] Ms Parkinson rang her helpdesk who immediately contacted the Datacom helpdesk. As Mr George had just left the building it was thought that he could return with the Datacom monitor reasonably quickly.

[18] The Datacom helpdesk rang Mr George who informed the helpdesk that as the original job was no longer open he could not return and carry out any work. A new job would have to be opened before he could do that. Mr George says he then offered to contact the client to advise her

of the situation. The helpdesk operator contacted Mr George's supervisor Ms Sally Scarisbrick. In the meantime Mr George contacted Ms Parkinson and told her why he could not help her.

[19] Mr George says he then rang Ms Scarisbrick; Ms Scarisbrick says she rang Mr George. Mr George was instructed to attend the HOT site at Onehunga and check out the problem with the monitor. He did return to the HOT site. It is more probable than not that Ms Scarisbrick contacted Mr George, as a later event posted against the job by Mr George states Mr George returned to the site in response to a call from Ms Scarisbrick.

[20] When Mr George returned to the Onehunga site there were some strong feelings of agitation displayed by both Mr George and Ms Parkinson. Mr George says Ms Parkinson was rude and abusive. By way of example Mr George said Ms Parkinson told Mr George he had not done his job properly and that she was not happy with Datacom. Ms Parkinson says Mr George was rude and by way of example said he told her off for 30 minutes. This exchange was included in the second complaint.

[21] At the investigation meeting and in response to this criticism, Mr George told me he did speak with Ms Parkinson that evening when he was there but he didn't tell her off. He told her how the job needed to be re-opened, because when he got the first call it was closed. Having met Mr George and experienced his obvious frustrations with people who do not understand the strict protocols required of him in his role as a customer services engineer, it is not difficult to understand why Ms Parkinson felt she had been told off for 30 minutes.

[22] On Friday, 30 January 2004, and on receipt of the first complaint from HOT, Ms Scarisbrick rang Mr George and invited him to attend a meeting to discuss a complaint received about him. Mr George was advised to bring a witness and that dismissal was a possibility. After arranging his witness it was agreed the meeting would take place on Tuesday, 3 February 2004.

[23] The second complaint was received on the following Monday (2 February 2004). The scheduled disciplinary meeting took place as agreed. Copies of the complaints were not provided to Mr George prior to the meeting. Neither did Ms Scarisbrick provide any detail to Mr George of the contents of the complaints prior to him attending the disciplinary meeting.

[24] The letter of dismissal states that Mr George was dismissed because of the complaints received and because he was no longer allowed to attend any of the HOT sites. If Ms Scarisbrick or

Mr Francis (the decision maker), had taken the time to interview Ms Parkinson they would have discovered that Ms Parkinson was not averse to Mr George being on site but *preferred* for him not to be there and this is what she had passed onto the HOT help-desk.

[25] During the disciplinary meeting Mr George specifically requested Ms Scarisbrick to contact Mr Peter Wallington, HOT site manager and seek his views on Mr George in order to bring some fairness to the process. Ms Scarisbrick did not contact Mr Wallington.

[26] While I accept that good customer-relations are an important issue for Datacom, a fair and reasonable enquiry would have seen both Ms Parkinson and Mr Wallington interviewed by Datacom for their input.

I am satisfied the employers enquiry was less than adequate. Datacom accepted the customers' account of events, but without any enquiry being made of the initiator of the complaint. Datacom rejected Mr George's explanation in its entirety.

Did Mr Francis have reasonable grounds to believe there had been misconduct by Mr George of sufficient gravity to warrant his dismissal?

[27] It is trite to say that an employee is entitled to be heard personally by the decision maker (*Irvines Freightlines Ltd v Cross* [1994] 1 ERNZ 424).

[28] On 5 February 2004 Mr Francis, advised Mr George that his employment would be terminated as a result of the complaints received from HOT. Mr Francis contended that the complaints brought into question Mr George's credibility with the customer.

[29] Mr Francis told me that he made the final decision about dismissal. He told me Ms Scarisbrick reported to him verbally the results of the disciplinary meeting but that he never checked the accuracy of that verbal report. Neither did Mr Francis speak to Mr George to seek his side of the story.

[30] Mr Francis did not undertake any form of enquiry and therefore did not have reasonable grounds to believe that there was misconduct by Mr George of sufficient gravity to warrant his dismissal.

The dismissal is unjustified.

Remedes

[31] As Mr George has been successful in his claim, he is entitled to remedies.

Lost wages

[32] Mr George claims two years lost wages. Mr George told the Authority that he is not currently working and that he has been in full-time study since February 2004. Mr George was paid nine weeks pay in accordance with his employment agreement when he was dismissed in February 2004.

[33] Section 128 of the Employment Relations Act provides that an applicant who has established they have a personal grievance should be reimbursed up to three months ordinary time remuneration unless the Authority is minded to exercise its discretion and award more.

[34] Mr George did not find alternative employment because he made a decision to undertake full-time study. His course of study commenced in February 2004, soon after his dismissal. Mr George was therefore not available to undertake full time work.

Mr George has not lost remuneration as a result of the dismissal, but rather because he made a conscious decision to remove himself from the job market and undertake full-time study. Therefore I make no award for lost remuneration.

Compensation

[35] Mr George told me he believed he was a target for dismissal. He said the events that occurred from January 2004 until his dismissal were all part of a conspiracy to dismiss him from his employment. Mr George maintained throughout the investigation meeting that work on a HOT site usually indicated that the employee concerned was to be dismissed. I asked Mr George for specific examples which lead him to this belief. He was unable to provide any. I am satisfied that there was no collusion on the part of Datacom and HOT to see Mr George dismissed in a predetermined manner.

[36] Mr George told the Authority that the dismissal left him feeling shocked, scared and stressed. Mr George was 52 at the time of the dismissal and knew that finding alternative employment would prove difficult.

[37] Mr George is entitled to an award to compensate him for the hurt and humiliation suffered as a consequence of his dismissal. I set that award at \$7,500.

[38] The Authority is bound by section 124 of the Act to consider the extent to which the actions of Mr George contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies. I accept that Mr George's behaviour and general conduct while attending a customer on the HOT site at Onehunga was unacceptable. I have assessed Mr Georges' contribution to be 10%.

Datacom Engineering Services Limited is ordered to pay Mr George \$6,750 pursuant to section 123(c)(i) of the Employment Relations Act 2000.

Compensation for loss of any benefit

[39] Mr George seeks compensation for loss of benefits that he would have become entitled to upon completion of his five years of service. Mr George has neither provided me with details relating to this claim nor has he quantified the claim.

[40] Without any evidence or details before the Authority I am unable to make any award under this head and decline to do so.

Costs

[41] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority