

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 70
5380015

BETWEEN TONY JOHN McINTYRE
 Applicant

A N D PERNOD RICARD NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Brian Fletcher, Counsel for Applicant
 Daniel Erickson and Jake Greenleaf, Counsel for
 Respondent

Investigation meeting: 23 and 24 January 2013 at Blenheim

Submissions Received: At the investigation meeting

Date of Determination: 24 April 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Tony McIntyre, claims he was unjustifiably dismissed by the respondent, Pernod Ricard New Zealand Limited, on 24 February 2012.

[2] Pernod Ricard accepts it dismissed Mr McIntyre but contends the dismissal was justified.

Background

[3] Mr McIntyre was employed as manager of one of Pernod Ricard's Marlborough vineyards, Condors Forest, since December 2001.

[4] On 15 February 2012 Mr McIntyre received a letter from Mr Peter McLeod, the Commercial Manager – South Island. Contained there-in was advice that:

This is a notice advising you of a disciplinary meeting to discuss the allegation of serious misconduct (as outlined in the Employee Handbook), specifically the allegation of, abusing, harassing or intimidating another employee, or threatening behaviour against another employee whilst at work. This relates to the alleged incidents that occurred and is summarised by Tracie Eyles in the document attached.

The allegations are that you were abusive and threatening towards Tracie Eyles, and your use of abusive and offensive language during your interactions with her, has led to her feeling unsafe and harassed. The incidents are outlined in the attached document.

[5] The letter goes on to notify a meeting time and place and advise the misconduct could, if proven, be considered serious and affect Mr McIntyre's continued employment.

[6] Ms Eyles' attached document described five specific allegations/incidents.

[7] The meeting occurred two days later and in the interim Ms Naidoo (Human Resources Manager) had been interviewing various employees either face to face or by telephone. The meeting was attended by Mr McIntyre, who was accompanied by Ms Rosemary Straker (Rose), his Assistant Manager. Pernod Ricard was represented by Mr McLeod and Ms Mala Naidoo. The allegations were discussed one by one and Mr McIntyre responded using notes he had prepared prior to the meeting.

[8] About the meeting Ms Naidoo says:

I started the meeting by thanking Mr McLeod and Ms Straker for attending. I clearly explained that the purpose of the meeting was to discuss the allegations made by Ms Eyles which were set out in Mr McLeod's letter. I also explained that this was an opportunity for Mr McIntyre to provide his feedback on the allegations, outline any explanations and offer any further comments to the matters as addressed. To confirm these issues I read out Mr McLeod's letter of 15 February 2012.

Mr McIntyre was visibly angry and upset throughout the course of the meeting. I recall at one stage in the meeting specifically having to stop the meeting to allow Mr McIntyre time to calm down. ...

[9] Mr McIntyre denies he was angry but accepts he was stressed and upset.

[10] The first complaint relates to events which occurred in February 2010. It takes two parts. The first relates to a comment Mr McIntyre made immediately after being advised of the death of Ms Eyles father-in-law. He accepts he made the comment but

says he did so in a friendly manner and at no time did he think Ms Eyles considered it offensive. The second part of the complaint relates to a telephone conversation said to have occurred the following day. Ms Eyles claims Mr McIntyre commented about the fact she was not at work and in an offensive and abusive way. Mr McIntyre denies the claim and adds the alleged date of the conversation in question is wrong. Ms Straker says she was present when the conversation occurred and supports Mr McIntyre in saying nothing untoward, offensive or rude was said.

[11] Ms Naidoo claims neither the incorrect date nor Ms Straker having overheard the conversation were mentioned during the disciplinary interview.

[12] The second complaint related to an alleged incident during the winter of 2010 but was not pursued by Pernod Ricard on the grounds it lacked sufficient specificity and/or supporting evidence.

[13] The third complaint relates to an event which is also said to have occurred in February 2010. Ms Eyles claims Mr McIntyre addressed her in an offensive way when he found her sending a work-related text to a colleague. Mr McIntyre says the text in question was not work related but more significantly staff had only recently been addressed about not using their phones or texting while operating machinery as it was a health and safety issue. He says he was annoyed to find Ms Eyles texting soon thereafter, but denies losing his temper and swearing at her.

[14] The fourth complaint relates to two conversations said to have occurred in October 2011 and relating to a serious health issue Ms Eyles has. About it, Mr McLeod says:

Ms Eyles said that she went to see Mr McIntyre in October 2011 about pain in her leg. She said that Mr McIntyre asked whether she needed to be replaced. Ms Eyles said that when she questioned what Mr McIntyre meant by that statement, he responded: "We cant (sic) keep f...in around like this I have work to be done it may be time to replace you ...".

[15] Ms Eyles also claims that on her return to work following treatment for the artery issue responsible for the pain in her leg, Mr McIntyre called her into his office. She says Mr McIntyre told her *things have been really good while you have been away and if there was any shit now I know where its come from.*

[16] Mr McIntyre's response is the first conversation actually occurred in August and not October, and he again denies impropriety. He says:

I had used a softly-softly approach with Tracie. I was unsure as to her future with the job having regard to her health problems. I showed concern for Tracie and most certainly would not have even hinted about her being 'replaced'. The focus was on her health and wellbeing.

[17] He adds another employee (Mr Collyns) approached later that day and advised Ms Eyles was concerned about her position. Mr McIntyre says that prompted a second discussion at which he suggested she may wish to avail herself of an EAP service and give priority to her health and wellbeing. Once again Ms Straker says she was present and corroborates Mr McIntyre's denials.

[18] Pernod Ricard say Ms Naidoo and Mr McLeod discussed the response to this allegation but *could not understand* the denial given Ms Eyles had approached Mr Collyns immediately after the meeting advising she was upset by what was said and its implications for her employment.

[19] With respect to the second part of the allegation, Mr McIntyre says that when Ms Eyles returned he simply said it had been really good while she was away. He denies making any other comment and this is again corroborated by Ms Straker.

[20] The fifth and final incident occurred on 7 February 2012. Mr McLeod says:

... Ms Eyles said she had been confronted by Mr McIntyre about a piece of equipment not being greased properly. Ms Eyles said that after she had tried to explain what had happened, Mr McIntyre raised his voice and swore at her.

[21] It is claimed that was followed by a number of negative and expletive laden observations. Mr McIntyre again denies being offensive or yelling as alleged. He says maintenance of the expensive machinery is an issue he constantly raises with staff and the discussion on the day in question was prompted by advice from another employee that maintenance on the machine in question, which was normally operated by Ms Eyles, was not being done. He says:

I told her that there was a standard of service to maintain and that she needed to improve. Others expected a higher standard of servicing. I said that she had been using the machinery long enough to know better.

I explained to Tracie that it was necessary to protect the company's assets as the machinery cost a lot of money.

[22] Mr McLeod says that having canvassed the allegations he asked Mr McIntyre if there was anything else he wanted to add. He says Mr McIntyre became visibly angry but once he calmed down advised *he was going to tell us what he thought of Ms Eyles because he knew he was going to lose his job so it did not matter.* The alleged comments were not complimentary and are said to have been followed by an admission Mr McIntyre's communication style was not the best and staff management was *the hardest thing to work with and manage.*

[23] After the meeting ended Ms Naidoo and Mr McLeod discussed the responses. On 21 February Mr McLeod wrote to Mr McIntyre advising there would be a further meeting on 24 February to discuss the outcome.

[24] In the interim another event occurred. Mr McIntyre took leave on Monday 20 February. He says he received a phone call from Mr Peter McLeod asking to meet at a café that day. Mr McIntyre says he agreed and during the conversation Mr McLeod observed he could *control* the outcome of the disciplinary investigation.

[25] Mr McIntyre goes on to say:

I was initially confused by this remark. I eventually realised Mr McLeod was suggesting to me that I could resign from my position before the final meeting. Mr McLeod referred in discussion with me at this meeting that it would be better for my career if I resigned rather than was dismissed.

[26] Mr McLeod says:

Mr McIntyre has misrepresented what occurred. I phoned Mr McIntyre on 20 February 2012 out of concern. I called him and arranged a meeting because he had seemed very upset and angry during the meeting. I wanted to make sure he was alright.

I was concerned for Mr McIntyre's welfare as his Manager and I was endeavouring to provide him with some support. I tried to convey to him the seriousness of the allegations. Given the pressure he was under I was worried he might do something stupid like contact Ms Eyles and try to talk with her.

I did not suggest or even imply that Mr McIntyre should resign. I may have used the word "control" in the context of him needing to

keep in control of himself in these stressful situations and not do anything inappropriate.

[27] The 24 February meeting occurred as scheduled.

[28] Mr McIntyre was accompanied by his solicitor and Pernod Ricard was represented by Mr McLeod and Mr Mike Insley, the National Viticulture Manager. About it Mr McLeod says:

Mr Insley opened the meeting at 9:00am. He explained that the meeting had been called to communicate the result of the investigation into the issues raised by Ms Eyles and followed on from the meeting held on 17 February 2012.

Mr Insley summarised the allegations and advised that after reviewing the evidence, we were satisfied that the allegations had been upheld. He said that Ms Eyles did not feel safe at Condors Forest and that Pernod Ricard's expectation was that managers provide a safe and enjoyable workplace.

Mr Insley said that Pernod Ricard had provided courses, training and counselling to Mr McIntyre as part of his ongoing training. We had also provided guidance with previous staff challenges as I have described already in this statement and as set out in Mala Naidoo's statement.

Mr Insley said the Pernod Ricard had decided to terminate Mr McIntyre's employment.

[29] It had been decided Mr Insley would deliver the decision as he was the most senior person in Marlborough and as Mr McIntyre's direct manager Mr McLeod felt uncomfortable doing so. Mr McLeod also felt obliged to assist Mr McIntyre after the event and advising dismissal would compromise his ability to do that.

[30] The decision was confirmed in writing.

Determination

[31] As already said Pernod Ricard accepts it dismissed Mr McIntyre. In doing so it also accepts it is required to justify the dismissal.

[32] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is justifiable:

... must 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 could have done in all the circumstances at the time the dismissal ... occurred.

[33] In applying that test the Authority must consider whether:

- a. Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- b. The employer raised its concerns with the employee prior to taking action;
- c. The employer gave a reasonable opportunity for response;
- d. The employer genuinely considered the explanation before taking action; and
- e. Any other appropriate factors.

[34] In respect to resources I note this is a significant employer with an in-house human resource capability. It's process should therefore be capable of withstanding robust scrutiny but I must conclude they fail to do so. I reach this conclusion for the following reasons.

[35] An employer with Pernod Ricard's resources should be expected to conduct a full investigation and question all relevant witnesses yet there is an obvious failure in this respect. The evidence shows Ms Straker was present when a number of the alleged incidences occurred, yet she was not formally interviewed. The failure to interview a significant and relevant witness is a significant deficiency which is, in this instance, compounded. Mr McLeod's evidence (confirmed by Ms Naidoo) is that Ms Straker did comment, albeit briefly, during the meeting of 17 February but was told her input was inappropriate.

[36] Other questions arise as to the efficacy of the investigation. Another witness was Mr Collyns yet answers he gave during the investigation contradicted conclusions reach by Pernod Ricard. For example when asked about the first incident (the phone call regarding Ms Eyles return to work after her father-in-law's death) Mr Collyns accepted the call was nothing more than a *when are you likely to come back?* This, from a witness who was there, falls a long way short of supporting a conclusion Mr McIntyre was abusive.

[37] Similarly I have an admission from Mr McLeod the notes taken by Ms Naidoo of her conversations with various witnesses were not returned for confirmation. That raises questions about their accuracy as does Ms Naidoo's admission both they, and her notes of the disciplinary meeting, were a summation containing key points and included her interpretation of replies as opposed to an verbatim record.

[38] There is then the fact an employer is required to put all concerns along with conclusions that may influence the outcome of an investigation. Again the evidence shows Ricard Pernod fell short in this regard. For example the evidence shows the statement of another of the company's vineyard managers who interacted with Ms Eyles was central to the conclusion reached, yet Mr McLeod accepts neither the notes of her statement nor key points therein were put to Mr McIntyre. Similarly the thought pattern outlined above and which influenced the outcome in respect to that allegation was never put. This type of failure will inevitably render a dismissal unjustified.

[39] There is also evidence of predetermination with witness comments favourable to Mr McIntyre not being considered. For example there was Mr Collyns assertion Ms Eyles should be moved from Condors Forest for the sake of all there and another who reported she was difficult to work with. There is no evidence these points were followed up.

[40] Whilst not an exhaustive list these deficiencies are indicative of various failures in respect to the requirements of s.103A that will render the dismissal unjustified. There are, for example further failures in respect to allowing Mr McIntyre to comment on issues in the mind of the investigators and detrimental to him. The failure to put key evidence, follow leads and confirm statements while relying on *interpretations* of what was heard lead to a conclusion Pernod Ricard has insufficient evidence upon which to base its substantive conclusions.

[41] For these reasons I conclude Pernod Ricard has failed to convince me they can justify the dismissal as it is required to do. The dismissal is unjustified.

[42] There are other matters about which evidence was proffered but which I need not discuss given my ability to reach a conclusion for the reasons outlined above. These include Mr McIntyre's training and the level of assistance he received in respect of addressing what Pernod Ricard saw as high turnover at Condors Forest.

There is also the issue of the café meeting though I will go no further than to observe it was perhaps unwise for Mr McLeod to have approached Mr McIntyre given he was the decision maker then considering Mr McIntyre's future.

[43] The conclusion the dismissal is unjustified raises the question of remedies. Mr McIntyre seeks wages lost as a result of the dismissal, recompense for the loss of other benefits and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[44] There was also a claim for a penalty for a breach of the Act's good faith requirements. Other than reiterating the claims existence, it was not pursued with vigour. Given that and the high threshold for the imposition of a penalty, I will not consider this claim further. Reinstatement was also claimed but that was withdrawn at the hearings commencement.

[45] Mr McIntyre's claim in respect to lost earnings is \$26,941. This represents the difference between what he would have earned with Pernod Ricard and money actually received from a job he commenced some three weeks after dismissal for the entire period between dismissal and hearing.

[46] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. An increased amount can be awarded provided there is evidence of things such as an attempt to mitigate.

[47] In support of his claim Mr McIntyre notes his current employment as a vineyard worker provides a fluctuating income and there is no prospect of a managers position in the foreseeable future. He then, however, undermined his claim by accepting his assertions about the unavailability of a managers job is assumptive and that he chose not to pursue that option, but go with the lesser option which was readily available. In such circumstances I conclude recompense should be limited to the three months specified in the Act. The loss for the period prior to obtaining the new job was \$4,788. Recompense for the remaining ten weeks is based on a prorate estimate calculated from earnings up to 25 November. I calculate that loss at \$4,897 making a total of \$9,685.00.

[48] Mr McIntyre also seeks recompense for the loss of a superannuation subsidy, subsidised medical insurance, a vehicle and a wine allowance. The claim was valued

at \$20,655 but this is the value of the benefits for a full year. The decision to restrict recompense to three months applies here for the same reasons it did to the wage loss. The loss therefore amounts to \$5,163.75.

[49] Mr McIntyre seeks \$15,000 as compensation pursuant to s.123(1)(c)(i) of the Act. The claim was supported with evidence but it was not comprehensive and does not justify the amount sought. Having considered the evidence, I conclude \$5,000 to be appropriate.

[50] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr McIntyre contributed to his dismissal in any significant way. Notwithstanding strong submissions in this respect from Pernod Ricard, I conclude that the investigative deficiencies were such I am left doubting the substantive justification for dismissal (see 40 above). I am therefore bereft of a basis upon which to conclude Mr McIntyre contributed in any meaningful way to the situation in which he found himself.

Conclusion and Orders

[51] For the above reasons I conclude Mr McIntyre has a personal grievance as he was unjustifiably dismissed.

[52] As a result the respondent, Pernod Ricard New Zealand Limited, is ordered to pay the applicant, Mr Tony McIntyre, the following:

- i. \$9,685.00 (nine thousand, six hundred and eighty five dollars) gross as recompense for wages lost as a result of the dismissal; and
- ii. A further \$5,163.75 (five thousand, one hundred and sixty three dollars and seventy five cents) gross as recompense for other benefits lost as a result of the dismissal; and
- iii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[53] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority