

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 239/09
5158374

BETWEEN MICHAEL KIMBER
 Applicant

AND NEW ZEALAND FIRE
 SERVICE
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Simon Mitchell, counsel for Applicant
 Andrew Scott-Howman, counsel for Respondent

Investigation Meeting: 2 and 3 June 2009

Determination: 16 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated the unresolved personal grievance of Mr Michael Kimber who claims that he was unjustifiably dismissed.

[2] Until his dismissal in March 2009, Mr Kimber was employed by the New Zealand Fire Service (NZFS) as Training Officer for the Bay of Plenty-Waikato fire region, a position he had held for about 13 years.

[3] The dismissal was confirmed on 24 March 2009 by letter from Mr Owen Kinsella, the NZFS Manager/Commander of the fire region, who advised Mr Kimber that he was being dismissed with one month's notice for repeatedly failing to attain the standard of performance required of him.

[4] Following his dismissal Mr Kimber sought mediation. That process took place on 27 April 2009 but did not resolve the grievance.

[5] Mr Kimber then applied under s 127 of the Employment Relations Act 2000 for an order requiring the NZFS to reinstate him pending the full investigation by the Authority of his personal grievance claim.

[6] A timetable for an early substantive investigation meeting was agreed with counsel, Mr Mitchell and Mr Scott-Howman, removing the need for the interim reinstatement application to be determined.

[7] It is contended for Mr Kimber that his dismissal was unjustified because his performance had been assessed against his ability to attain certain formal qualifications rather than his competence to deliver training of a certain standard to recruits. The qualifications had been developed under the New Zealand Qualifications Authority (NZQA) Unit Standards framework which the NZFS had adopted in mid-2007.

[8] There is no dispute between the parties that despite repeated attempts, Mr Kimber had been unable to obtain a pass in Unit Standard 3272. The NZFS considered that as a consequence he was ineligible to be assessed on Unit Standard 20395, so he did not achieve a pass for that either. The subject of those unit standards is the wearing and operating of breathing apparatus in emergencies. Mr Kimber was advised by the NZFS of its view that he could not competently perform his training work without passing both.

[9] The NZFS made no complaint or criticism in relation to the standard of training that was being provided to recruits by Mr Kimber. As submitted by Mr Mitchell, the quality of his work in that regard could have been assessed, as with anyone who teaches students. It is clear that Mr Kimber was not dismissed for failing to deliver, to an acceptable standard, training to student recruits.

[10] It was contended for Mr Kimber that the employer's focus on his ability to obtain any particular unit standard failed to take account of the extent to which contractually he was required to attain any formal qualifications.

[11] Of relevance in this regard is the purpose of the Training Officer job which was described in the Position Description in the following way:

Training Officer is responsible for meeting the agreed training and support needs of both career and volunteer brigades by ensuring effective operational focused training, and support activities.

[12] In relation to Technical Knowledge, the Position Description provided:

Thorough knowledge of NZFS operational requirements in regard to operational standards and tasks undertaken in the full range of incident management.

[13] There is no mention in the Position Description of any requirement to attain any prescribed qualification such as Unit Standards 3272 and 20395.

[14] The claim is therefore that the NZFS did not have any basis for adjudging Mr Kimber to be not competent. Accordingly it is contended the employer had no grounds on which to dismiss him.

[15] As remedies Mr Kimber strongly seeks reinstatement to his position of Regional Training Officer, reimbursement of wages lost as a result of his dismissal and compensation for hurt feelings, humiliation and general distress.

Justification for dismissal

[16] The test of justification is contained in s 103A of the Employment Relations Act 2000, which requires the question of whether a dismissal is justifiable to be determined:

... on an objective basis, by considering 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 ... occurred.

[17] The attainment of the unit standards became the object of a formal performance management process administered to Mr Kimber. The explanation given by Mr Kinsella for taking that step was:

... the unit standards are mainly an objective measure of a minimum standard that we consider we can reasonably expect of our trainers. Furthermore, it is clearly reasonable to expect our trainers to hold the standards they teach.

[18] I find that Mr Kimber was dismissed because his employer considered he lacked a particular attribute the NZFS required of its trainers, namely proficiency in relation to the subject of Unit Standards 3272 and 20395. The purpose of those and other unit standards and their adoption by the NZFS, was not simply to provide a recognised qualification that could be achieved or attained. Their purpose and their adoption was to provide an objective way of measuring a trainer's proficiency in

relevant work in which Mr Kimber was required to train recruits so that they could gain that proficiency themselves.

[19] By being required to pass the unit standards Mr Kimber was not I find asked to perform a job that was different to the one he had been appointed to and in which his employer could reasonably expect him to be proficient. What changed was that the measurement of his proficiency was made with reference to the requirements for passing particular unit standards. That change arose from the adoption by the NZFS of the NZQA standards framework in 2007.

[20] There is no suggestion in this case that the relevant Unit Standards were simply arbitrary levels of attainment whose content was of little or no relevance to the work of firemen or those such as Mr Kimber whose job it is to train firemen.

[21] Mr Mitchell and Mr Scott-Howman in submissions both referred to the leading case in relation to dismissal for poor performance; *Trotter v Telecom Corporation of New Zealand Ltd* [1993] 2 ERNZ 659. At page 681 of his judgment, Goddard CJ observed that it was not for the Court (or Authority in this case) to be the arbiter of the standards set by the employer or of the employer's judgement of the question whether the employer's standards have been met.

[22] A similar view was expressed in *Graham v. Airways Corporation of New Zealand* [2005] 1 ERNZ 587, at para.[109]:

Matters of professional performance in a highly specialised occupation are primarily for assessment by the employer and not this Court. If the employer's assessment of that performance was reasonably and fairly open to it to make, the Court will not second-guess it.

[23] As the Court has held in the above cases, it is not a matter for this Authority's judgement as to how the NZQA unit standards came to be adopted by the NZFS. I may observe though that the Fire Service has been an accredited Government Training Establishment since 1998. The NZFS adopted the unit standard scheme in mid-2007 as part of the requirements of being a Government Training Establishment. This has enabled it to assess trainees against unit standards and certify them towards NZQA qualifications. Part of the rationale for this was that the scheme would allow trainees to gain NZQA qualifications and that it would provide an objective, skill-based assessment process.

[24] The Authority is satisfied from the evidence that, in his efforts to pass the Unit Standards, Mr Kimber was fairly and reasonably assessed in his performance. He had every reasonable opportunity given to him to pass. As Mr Scott-Howman submitted, despite considerable support and time allowed to achieve the standards, he failed to do so. It is not open to the Authority through a personal grievance claim to re-assess his proficiency.

Determination

[25] Applying s 103A of the Act, the Authority determines, on an objective basis, that the actions of the NZFS and how NZFS acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal of Mr Kimber occurred. He does not, therefore, have a sustainable personal grievance arising out of his dismissal or the actions of the employer preceding it.

Costs

[26] Costs are reserved. Any application by the NZFS is to be made in writing within 14 days of the date of this determination. Any reply on behalf of Mr Kimber may be made in writing within a further 14 days after that period. Any extension of those periods must be sought from the Authority.