

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 35/09
5123124

BETWEEN GEOFFREY GWILT
 Applicant

AND BRIGGS & STRATTON NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Rodger Pool for Applicant
 Martin Round for Respondent

Investigation Meeting: 25 and 26 November 2008

Submissions received: 3 and 12 December 2008 from Applicant
 9 December 2008 from Respondent

Determination: 09 February 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent (BSNZ) is the New Zealand subsidiary of an international business which makes engines and related products for use in mowing equipment. Mr Gwilt worked for BSNZ for almost four years, first in a customer services role and then as Technical, Training and Warranty Manager. He was given four weeks notice of dismissal in a letter dated 24 April 2008 which stated: *“the reason for the termination is that you have refused to run the technical training and service schools for BSNZ despite having been provided with the necessary training.”*

[2] Mr Gwilt does not dispute that running technical training and service schools was part of his job and says he did not refuse to do it. He says that before he moved into the position of Technical, Training and Warranty Manager he had no experience as a trainer and accepted the job on an assurance that he would receive the training he

needed to bring his product knowledge and training skills up to the level required in the role. He says BSNZ failed to provide this training and dismissed him (unfairly) rather than do so.

[3] BSNZ's annual training programme (aimed at dealers and engine repairers in the industry) is usually run during July and August, before the mowing season begins. Mr Gwilt took up the role of Technical, Training and Warranty manager in March 2006 but had no significant involvement in the winter round of training courses that year. In 2007 he made two trips to Australia for training with Australian service manager Rohan Carroll and another experienced Australian trainer, Todd Everett. He then observed and assisted Mr Carroll in the delivery of the 2007 programme in New Zealand, which included two of the three main courses he would be required to run.

[4] By the end of 2007 Mr Carroll had told New Zealand manager Glenn Woollett that he was satisfied that Mr Gwilt was a competent trainer. It remained for Mr Carroll to come to New Zealand in July 2008 to deliver a round of the third course, with Mr Gwilt observing and assisting, after which, from BSNZ's point of view, Mr Gwilt would be expected to take full responsibility for delivering all three courses (subject to customer demand) to complete the 2008 round of training in New Zealand.

[5] In January 2008 Mr Woollett asked Mr Gwilt to proceed with the preparation of a "training calendar" for the 2008 season. Despite several reminders, Mr Gwilt never prepared this calendar. Instead, over the course of the next four months he repeatedly expressed concerns that the preparation he had received for the training role was not as extensive as that provided to either his Australian counterparts, or his predecessors in the New Zealand role, and insisted that without further training he would not be adequately equipped to run the 2008 New Zealand training programme on his own.

[6] Mr Woollett did not agree that Mr Gwilt was not adequately equipped to run the courses required in 2008 and did not offer further training beyond the July visit planned for Mr Carroll. After talking to Mr Gwilt he formed a view that Mr Gwilt lacked confidence in his own abilities as a trainer. Although Mr Woollett did not share that lack of confidence he came up with a proposal to restructure Mr Gwilt's job so that the training component was removed and replaced with other responsibilities. Mr

Gwilt had reservations about this proposal as it was to be coupled with the loss of his company vehicle.

[7] Discussions between the two men stalled and eventually, when the deadlock could not be resolved, Mr Woollett dismissed Mr Gwilt.

Issues

[8] The question for determination here is whether this dismissal was justifiable on the grounds set out in the letter of dismissal. Pursuant to s. 103A of the Employment Relations Act 2000 this in turn will be determined by “*whether the employer’s actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.*”

[9] In order to establish whether the overall test of justification has been met in this case it will be necessary for me to identify:

- i. Whether Mr Gwilt was provided with sufficient training to enable him to run technical training and service schools;
- ii. Whether it was fair and reasonable for Mr Woollett to conclude that Mr Gwilt had refused to run the technical training and service schools, and if so,
- iii. Whether it was fair and reasonable for Mr Woollett to proceed to dismiss Mr Gwilt for this.

[10] If the overall test for justification has not been met Mr Gwilt’s personal grievance will have been made out and the issue of remedies, including the issue of contributory conduct, will fall to be determined.

(i) Was Mr Gwilt provided with sufficient training?

[11] Mr Gwilt came to the role of Technical, Training and Warranty manager with over twenty five years experience in customer service, technical support and warranty administration. He also held relevant trade qualifications including City and Guilds certificates in Grain and Forage Harvesting Machinery, Power Units and Transmissions, Farm Machinery and Agricultural Machinery.

[12] Running BSNZ's training programme accounted for about 25-30% of Mr Gwilt's job as Technical, Training and Warranty manager. For a period after his appointment that aspect of the job was put on hold while Mr Gwilt settled in and came to grips with his other responsibilities.

[13] In May 2007 his preparation to take up his training responsibilities began with a trip to Melbourne where he participated in two technical training courses that he would eventually be required to present. These were the "*Technical Update Seminar*" (TUS) and the "*Hydrogear Training School*" (HGTS.) He sat right through each of these courses twice and for each was provided with the curriculum, handouts, notes, instructor's manual, CD and DVD. Then in August 2007 Rohan Carroll came to New Zealand to lead the presentation of the New Zealand round of TUS and HGTS courses for that season. At first Mr Gwilt watched while Mr Carroll presented, then as they went round the country Mr Carroll observed Mr Gwilt as he gradually took over more responsibility for the presentation. Mr Carroll reported positively to Mr Gwilt's managers about Mr Gwilt's performance in fronting these two courses. During this visit Mr Carroll went over amendments Mr Gwilt had made to the programme (in order to make it fit local requirements) and approved these changes.

[14] Also in August 2007 Mr Gwilt went to Brisbane to participate in the *Authorised Field Service School* (AFSS) which was the third main component of the New Zealand training programme. At five days duration it was longer than the other two courses. It was also more intensive. Mr Gwilt had been a student on the course earlier on in his employment with BSNZ (in November 2005) and initially failed the final exam, although he successfully re-sat it soon afterwards. In August 2007 he sat through much of the course although not all as he assisted the presenter with general

administration tasks and sometimes, attending to participants' needs prevented him from listening to all of the presentation himself.

[15] It had been planned that before the end of 2007 Mr Carroll would return to New Zealand to lead an AFSS course with Mr Gwilt gradually taking over responsibility, in the way he had with the recent TUS and HGTS courses. However it did not prove possible for this visit to be arranged and in the end no AFSS courses were run in New Zealand in 2007. Instead, it was proposed that Mr Carroll would come back to do this in July 2008.

[16] The expression "technical training" in the letter of termination refers to the TUS and HGTS courses and "service schools" to the AFSS (which could be run in separate, short modules). Mr Gwilt told me that he had not had any problems when he had run the 2007 TUS and HGTS courses under Mr Carroll's supervision and was ready to run those alone. His main areas of concern, he told me, were that:

- i. he did not yet feel sufficiently familiar with the content of the service school (AFSS) course to run it alone;
- ii. although Mr Carroll had checked and approved the New Zealand AFSS materials Mr Gwilt believed they required updating and that the microfiche provided was obsolete, and
- iii. that Mr Gwilt felt that he needed further training as a trainer.

[17] Mr Gwilt was concerned that the July 2008 visit would not be enough to complete his preparation to run AFSS. With the TUS and HGTS courses, he and Mr Carroll had done at least two of each together, with Mr Carroll running most of the first, while Mr Gwilt observed, and Mr Gwilt most of the second, with Mr Carroll watching. However he said that from what he understood of the plan for July, he and Mr Carroll would have time to run only one complete AFSS between them.

[18] In relation to the issue of "training as a trainer" Mr Gwilt emphasised his concern that he understood that his predecessor received more comprehensive training

than he did, including in the development of general presentation skills. This had involved a trip to the parent company's factory in the United States.

[19] The respondent does not dispute that Mr Gwilt needed more preparation before running AFSS courses independently (this being the purpose of the visit proposed for Mr Carroll in July 2008.) It was however the respondent's expectation that after the July visit, Mr Gwilt would be ready to go ahead and run all three courses on his own.

[20] Mr Woollett acknowledged that (in the past) others had had more training than Mr Gwilt had received up to the time his employment ended. However he said that this had been provided as on-going professional development over a period of some time, and was not all provided as induction. He also noted that in 2008 the respondent and its parent company had reduced training budgets across the board and staff were no longer being sent on non-essential training. Quite simply, he said, a trip to the United States was out of the question for Mr Gwilt at that time.

Determination

[21] Dealing with the first area of concern to Mr Gwilt, I accept that it could not be said for certain (in advance of it happening) that the July visit by Mr Carroll would have been sufficient to prepare Mr Gwilt to deliver the content of the service school on his own. However, given his prior experience and qualifications, and his satisfactory performance in presenting the other two courses, it was reasonable for the respondent to anticipate that it would. The proposed visit by Mr Carroll amounted to reasonable provision of training in the content of the AFSS course and it was reasonable for the respondent to expect that afterwards Mr Gwilt would have been able to run AFSS on his own.

[22] As for Mr Gwilt's second area of concern, he gave a convincing explanation of how and why the materials could be improved. Nonetheless, working with slightly dated teaching tools did not render it impossible for him to do his job as a trainer. I accept the respondent's argument that it was up to Mr Gwilt (like other company trainers) to make the best of what was provided until such time as the materials were updated.

[23] In a similar way, Mr Gwilt would no doubt have benefitted from attending training in presentation skills and other “training as a trainer” as he described it. Again, however, I accept that if the respondent was satisfied with the standard of his presentation (as Mr Carroll had been with the TUS and HGTS presentations) then it was not obliged to provide further training in this area.

[24] In short I conclude that the respondent did make adequate provision for Mr Gwilt’s training to run the technical training and service schools.

(ii) Was it fair and reasonable for Mr Woollett to conclude that Mr Gwilt had refused to conduct the technical training and service schools?

[25] It was the usual practice of the respondent to send out a timetable for the training season well beforehand in order that the programme could be adjusted to meet demand from prospective attendees. In 2007 Mr Woollett and the office administrator had assisted Mr Gwilt to prepare a “first cut” of that year’s calendar (a task which took a couple of hours.) The administrator had then confirmed venues, made bookings and (in June) sent the calendar out to prospective participants. As responses came in the calendar was adjusted to accommodate demand. With the first session due to run in August all agreed that this was a tight timeframe. In order for the administrator to complete her responsibilities (such as securing venues) on time the initial calendar would have to go out at least two months prior to the first course.

[26] The sequence of events that led to the end of Mr Gwilt’s employment began in January 2008 when Mr Woollett (who was on annual leave at the time) emailed him asking that he prepare the 2008 training calendar. On Tuesday 12 February Mr Woollett emailed Mr Gwilt to remind him about the need to prepare the calendar, telling him he required it by the Friday. It did not eventuate. On or shortly after 7 March he met with Mr Gwilt in an attempt to establish what was causing the delay. Mr Gwilt told him he did not feel adequately prepared for the training work from which Mr Woollett drew the conclusion that Mr Gwilt was having some sort of crisis of confidence about doing it. He offered to assist by joining Mr Gwilt in presenting the programme but Mr Gwilt declined. The meeting ended with an agreement from Mr Gwilt that he would go away and get the programme together. Mr Gwilt told me

that he did create a draft but never passed it on to the administrator or to Mr Woollett. He told me he could not explain why not.

[27] It was important for the 2008 training programme to be finalised by May at the latest so that prospective attendees had adequate notice of the proposed July service schools and so that Mr Carroll could put in place his travel arrangements. Mr Gwilt acknowledged that by the beginning of April it would have been a cause for concern that there was not even a draft programme. In fact, Mr Woollett was by then very frustrated at what he saw as an inexplicable failure to produce the programme. On 8 April Mr Woollett wrote to Mr Gwilt as follows:

“...you have been asked to produce a training calendar for the 2008 year, which to date you have not done. We have had a meeting to discuss this, in this meeting I tried to get you to set some dates for Technical update and Hydro-Gear service schools... I tried to talk you around and help you through what appears to be a fear of teaching by offering to run these classes with you but I could not convince you to do so.

BSNZ is now in the situation where technical training is not being done and Dealers are requesting dates for service schools.

BSNZ must run these service schools and we require our Technical, training and Warranty Manager to be capable of this. By not producing the required and requested Training calendar it appears to me that you no longer wish to be this person.

I request you attend a meeting in my office ... where we will discuss where we go from here.”

[28] At this meeting (which took place on Friday 11 April) Mr Woollett put forward his proposal to resolve the problem: the training component of Mr Gwilt’s job could be replaced with responsibilities for inventory, with no loss of salary for Mr Gwilt, although he would lose his car and change work station. The proposal was feasible from Mr Woollett’s point of view because a staff member with responsibility for inventory was retiring and a forthcoming merger with another company was expected to bring a second training manager into the organisation. Because the merger negotiations were not complete and remained confidential Mr Woollett was not able

to tell Mr Gwilt anything about it or explain properly how his proposal was going to work. Mr Gwilt told me that as well as being reluctant to lose his car and his office he felt suspicious that he was being eased out of his job, possibly to make way for the return of a former staff member who he happened to know was looking for work.

[29] The meeting ended on the basis that Mr Gwilt would go away and decide which of two choices he would accept: stay in his current role, with responsibility for the training programme, or take a modified role, with the loss of the car and office. Later that day Mr Woollett provided an employment agreement and job description for the new role. On Monday 14 April Mr Gwilt met with his employment advisor, Mr Bennett to take advice on the new employment agreement. He learnt from Mr Bennett that the respondent's representative (Mr de Latour) had on a without prejudice basis tabled a third choice: negotiation of an exit package. Mr Bennett also relayed what he understood to be an ultimatum from the respondent's representative: unless the training issues were resolved or an exit package negotiated, disciplinary action and dismissal would be likely to follow. The following day, Tuesday 15, the respondent's representative tabled an offer which was rejected.

[30] Neither party has claimed privilege in relation to the communications between Mr Bennett and Mr de Latour. Mr de Latour's recall of the conversation differs from that of Mr Bennett, in that he asserts that he said that a disciplinary process would result with the possible (rather than definite) outcome of dismissal.

[31] Mr Woollett told me that because of the pressing need to finalise the training programme and because he wanted to know what work there might be for the incoming (additional) training manager, he needed and expected an answer from Mr Gwilt by Wednesday 16 April. He did not explicitly tell him this however. When he did not get a response from Mr Gwilt on that day, he wrote to him as follows:

“ my understanding... is that you are coming back to me regarding whether or not you will accept the position offered...I understand you have refused the “Training Position” ... I ask you to confirm that my understanding...is in line with yours... ”

[32] Mr Woollett told me that by “the position offered” he meant the new (modified) role and by “the training position” he meant Mr Gwilt's existing position.

He also went on, in that letter, to note that he had become concerned about Mr Gwilt's health and offered counselling at BSNZ's expense.

[33] In his written response, on 18 April, Mr Gwilt replied:

"I have not refused the "Training Position." I have always said I am willing to carry out training requirements of my job provided I receive the necessary training...

I am happy to provide a training calendar on the basis that I will have received the required training prior to the commencement of the training"

[34] In relation to the new role Mr Gwilt advised that he had passed the proposal (in the form of the agreement and job description) to his advisor. He declined the offer of counselling.

[35] Before receiving this letter, however, Mr Woollett was told by an Australian colleague that he had heard that Mr Gwilt had accepted a position in Australia. On 18 April (in a letter which "crossed" with Mr Gwilt's letter) he wrote to Mr Gwilt again, reiterating what he had said in his letter of 16 April and continuing:

"[the employer's representative] yesterday suggested you have indicated you are now prepared to accept the role of "training officer" when clearly you had turned the position down...after your refusal I have appointed another person..."

[36] The letter went on to record what Mr Woollett had been told about the Australian job and noted that Mr Gwilt seemed to come and go as he pleased and was not communicating with him. Mr Woollett called Mr Gwilt to a meeting on 23 April and set out a list of matters to which he would be expected to respond, as follows:

- *"Why you have failed to respond as promised to the offer of position?*
- *What you have given me no response to the offer of medical help?*
- *Why you have not accepted or rejected the job offer?*
- *Did you in fact take another position with another company in Australia?*
- *Would you prefer to discuss an exit package?*

- *Given the situation now please indicate your wishes as to the outcome of the meeting.”*

[37] Finally Mr Gwilt was told that *“in the absence of acceptable responses at the meeting your employment is in jeopardy.”*

[38] On 23 April, before the meeting, Mr Gwilt wrote back. He reiterated that he had not refused to do the training work which formed part of his existing job. He said that he was *“shocked to hear that you have already appointed another person to perform a role that was supposed to be part of my duties.”* He said that he had not refused the new job, and was giving it consideration. He said he had already responded to the offer of “medical assistance” and had already said that he did not wish to make any proposal in regard to an exit package. He did not respond to the issue of whether he had taken a job in Australia.

[39] Mr Woollett told me that although he had previously told Mr Gwilt that he had appointed someone else to the existing training role (by whom he meant the incoming trainer from the merging company) those arrangements had not been finalised and as of 23 April, three options were still available to Mr Gwilt:

- i. stay in his existing role, with the programme to be done immediately;
- ii. take the new role with the loss of the car and the office, or
- iii. negotiate an exit package.

[40] Mr Gwilt has not disputed that on 23 April the option of staying in his existing role was back on the table for his consideration.

[41] The meeting went ahead as planned. I was provided with Mr Bennett’s notes which were agreed to be an accurate record of the discussions. They show that much the same ground was traversed as on previous occasions. Once again Mr Gwilt explained that he felt he needed more training and once again Mr Woollett responded

by saying that he understood from Mr Carroll that Mr Gwilt was adequately trained. Mr Gwilt also told Mr Woollett that he had not accepted a new job in Australia.

[42] From what the parties recall, and from the meeting notes, the meeting ended without an indication from Mr Gwilt as to whether or not he would take the new role, and without an indication from Mr Woollett as to the timeframe within which his response was required. In short, the meeting ended inconclusively without any resolution of the issues between the parties.

Determination

[43] It is not in dispute that it was part of Mr Gwilt's job to arrange and present the respondent's 2008 training programme. Mr Woollett's repeated and unambiguous requests that Mr Gwilt complete the first step of those arrangements (by producing a training calendar) were therefore reasonable. Nonetheless Mr Gwilt at first ignored them and later went on to state that he would not arrange a training programme until he was provided with further training (over and above the visit planned by Mr Carroll for July.) In effect, he was prepared to do this work only if a prior condition was met: the provision of a trip to the U.S. for "factory training." Mr Woollett was satisfied that Mr Gwilt did not require this trip and did not plan to send him on one before the 2008 training season. He made both these points clear to Mr Gwilt.

[44] In these circumstances, both Mr Gwilt's conduct and his statements amount to a refusal to perform training work that was part of his role.

(iii) Was it fair and reasonable for Mr Woollett to proceed to dismiss Mr Gwilt for this?

[45] Mr Woollett told me that by the end of the meeting of 23 April he felt that he was being stonewalled and undermined. He told me he was under pressure from his manager in Australia to resolve the issues and progress arrangements for the training season, and felt frustrated that Mr Gwilt was not responding to what he saw as attempts on his part to find a solution that would work for both BSNZ and for Mr Gwilt personally. He was also sceptical about Mr Gwilt's commitment to BSNZ given Mr Gwilt's exploration of job opportunities in Australia.

[46] On 24 April, he sent Mr Gwilt a letter of dismissal.

Determination

[47] I begin by acknowledging that, up to the point of termination, Mr Woollett treated Mr Gwilt fairly and with good faith. I am satisfied that he set out to support Mr Gwilt first by offering his personal help with presentations and later by proposing that Mr Gwilt be relieved of the training duties. He also offered to supply Mr Gwilt with professional counselling assistance. Mr Gwilt refused all the help that was offered to him, failed to prepare the training programme and maintained what I find to have been an intractable and unreasonable insistence that his employer provide unnecessary additional training. In these circumstances, Mr Woollett's frustration with Mr Gwilt was not surprising.

[48] Nonetheless I conclude that the termination was unjustified for the simple reason that Mr Gwilt was not warned. Mr Woollett should have told him, in plain terms, that the consequence of continued failure to produce the training calendar would be dismissal. The respondent says that that this could be inferred from the exchanges between the parties up to and including the meeting of 23 April, and from Mr Woollett's letter of 18 April where he said, as recorded at paragraph [37] : "*in the absence of acceptable responses at the meeting your employment is in jeopardy.*"

[49] I do not accept this submission. An employment warning cannot be implied. It must be express and unequivocal. Nor is an employee expected to "fill in the gaps." It is clear with the benefit of hindsight that Mr Woollett was not prepared for Mr Gwilt to take any longer to consider the options. While this position was entirely reasonable it had to be conveyed clearly and expressly to Mr Gwilt. Unfortunately, it was not.

[50] In short, no proper warning was given. The termination of employment was therefore procedurally unfair and has not been justified.

(iv) Remedies

[51] It was very clear from his evidence and indeed his demeanour before the Authority that Mr Gwilt was very shocked and distressed at losing his job. In addition he has been unsuccessful in finding permanent work. At the time of the Authority's investigation meeting Mr Gwilt remained unemployed apart from a brief period of casual work which had paid him \$2,376.19. He told me that as at 1 October 2008 he had applied for 95 positions of which some, such as a truck driving job, were at a lower level than his previous position. He provided a log of these job search efforts.

[52] Mr Gwilt seeks reinstatement to his role as training manager, \$20,000 compensation for hurt and humiliation, and lost earnings and benefits. In his witness statement he set out those losses as follows:

Salary	\$ 19,799.00
Profit share FY 2007 (approximately)	\$1,657.00
EVA bonus	\$274.00
5% company contribution to Super/Health	\$990.00
Car (net)	\$5174.10
(plus four weeks loss of use for notice period)	\$1,057.00
Holiday pay	Not quantified

[53] In closing submissions the claim for loss was extended "*to the date of reinstatement or if not reinstated, to the date of the Authority's determination.*" Annual remuneration was specified as being:

Salary	\$52,750.00
Profit share FY 2007	\$4,414.00
EVA bonus	\$729.00
5% company contribution to Super/Health	\$2,638.00
Car	\$13,785.00

[54] The respondent has not challenged the accuracy of this information about Mr Gwilt's remuneration package.

[55] A claim for travel and accommodation costs of \$10,588 (associated with job search) and a claim for interest were also added in submissions.

Determination

[56] This is a case where contributory conduct is high. Mr Gwilt has largely been the author of his own misfortune. The respondent's evidence on this point was reinforced by Mr Gwilt's own evidence. In my meeting with him I formed a view that he lacked any awareness of the effects of his own behaviour and refused to take any responsibility for any part he played in the situation. I set the level of contributory conduct at 50%.

[57] In such circumstances I consider it would completely untenable for him to resume employment with the respondent. I therefore reject Mr Gwilt's claim for reinstatement.

[58] I also reject entirely the claim for travel and accommodation costs associated with job search efforts. Even if I were satisfied that it was within the Authority's jurisdiction to award reimbursement of the costs of job search, I do not consider the costs incurred by Mr Gwilt to be reasonable.

[59] I am satisfied that Mr Gwilt found the termination of his employment very distressing. In the absence of contribution I would have considered an award of \$12,000.00 to be appropriate. With reduction for contribution I set the award at \$6,000.00.

[60] Turning to lost earnings, I accept that Mr Gwilt has made strenuous attempts to mitigate his losses. I consider however that his ongoing unemployment is a result of the economic downturn rather than of the personal grievance. I do not accept that there is a case for awarding lost earnings beyond the three month period set out in s.128 of the Employment Relations Act.

[61] Three months lost earnings (as a proportion of the sums set out in paragraph [54]) amounts to \$15,132.75 (gross) in total. Reduced by 50% for contribution the lost earnings become \$7,566.38. Holiday pay at 8% is payable on this amount.

[62] Finally, compensation for three months loss of the use of the car amounts to a further \$3,446.25 (net.) With reduction for contribution this compensation becomes \$1,723.13.

Summary of orders

[63] **The respondent is ordered to pay to the applicant the following sums:**

- i. \$6,000.00 compensation for hurt and humiliation;**
- ii. \$7,566.38 (gross) lost earnings plus 8% holiday pay, and**
- iii. \$1,723.13 compensation for loss of the use of a company vehicle.**

Costs

[64] The issue of costs is reserved. If the parties cannot resolve that matter between themselves, any request for costs, with submissions in support must be lodged with the Authority within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority