

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 104/10
5147749

BETWEEN TODD KILKENNY
 Applicant

AND BUNNINGS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: D Oliver, Counsel for Applicant
 D France, Counsel for Respondent

Investigation Meeting: 17 February 2010 at Napier

Submissions Received: 4 March 2010 for Respondent
 19 March 2010 for Applicant

Determination: 28 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Kilkenny claims that he was unjustifiably dismissed, effective from 24th October 2008. He also claims that his employer, Bunnings Limited, breached an implied agreement to provide him with a safe workplace, in that he alleges that he was verbally and physically threatened by his manager. Bunnings Limited (“Bunnings”) denies the claims and says that the dismissal of Mr Kilkenny was justified on the grounds that he misused his Bunnings team discount card.

[2] In addition to the evidence of Mr Kilkenny, the Authority heard from Mr Edward Te Paki and there is a written statement from Mr Selwyn Smith. The evidence for Bunnings came from Mr Bill Bond, Ms Melanie Stanaway and Mr David Cook along with a written statement from Mr Brian Feary. All of the available evidence has

been closely considered, albeit it may not be specifically referred to in this determination.

Background Facts and Evidence

[3] Mr Kilkenny initially commenced his employment with Bunnings on 24th July 2002 and worked as a part-time sales person until 27th November 2005. He then commenced a second period of part-time employment from 25th September 2006 until his dismissal on 24th October 2008. The evidence of Mr Bond, the Napier Branch Manager for Bunnings, is that upon his initial engagement in 2002, Mr Kilkenny signed an employment agreement and received the *Bunnings Team Member Handbook*. Upon his second period of employment, Mr Kilkenny signed an employment agreement on 12th September 2006. The Authority has not sighted the 2002 employment agreement; rather there is a position description and an induction checklist, both signed by Mr Kilkenny. The latter document confirms that Mr Kilkenny received an employment agreement and the employee handbook. While the signed 2006 employment agreement has been produced to the Authority, it seems that Mr Kilkenny did not receive a further employee handbook in regard to the second period of employment. The handbook produced to the Authority is the current document in use throughout Bunnings. The evidence of Mr David Cook, the National Human Resources Manager for Bunnings, is that there have not been any changes to the handbook between 2004 and 2006, but he does not have any knowledge of the 2002 handbook.

[4] Relevant to some of the matters under investigation is the following:

(a) Clause 7 of the employment agreement:

Company Handbook

The Company will issue, and from time to time make variations to, a company handbook called "Welcome to Bunnings" (the Handbook) which will set out certain conditions of employment which are not provided in this agreement and are common to most team members. The Handbook will be made available to you at the time of employment. Variations to the Handbook (other than statutory requirements) will be discussed with the Consultative Group before implementation. Variations will be placed on team member notice boards.

(b) Clause 3.10 of the *Bunnings Team Member Handbook* (abridged):

Reselling stock bought at team member discount prices and buying stock for other people at the team member discount rate are considered unauthorised selling of company property.

- (c) Clause 9 of the *Bunnings Team Member Handbook*:

Operating Procedures Manual

Every site has an Operating Procedures Manual. We do not expect you to be familiar with every chapter, but you must be aware of the policies and procedures governing your activity, whether it is your normal role or one you have been asked to fulfil temporarily. It is your responsibility to consult the manual if you are in doubt about a policy or a procedure. This manual covers policy on dress and all other relevant issues.

- (d) Clause 10 of the *Bunnings Team Member Handbook*:

Team members Purchases

Immediately upon joining you will be eligible to buy product from our wide range of stock at team members rates. Team members purchases are available to you and your family members living in your home only. Goods purchased in this way are for personal use and not for re-sale. A team members discount card is issued, it is not transferable and must be shown when making team members purchases. The card may be used for one major building project per 10 year period. The benefit ceases the day you stop working on company premises.

- (e) Clause 4.17 of the *Operating Procedures Manual*.

This sets out in some detail the provisions that apply to staff obtaining the Bunnings team member discount; in particular:

4.17.2 Restrictions and Family Use

The granting of the Team Member Discount Facility is to be regarded as a privilege. This benefit applies only for purchases made for the personal use of the team member and members of the immediate family living in the team member's home. For the purpose of this policy, family means spouse / partner, children, siblings and parents. Purchasing on behalf of others including relations not in the above category, is not permitted.

Discounts will not be given on goods purchased for re-sale, business or trade use. This includes any team members involved in running their own business outside of Bunnings employment.

Abuse of, or acting in contravention of any part of this policy, is expressly prohibited and is regarded as [sic] dismissible offence.

The first incident

[5] On 26th September 2008, Mr Kilkenny attended a formal meeting with Mr Bond to discuss concerns relating to three allegations:

- (i) Releasing materials without proper paperwork while a client account was "on stop".
- (ii) Claiming extra hours on his time sheet than actually worked.
- (iii) Communication with customers likely to cause loss of business.

[6] The evidence of Mr Bond is that Mr Kilkenny “*agreed*” with the first two allegations but denied the third. The outcome was that Mr Kilkenny received a formal written warning. Mr Bond says that he typed the warning letter and then went to deliver it to Mr Kilkenny on site. Mr Bond attests that:

“Mr Kilkenny got very loud and started waving his arms around. He moved very close to me and pushed his finger into my chest shouting that I had “just screwed him.” He was loud and threatening.”

The further evidence of Mr Bond is that Mr Kilkenny refused to sign the warning and “*carried on objecting loudly.*” Mr Kilkenny did then sign the warning. It was to remain on his personnel file for six months. The warning cautioned Mr Kilkenny that:

If you fail to correct the above problem/s or there are any further breaches in [sic] similar Company rules, this will result in further disciplinary action, which could result in dismissal.

[7] The evidence of Mr Kilkenny is that after the disciplinary meeting, Mr Bond “*was very aggressive*” towards him. Mr Kilkenny attests that Mr Bond said to him: “*Come on we’ll take our shirts off and roll around in the dirt now*” and that Mr Bond bumped his chest against Mr Kilkenny’s chest. Mr Kilkenny says that he felt so intimidated by Mr Bond that he made a statement to the Police about the incident. However, what Mr Kilkenny fails to say in his evidence is that he never made the complaint to the Police until 5th February 2009, some 19 weeks after the alleged event. The statement made to the Police includes:

I was advised by my legal council [sic] to make this statement to [sic] Police as a reference to Employment Relations Court case against Mr Bill BOND.

On 9th April 2009, the Police wrote to Mr Kilkenny. The author of the letter, Senior Sergeant Goodall, informs that:

In the statement taken from you by Constable COLLINS on 5 February 2009, you indicated that you did not require any further Police action at that time. On 26 March 2009, you returned to the Police Station advising that you now wished to pursue a prosecution against Mr BOND for assault.

Senior Sergeant Goodall informed Mr Kilkenny that the Police would not be taking any further action in respect of the matter, due to: the extremely minor nature of the alleged assault, the time delay in making the complaint, the lack of independent witnesses to the incident, and Mr Bond’s “*categorical denial*” that any assault occurred.

The second incident leading to dismissal

[8] On 14th October 2008, as it was not a working day for him at Bunnings, Mr Kilkenny was engaged in laying some carpet at another work site. The evidence of Mr Kilkenny is that another person on the work site, an engineer named Matt, indicated he was going to the Bunnings outlet in Hastings. Mr Kilkenny says that he asked Matt to buy some filler (RTV) for him as Mr Kilkenny needed the filler to patch some vinyl at his home. As the RTV cost about \$20, Mr Kilkenny gave this sum of money to Matt along with his Bunnings team discount card. The further evidence of Mr Kilkenny is that he phoned ahead to Bunnings (Hastings) and spoke to a person named Warren, to say that Matt would be coming in to buy the RTV on behalf of Mr Kilkenny. The reason for ringing ahead, Mr Kilkenny says, is that he wanted to be “*upfront about all of this.*” Matt subsequently returned with the RTV and some change from the \$20. However, in addition to the RTV, Matt also purchased on the discount card, three other items, bringing the total purchase to \$89.23. The evidence of Mr Bond is that without the staff discount, the purchase would have amounted to \$137.50.

[9] Mr Bond attests that on 14th October 2008, the Store Supervisor for the Hastings store informed him that Mr Kilkenny’s discount card had been used by another person. On 15th October, Mr Bond phoned Mr Kilkenny to arrange a meeting for 18th October (the next working day for Mr Kilkenny), and that he should arrange to have a representative accompany him. Mr Bond says that on 18th October he went to find Mr Kilkenny to have him attend the pre-arranged meeting. It is the evidence of Mr Bond that Mr Kilkenny refused to attend the meeting and he became “*very loud*” and started shouting and waving his arms about. Mr Kilkenny said he would not attend a meeting until he knew exactly what the evidence against him was. Mr Kilkenny says that the first he knew of the allegations was when he came to work on 18th October. Mr Kilkenny attests that upon being approached by Mr Bond and insisting that he be told about the details of the allegations, Mr Bond told him to; “*get in his fucking office.*”

[10] It was subsequently agreed that Mr Kilkenny would attend a meeting on 22nd October 2008. Mr Kilkenny signed a “*You need to know*” form that Bunnings uses in

such circumstances. The form advised Mr Kilkenny that three matters would be discussed:

- (i) Removing goods without paperwork;
- (ii) Misuse of the team discount card; and
- (iii) Not turning up for work on a rostered working day.

[11] Due to Mr Kilkenny arriving for the meeting on 22nd October and not having a support person available, the meeting was postponed until 23rd October. Mr Kilkenny was then accompanied by Mr Selwyn Smith. Mr Bond was accompanied by Ms Melanie Stanaway. The outcome was that on 24th October 2008, Mr Kilkenny was informed that his employment would be terminated. This was confirmed in a letter from Mr Bond dated 28th October 2008. The letter informed that the other two matters raised with Mr Kilkenny were “*still under investigation,*” but in regard to the misuse of the discount card, Mr Kilkenny’s explanations were not sufficient to mitigate his actions. Mr Kilkenny was informed of his right, under the provisions of the employee handbook, to appeal the decision within 5 days. The right of appeal advice is not correct, as clause 4 of the *Bunnings Team Member Handbook* provides:

4. Employment Problems

If you have an employment problem or a personal grievance, then you must notify your Area Manager within 30 days.

An in-house Arbitration Committee of four would [sic] be convened, made up of two team member representatives of your choice, and two management representatives. The meeting would [sic] be chaired by a member of management not connected with the grievance. This Arbitration Committee will have the right to call witnesses, weigh up the facts and recommend a settlement. If a satisfactory outcome is not achieved, then you can lodge an employment problem or personal grievance claim under the standard procedures outlined in the Employment Relations Act 2000.

[12] While I conclude that the drafting of the letter by Mr Bond confirming the dismissal of Mr Kilkenny was careless in several regards, there is no evidence that Mr Kilkenny was prejudiced in any manner by the incorrect time frame for the right of appeal being notified. Nor has this been claimed with any real conviction by Mr Kilkenny. Nonetheless, as it appears that Mr Kilkenny did not receive the letter within the (incorrect) 5 day appeal period, and hence may have mistakenly believed that the right to appeal his dismissal had expired, I asked him at the investigation meeting to explain any grounds that he might have advanced had he chosen to do so within a period of 30 days. Mr Kilkenny did not advance any tangible matters that had not already been considered at the meeting on 23rd October 2008 and I am satisfied that there has been no unfairness visited upon him in this regard. Nonetheless, in

circumstances where different facts exist, this may not be the case and it is recommended that be more observant of its obligations in exercising its disciplinary processes and the manner in which its correspondence is drafted.

Analysis and Conclusions

Was Mr Kilkenny unjustifiably dismissed?

[13] In deciding this question I must apply the test provided by s103A of the Employment Relations Act 2000 and determine, on an objective basis, whether the action of Bunnings in dismissing Mr Kilkenny, was what a fair and reasonable employer would have done in the circumstances.

[14] Mr Kilkenny says that Bunnings failed to carry out a fair and reasonable investigation into the circumstances surrounding the use of the discount card. It is also submitted that the process adopted by Bunnings was defective and “severely disadvantaged” Mr Kilkenny. It is submitted that while Mr Bond intended to conduct a disciplinary meeting on 18th October 2008, Mr Kilkenny did not have any allegations before him. I accept that initially, this was probably so. The evidence of Mr Bond is that he phoned Mr Kilkenny on 15th October at 9:15a.m. “*to discuss the issue*” of the use of the discount card. Mr Bond also says that he advised Mr Kilkenny that “*a witness or representative was appropriate*” for the anticipated meeting on 18th October. Clearly, Mr Kilkenny opposed with some vigour, attending a meeting on that day, on the basis that he wanted to know more about the allegations against him. As a consequence, the meeting was postponed. The evidence is that upon the protestations of Mr Kilkenny, Mr Bond; “*... went through the allegations and a brief outline of the evidence.*” Mr Bond says that Mr Kilkenny wanted to discuss the evidence then but he was informed that this would take place later at a meeting. Mr Kilkenny was then presented with the “*You need to know*” form that set out the allegations. The form also sets out that Mr Kilkenny was entitled to:

- have a witness or representative with you during the meeting
- know that the outcome of the meeting could affect your employment (either with a warning or termination)
- have an opportunity, to put your side of the matter
- have an opportunity, before and during the meeting, for confidential discussions with your witness or representative

[15] Therefore, I conclude that as of some time on the morning of 18th October 2008, and well before the subsequent disciplinary meeting on 23rd October, Mr Kilkenny: had the allegations he was facing explained to him by Mr Bond, had viewed in writing, the allegations he was expected to answer to, along with his entitlement to be represented; he knew the possible outcome of the meeting, and he was aware that he would have an opportunity to give an explanation for consideration by Bunnings. Furthermore, Mr Kilkenny signed an undertaking that he had read, understood and accepted the content of the “*You need to know*” form. Given all of this, I do not accept that Mr Kilkenny was subjected to a defective process in regard having the allegation pertaining to the misuse of the discount card put to him.¹ Additionally, I doubt that Mr Bond spoke to Mr Kilkenny in the manner that Mr Bond alleges in regard to Mr Kilkenny being required to go to Mr Bond’s office on 18th October 2008.

[16] In regard to the submission that Mr Bond failed to carry out a fair and reasonable investigation, it is difficult to see what more would have been achieved had Mr Bond interviewed Matt or Warren, as Bunnings accepted Mr Kilkenny’s explanation pertaining to his involvement with them but concluded that his explanation did not in any way mitigate the unauthorised use of his discount card. I find that this was a conclusion that Bunnings could fairly and reasonably arrive at based on the evidence that was available at the conclusion of the interview with Mr Kilkenny on 23rd October 2008.

[17] It has also been submitted for Mr Kilkenny that he should have received a copy of the notes taken at the meeting on 23rd October, in order to ensure that his explanation had been accurately recorded. The evidence of Mr Bond is that Mr Kilkenny did not ask for a copy of the notes. Having now seen the notes, Mr Kilkenny has not taken any issue with the content, except to note that it is not recorded that Mr Bond inferred that unless Mr Kilkenny was “*gay*” the discount card could not be used by a “*friend*.” Apart from the fact that is not the context in which Mr Bond was speaking, (Mr Kilkenny appears to have attempted to justify the misuse of the card on the basis that Matt was his “*partner*” in a business sense) there is no other relevance in

¹ The Authority has not been required to examine the other two allegations against Mr Kilkenny as he was not subjected to any disciplinary outcome concerning them.

regard to any allegation of unfairness related to Mr Kilkenny not receiving the notes of the disciplinary meeting.

[18] Mr Kilkenny also says that the manager prior to Mr Bond ran a “*lax depot*” up until his departure in 2008.² Mr Kilkenny appears to be suggesting that the use of his discount card by another person may have been acceptable to the previous manager, but Mr Kilkenny has not provided any evidence that he, or any other employee, was able to let an unauthorised person use a discount card with the approval of the previous manager. Mr Bond also gave evidence pertaining to a meeting he held with all staff (including Mr Kilkenny) on 11th September 2008, shortly after taking over as manager of the branch. Mr Bond attests that he: “... *made it very clear to all staff that the rules would be tightened and that I had high expectations of all team members to stick to the rules.*” Because there is no evidence of any disparity of treatment in regard to the use of a staff discount card in similar circumstances to that of Mr Kilkenny, or at all, I conclude that there is no merit to this aspect of his arguments.

[19] Additionally, Mr Kilkenny says that he: “... *was never given the rules covering use of the team card so I did not know that it was considered wrong to get someone else to pick-up my purchase (act as an agent for me).*” Mr Kilkenny attests that there is nothing in the rules prohibiting what he did.

[20] It seems that there are two possible aspects to the misuse of the discount card. Firstly, there is the fact that Mr Kilkenny allowed his card to be used by an unauthorised person (Matt) who not only made a purchase on behalf of Mr Kilkenny, but also made several purchases, presumably for himself, at a discount rate. Then it seems to have been inferred that the purchase of two tubes of RTV by Matt, on behalf of Mr Kilkenny, was for business gain by Mr Kilkenny rather than personal use, but this does not appear to have been explored to any real extent. The letter of 28th October 2008 confirming the dismissal of Mr Kilkenny, makes a rather cryptic reference to the reason for the dismissal being; “Miss-use [sic] of team card.”

[21] The rules in regard to the proper use of the discount card are to be found in the *Bunnings Team Member Handbook* (clauses 3.10 and 10) with more detail being provided by clause 4.17 of the *Bunnings Operating Procedures Manual*. In regard to

² Mr Bond commenced his employment at the Napier branch of Bunnings on 1st September 2008.

the former document, while it appears that Mr Kilkenny was not issued with a handbook upon the commencement of his second period of employment in 2006, despite his evidence to the contrary, I conclude that it is more probable than not that he did receive a copy of it when he initially started work with Bunnings in July 2002, working through to November 2005. On the balance of the evidence, I believe that it is reasonable to conclude that Mr Kilkenny was aware of the requirements in the handbook pertaining to the use of the card in that: “... *purchases are available to you and your family members living in your home only,*” and that the card is “*not transferable.*”³

[22] The consequences of any abuse or contravention of the team members discount policy is to be found in the *Operating Procedures Manual* at sub-clause 4.17.2 [see paragraph 4 above]. There is an express prohibition of any abuse or contravention of the policy and any such transgression is; “... *regarded as [sic] dismissible offence.*” Apparently, the manual is kept in a cupboard in the team room at the Napier site and it seems entirely possible that Mr Kilkenny may not have ever sighted it. But in any event, there is no mention in the employment agreement of it being a component of the overall conditions of employment (as compared with the handbook) hence the contractual status of the manual is problematic, particularly given that notice of its presence and location is not clearly promoted.

[23] While Mr Kilkenny has raised some doubts as to his overall knowledge of the requirements pertaining to appropriate use of the discount card, I believe that on the balance of probabilities, it is reasonable to conclude that Mr Kilkenny had knowledge of the policies pertaining to the proper use of the card to such degree that he knew that he should not allow an unauthorised person to use the card, and that to do so, would be treated as serious misconduct by his employer. There is also the fact that Mr Kilkenny had been issued with a warning only one month beforehand and that this warning cautioned him that if: “... *there are any further breaches in [sic] similar Company rules, this will result in further disciplinary action, which could result in dismissal.*” Taking all of this into account, along with the position espoused by Mr Cook, that the use of the card is a “*significant*” privilege, that Bunnings insist should not be abused, and any misuse is regarded as serious; I conclude that it was open to

³ The evidence of Ms Stanaway is that during the disciplinary meeting on 23rd October 2008, Mr Kilkenny; “... *made it clear that he knew that the Bunnings team discount card could only be used by himself or his partner or a family member that lived with him. Mr Kilkenny also stated that he understood that the person using the card needed some form of identification.*”

Bunnings to treat the misuse of the card as serious misconduct and that it was fair and reasonable to impose the sanction of dismissal.

Was there a breach of the implied duty to provide a safe workplace?

[24] I have to say that I found this claim to be misguided and unmeritorious with the evidence of Mr Kilkenny and Mr Te Paki being largely unreliable. I conclude that while there may have been some mutual dislike between Mr Bond and Mr Kilkenny, I do not accept that this manifested itself in the manner attested to by Mr Kilkenny. I did not find the evidence of Mr Kilkenny on this matter to be credible and the evidence of Mr Bond is preferred. Furthermore, I cannot help but conclude that the complaint to the Police was an imprudent attempt to give some questionable support to an unsupportable claim

Determination

[25] For the reasons set out above, I find that the dismissal of Mr Kilkenny was an option that was fairly and reasonably available to the employer in all the circumstances. I find that the dismissal of Mr Kilkenny was justified and that he does not have a personal grievance. The claim is dismissed.

[26] I also find that there was not a breach by Bunnings of the implied duty to provide a safe workplace and this claim is dismissed.

Costs

[27] Costs are reserved. I note that the applicant is legally aided and while it is unlikely that a recovery of a contribution to its costs is available, the respondent has 28 days from the date of this determination to file and serve submissions with the Authority should it wish to do so. In this event, the applicant has a further 14 days to file and serve submissions in response.

K J Anderson
Member of the Employment Relations Authority