

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 230
5557045

BETWEEN

KEVIN ANTHONY
LENAGHAN
Applicant

A N D

HYDROVAC LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: C English, Counsel for the Applicant
J Douglas, Counsel for the Respondent

Investigation Meeting: 24 May 2016 at Auckland

Submissions Received: 24 May 2016 from both parties

Date of Determination: 6 July 2016

DETERMINATION OF THE AUTHORITY

- A. Kevin Lenaghan was unjustifiably disadvantaged by Hydrovac Limited's actions in suspending him on 9 April 2015.**
- B. Kevin Lenaghan was unjustifiably dismissed by Hydrovac Limited.**
- C. I decline to award any remedies under s124 because Mr Lenaghan's behaviour was causative and blameworthy to the extent that 100% reduction in remedies is appropriate.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] Kevin Anthony Lenaghan was dismissed on 20 April 2015 following allegations he was drinking alcohol and offering it to other employees at work. He submits he was unjustifiably disadvantaged by the suspension on 9 April 2015 and unjustifiably dismissed on 20 April 2015.

Relevant facts

[2] Hydrovac Limited (Hydrovac) is a drainage and waste company. It provides services such as vacuum loading, hydro extraction, wastewater systems, drainage CCTV, spill response and grease traps. Mr Lenaghan was employed on 29 September 2014 as a Hydrovac operator. His job was to assist with and operate heavy machinery including trucks to provide those services. He often worked unsupervised around the city.

[3] This matter focuses on the events that occurred on 28 February 2015. Around 9pm Mr Lenaghan attended a job at the West City Mall in Henderson. Witnesses allege he was drinking alcohol and offering it to co-workers.

[4] Unfortunately it was not until 1 April 2015 that Hydrovac received a complaint from a client about his behaviour. The respondent's Operations Manager, Jason Koenen, investigated the allegations. He interviewed witnesses and received three written statements. He provided this information to the decision maker and General Manager, David Coutts.

[5] Mr Coutts sought advice from an external HR consultant, Steve Punter. He determined Mr Lenaghan should be suspended on 9 April 2016 without consultation.

[6] Three disciplinary meetings were held on 10, 15 and 20 April 2015. Written statements were read out but not given to him at the first meeting.

[7] On 20 April 2015 he was dismissed. He raised a personal grievance on 22 April 2015.

Was Mr Lenaghan unjustifiably disadvantaged in his employment by the suspension?

[8] For a personal grievance of unjustified disadvantage, an employee must show that one or more of the conditions of their employment was affected to their disadvantage by some unjustifiable action by the employer.¹

[9] It is common ground Mr Lenaghan was suspended on pay from 9 April 2015 without prior consultation. There was some suggestion this may not have disadvantaged him because he was on full pay and able to consult his lawyer. I take the view there was disadvantage because he was unable to work. It was a term of his employment agreement that he could work and he was prevented from doing so by the act of suspension.

[10] Given my finding the onus is upon the respondent employer to show on the balance of probabilities that its action was justified.²

[11] The fact that an employer may have reason to suspect that an employee has engaged in serious misconduct, does not of itself justify suspension while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue.³ Imminent danger to the employee or others and an inability to perform safety-sensitive work are circumstances where immediate suspension is justified. The test in each case must be the fairness and reasonableness of the employer's conduct.⁴

[12] The employment agreement between the parties contained a contractual term allowing the respondent to suspend Mr Lenaghan "if we have good reasons to do so".⁵ "Good reasons" are not defined within the agreement. It is likely to be a breach of trust and confidence or serious misconduct that may give rise to a 'good reason.'

[13] There was a good reason to suspend here. The alleged conduct was serious. Mr Lenaghan's job involved work around the city largely unsupervised. The

¹ Section 103(1)(b) Employment Relations Act 2000 (Act).

² Section 103A of the Act.

³ *Singh v Sherildee Holdings Ltd t/a New World Opotiki* EmpC Auckland AC53/05, 22 September 2005 at [91].

⁴ *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587 at [104].

⁵ Clause 5.5 Individual employment agreement dated 29/9/14.

allegations gave rise to reasonable concerns he was unable to safely work off site unsupervised.

[14] The parties met on the day of suspension. There was an opportunity for consultation at the meeting. Given the amount of time that had elapsed since the incident and the investigation, this was not a situation requiring immediate action. There was no basis to deprive Mr Lenaghan of any opportunity to comment. This defect was not minor and did create unfairness.⁶

[15] As a consequence Kevin Lenaghan was unjustifiably disadvantaged by Hydrovac Limited's actions in suspending him on 9 April 2015.

Was Mr Lenaghan unjustifiably dismissed?

[16] It is accepted Mr Lenaghan was dismissed on 20 April 2015. The onus falls upon the respondent to justify whether its actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.⁷

[17] To justify dismissal, an employer must also show, having regard to the resources available, they sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to taking action.⁸

What were the resources of this employer?

[18] The resources of this employer were constrained to some extent. This is a small to medium sized employer. It did not have a human resources department. Both the investigator (Mr Koenan) and the decision maker (Mr Coutts) had little if any employment experience. They were reliant upon the advice of an external HR consultant as a consequence. I have some concerns about the quality of that advice which may be evident in the below decision.

[19] By comparison, Mr Lenaghan acknowledged he had been involved in at least two employment relationship disputes. The evidence was he had obtained two mediated settlements (one for \$50,000) against two former employers.⁹

⁶ Section 103A(5) of the Act.

⁷ Section 103A(2) of the Act.

⁸ Section 103A(3) of the Act.

⁹ Agreed Bundle of Documents (ABD) Document 15 Minutes Meeting 15 April 2015.

[20] His employment experience was also evident in his correspondence. The personal grievance he wrote refers to sections of the Employment Relations Act 2000, Holidays Act 2003 and cites employment law cases. Specific remedies such as “compensation for lost income”; reinstatement; “\$10,000 penalty for breach of good faith”; “\$30,000” compensation under s.123(1)(c); “a penalty of \$30,000 for breach of employment agreement” are also sought.¹⁰

[21] In comparison to the respondent, Mr Lenaghan was well aware of his legal rights and obligations during the material period of this dispute.

Was there evidence of conduct before the employer that Mr Lenaghan could have been dismissed for?

Grounds for dismissal

[22] The grounds for the dismissal were that he was found in possession of alcohol in his car at the worksite, offered another staff member an alcoholic drink and his breath smelt of alcohol.¹¹

[23] There was no evidence to support the conclusion Mr Lenaghan’s breath smelt of alcohol. This does not mean the dismissal was unjustified if the remaining grounds constitute misconduct he could have been dismissed for.

[24] I do not accept the applicant’s submission drinking alcohol near the worksite in his car outside of work hours was not misconduct. Mr Lenaghan would have been at the time in charge of a motor vehicle. He was due to start work where he would be operating heavy machinery including a truck. It could have been a criminal offence to drive under the influence of alcohol.¹² Offering alcohol to colleagues at a safety sensitive worksite would also have had serious consequences. These two grounds, if proven, were misconduct a reasonable employer could have dismissed him for.

Evidence for dismissal

[25] The evidence of Mr Lenaghan’s conduct was in three written statements from two co-workers Eti Meleisea and Alan Osoo and the client complainant. All of these

¹⁰ ABD Document 22 Personal Grievance letter dated 22 April 2015..

¹¹ ABD Document 21 Letter of termination dated 20 April 2015.

¹² See ss12 and 58 Land Transport Act 1988. It is an offence to drive a motor vehicle while under the influence of alcohol or drugs.

statements confirmed Mr Lenaghan had been seen under the influence and/or drinking alcohol while on the worksite.

[26] Mr Ososo's statement gave evidence of being offered alcohol by Mr Lenaghan. He alleged Mr Lenaghan was under the influence of alcohol, had been drinking all night and offered him a bottle of Smirnoff vodka. I do not accept the applicant's submission Mr Ososo's statement was unclear about what he saw. It is reasonable to infer when Mr Ososo states Mr Lenaghan offered him "a glass bottle of Smirnoff" that he was drinking alcohol. The context leaves little doubt of what Mr Ososo was alleging Mr Lenaghan was doing. At the time Mr Lenaghan denied and continues to deny drinking alcohol that evening or offering anyone else alcohol.

[27] Mr Meleisea's statement largely confirms Mr Ososo's statement. The only inconsistency is the type of alcohol – he says it was a six pack of beer. The applicant now challenges its accuracy and also its inconsistency with Mr Ososo's statement. No error of this nature was raised at the time of the dismissal for investigation. In my view it is an explainable mistake. Mr Ososo used the word 'six pack' to describe the vodka when speaking to Mr Coutts below. This is more commonly used to refer to beer. This may explain why Mr Meleisea may have assumed he meant beer when he spoke to Mr Ososo.

[28] The client complainant alleges he was seen by one of his workers in his car consuming alcohol. His evidence is hearsay. However there was no suggestion the client made the story up. Rather Mr Lenaghan now suggests there was a mistaken identification. This was not raised at the time of the dismissal. This was not explored at hearing by summoning of the client witness.

[29] The evidence was sufficient for the respondent to start a disciplinary proceeding.

Dismissal decision

[30] The respondent preferred Mr Ososo's and the client complainant's evidence. From Mr Coutts evidence his conclusion was based upon an assessment of Mr Lenaghan's truthfulness.

[31] There was a reasonable basis for the respondent to conclude Mr Lenaghan was being untruthful. He was evasive and contradictory. Throughout the disciplinary

process he would refer to evidence that could corroborate his version of events but never produced it. He alleged his ex-partner and an employee would say he wasn't drinking that day¹³. His ex-partner's evidence only covered what he did up to 7.30 pm not 9 pm.¹⁴ He referred to a recorded telephone conversation with Alan Oso to confirm he was not drinking, then states he "couldn't remember whether he recorded it or not."¹⁵ He then repeats the allegation that he recorded a conversation with Mr Oso in his personal grievance letter dated 22 April 2015.¹⁶ At hearing when questioned about this he confirmed there never was any recording.

[32] Mr Lenaghan's untruthfulness was best shown when questioned about his previous convictions for dishonesty offending. He admitted theft of furniture in 1996 and confirmed to me under oath there was no other dishonesty offending. Under cross-examination it was put to him that he had also been convicted of impersonating a pilot in 2003. He admitted this and then also admitted he had convictions for benefit fraud in 2006-7.

[33] This evidence was substantially helpful in assessing Mr Lenaghan's veracity.¹⁷ It demonstrated an inability to refrain from lying when under a legal obligation to tell the truth. The convictions for dishonesty also indicate a propensity for dishonesty. This leads me to conclude it was more probable Mr Lenaghan was untruthful in his denials about the alleged conduct.

[34] This raised doubt about the truthfulness of Mr Lenaghan's evidence he produced at hearing. During the disciplinary process he had alleged Smirnoff vodka "was not something that he would drink in any case"¹⁸. At hearing this changed to an alleged physical reaction to vodka. He produced a medical certificate dated 26 February 2016 that stated "he might have a reaction to vodka".¹⁹ I had concerns about this medical certificate. It was produced late, 10 months after the dismissal had occurred. It was based upon Mr Lenaghan's reported symptoms as opposed to any diagnostic testing. It used equivocal language "might" as opposed to any diagnosis.

¹³ ABD Document 14 Minutes 10 April 2015 meeting.

¹⁴ ABD Document 20 Minutes 20 April 2015 meeting.

¹⁵ ABD Document 15 Minutes 10 April 2015 meeting.

¹⁶ ABD Document 22 Personal Grievance Notice 22/04/2015.

¹⁷ See s.37 Evidence Act 2006 regarding veracity in civil proceedings. The Court in *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 117 at [81] approved by the Court of Appeal *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340 at [24] also held there is guidance from settled principles of common law and relevant provisions of the *Evidence Act 2006*, even though it does not govern proceedings in the Authority.

¹⁸ Document 15 ABD Minutes 15 April 2015 meeting.

¹⁹ Medical Certificate dated 26 February 2016 Exhibit A produced by K Lenaghan 24/05/16.

It did not specify he is likely to have had this reaction to vodka in February 2015 when the incident occurred. It does not refer to any history of medical treatment for this reaction to vodka. It did not identify what was in vodka that caused the allergy.

[35] Mr Lenaghan then produced at hearing a further letter that set out his medical history.²⁰ This did not confirm any vodka reaction. It did however confirm he was a binge drinker.²¹ It appeared more probable that he had a tolerance for alcohol including vodka as opposed to any reaction. Even if there had been previous medical advice to avoid vodka, I have to wonder why this was never raised with his employer before dismissal. His evidence does not ring true.

[36] I have some doubt about the late raising of his explanation of mistaken identity. Mr Lenaghan for the first time in evidence filed on 2 May 2016 states this was a case of mistaken identity. He alleged he saw Alan Ososo driving his truck to a local bottle store and that Mr Ososo is known to continuously drink alcohol. He did not summons Mr Ososo for hearing. When asked why he did not tell the respondent about this earlier he said “it was because Dave [Coutts] did not ask”. His Counsel suggested he was naive. I do not accept this. He has extensive experience with personal grievances.²² It can be reasonably inferred he would have known to raise this explanation at the time given his knowledge.

[37] Mr Coutts has since re-interviewed Alan Ososo. Mr Ososo accepted he went to a bottle store to purchase cigarettes accompanied by Mr Lenaghan. It was there Mr Lenaghan purchased a six pack of Smirnoff vodka which he opened and consumed onsite and then offered Mr Ososo a drink which he refused.

[38] I can only infer the delay was deliberate. Mr Lenaghan did not wish the respondent to investigate this at the time because a liquor store would have had records of that night including CCTV footage, receipts and staff that may have seen these men. It is doubtful the store would have retained CCTV footage or be able to provide any of this evidence now.

²⁰ Letter Wai Health Clinic to K Lenaghan dated 31 August 2015 Exhibit B produced by K Lenaghan 24/05/16.

²¹ Letter Wai Health Clinic to K Lenaghan dated 31 August 2015 Exhibit B produced by K Lenaghan 24/05/16.

²² See paras. [19] to [21]; ABD Document 15 Minutes 15 April 2015 meeting.

[39] I do not place much weight upon the evidence of his private investigator about where his car was parked. This was not before the employer and based upon Mr Lenaghan's self-reporting about the location of his car that evening.

[40] Taking these matters into account, a reasonable employer could have concluded Mr Lenaghan had been seen drinking alcohol at the worksite and offering alcohol to workers. There was evidence Mr Lenaghan had conducted himself in a manner that a reasonable employer could have dismissed him for.

Was the process leading to dismissal what a fair and reasonable employer could have done?

Investigation

[41] The investigation was undertaken by Jason Koenan, Operations Manager. He took a file note of the complaint then attempted to contact all persons involved within a short timeframe and asked them to provide a written statement. No further investigations were required of the respondent based upon Mr Lenaghan's responses during the disciplinary process.

Were the concerns properly raised?

[42] The concerns were set out in a letter dated 9 April 2015.²³ As noted above these were not the same concerns the respondent concluded gave rise to the dismissal. The allegation his breath smelt of alcohol was never raised with Mr Lenaghan. I would consider this minor and did not create unfairness because of my conclusions there was serious misconduct.²⁴ However that is not the end of the matter.

[43] Mr Lenaghan requested but was not provided all of the material Mr Coutts had before him at the time he made the decision. Although I accept Mr Coutts read the three central witness statements at the first disciplinary meeting, this was insufficient to discharge his obligations as a reasonable employer. Mr Lenaghan should have received a copy of those statements and notes taken by Mr Koenan about what witnesses had told him as well as three other witness statements. The additional material may have had little bearing upon the final decision at the time but fairness required that he be given it.

²³ ABD Document 12 Letter Hydrovac to K Lenaghan dated 9 April 2015.

²⁴ Section 103A(5) Employment Relations Act 2000.

[44] I accept Mr Coutt's evidence the respondent tried to agree a process for Mr Lenaghan to receive the witness statements because some witnesses feared retaliation²⁵ and another was an existing client requiring some sensitive handling. However the employee witnesses were known to Mr Lenaghan. There was no reason not to provide the statements with a restriction on contact. By the second disciplinary meeting Mr Lenaghan had already contacted Mr Ososo.

[45] I reject the submission Mr Lenaghan was not given an opportunity to seek representation. He was invited to bring a support person to the meetings.²⁶ He was asked at the first meeting about his support person.²⁷ At the beginning of the second meeting on 15 April 2015 he had been advised by his barrister to "tell it as it happened."²⁸ At the third meeting he states he had "already spoken to his barrister about interim reinstatement" and would be filing a personal grievance.²⁹

[46] Although Mr Lenaghan was also given an opportunity to question the witnesses,³⁰ this was insufficient to discharge the respondent's obligation to provide a copy of the 'complaints' in the first place. This defect was not minor and did create unfairness.

[47] If the concerns were not properly raised with Mr Lenaghan, he cannot have had an opportunity to be heard and the respondent cannot have genuinely considered his reply. In the circumstances Kevin Lenaghan was unjustifiably dismissed.

Remedies

[48] Having found there was a personal grievance, I am required to consider remedies. A global approach to remedies is warranted because the unjustified disadvantage of suspension has led to the unjustified dismissal.

Lost remuneration

[49] I must order payment of the lesser of a sum equal to proven lost remuneration or to 3 months' ordinary time remuneration.³¹ Mr Lenaghan has an obligation to

²⁵ ABD Document 14 Minutes meeting 10 April 2015.

²⁶ ABD Document 12 Letter to K Lenaghan dated 9 April 2015.

²⁷ ABD Document 14 Minutes meeting 10 April 2015.

²⁸ ABD Document 15 Minutes meeting 15 April 2015.

²⁹ ABD Document 20 Minutes meeting 20 April 2015.

³⁰ ABD Document 16 Email S Punter to K Lenaghan dated 15 April 2015.

³¹ Section 128 of the Act.

mitigate loss by seeking alternative paid employment irrespective of whether he seeks reinstatement.³² An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.³³

[50] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like³⁴. No evidence of his efforts to find work has been provided, although he states he found a job 13 weeks later. This does not displace the evidential burden upon him to prove mitigation on the balance of probabilities. He also states his salary received was at a lower pay rate but does not quantify his losses. I decline to award any lost remuneration.

Hurt and humiliation

[51] There is little or no evidence of hurt and humiliation. An award of \$500 to mark the seriousness of the respondent's actions is sufficient. This is subject to contribution.

Contribution

[52] I must consider the extent to which an employee's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the remedies that would otherwise have been awarded (s.124). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.³⁵ A 100 per cent reduction under s 124 may be appropriate, depending on the circumstances, although such a result is likely to be rare.³⁶

[53] Given my finding there was serious misconduct, I take the view 100% reduction in remedies is appropriate. There was conduct that gave "good reason" for suspension to be imposed and a justified dismissal. In my view it was both causative and blameworthy. This is a rare case where 100% reduction is appropriate.

³² *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

³³ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

³⁴ *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

³⁵ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.

³⁶ *Murray Knapp v Locktite Aluminium Specialties Limited* NZEmpC AUCKLAND [2015] NZEmpC 71 at [34].

[54] I decline to award any remedies under s124 because Mr Lenaghan's behaviour was causative and blameworthy to the extent that 100% reduction in remedies is appropriate.

[55] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority