

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Vincent Nutter (Applicant)
AND Telecom New Zealand Limited (Respondent)
REPRESENTATIVES Mr V Nutter on his own behalf
Mr D Patten for the Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 4 December 2001
MEETING Wellington
DATE OF 24 January 2002
DETERMINATION

DETERMINATION OF THE AUTHORITY

1. Mr Nutter claims that he was unjustifiably summarily dismissed by the respondent, Telecom New Zealand Limited (Telecom) without proper cause and that the procedure adopted by Telecom was unfair. Telecom denies all these allegations.

Order Prohibiting Publication

2. For reasons that will become apparent, I order, pursuant to clause 10(1) of Schedule 2 of the Act, that the names of the witnesses Ms U and Ms Z not be published, nor any information that may lead to their identity being ascertained.

Determining the Facts

3. Very few of the facts in this case are disputed. Rather, disputes related more to the motivation for actions of the various participants, particularly Mr Nutter and his manager Mr Knight. Where there are any matters in dispute I prefer the evidence of Mr Knight to that of other witnesses. Mr Knight struck me as a very credible witness who was prepared to concede points when he was not fully aware what had occurred and did not downgrade the evidence of other witnesses (particularly Mr Nutter) who were giving

evidence as best as they could recall about stressful situations affecting them personally. Furthermore, I accept the corroborative evidence of Mr Scott (a colleague of Mr Knight's, but who was one step removed from the process and had expertise as a contracts manager in note-taking) about what occurred in the disciplinary meeting that preceded Mr Nutter's dismissal, which was backed up by his written record of the meeting.

4. Mr Nutter complained about a number of features of Telecom's handling of this case with respect to the late delivery and withholding of documents. These issues are properly addressed in costs submissions, but I do not consider that they impact negatively on the evidence of Mr Knight and Mr Scott.

The Facts

5. Mr Nutter was a telecommunications specialist with a degree in computer science. He worked for Telecom between 1989 and 25 June 2001, when he was dismissed on a month's notice, which he was not required to work. At the time of his dismissal he was a transport investment analyst required to develop, communicate, and manage Telecom's investment plan for transport. His manager was Mr Gavin Knight, who had been his boss since 1998.
6. In June 2001 Mr Knight's section was due to move buildings. His assistant, who was responsible for organising the move, reported to him that one of his staff members was upset about the proposed seating arrangements because she would have to sit near Mr Nutter. Mr Knight was interested in this because of previous issues that he was aware of involving Mr Nutter and other female staff. Mr Knight arranged to see Ms U on 14 June 2001 to ascertain what her concerns were.
7. Mr Knight got Ms U to later document her concerns about Mr Nutter, which were discussed at a meeting on 18 June. According to her report she had worked with Mr Nutter since 1999, but her concerns had only really grown since March 2001. Her report was fact-based, rather than subjective, and related principally to banter and flirtation between the two. Ms U's real concerns related to what had happened after she and another colleague, Ms Z, had been out to lunch at Mr Nutter's expense. Ms U later sent him a light-hearted email as they sometimes did. He replied in like vein, talking about a

voodoo doll he was making. Mr Nutter then approached Ms U, took some fluff off her jumper and pulled a hair out of her head. He told her that this was for the purposes of preparing his voodoo doll. Ms U wrote –

“Re the voodoo doll – you are really sadder than I first thought !!!! Get a life Vince and keep me out of it. From a happily married U”.

8. The next day she noticed that Mr Nutter looked quite pale and she asked about his health. He said that he was *“feeling pretty grim and that my email telling him to get a life had really offended him”*. She stated that this annoyed her, as she had never led him to believe she had any feelings for him other than a friendship at work. She then sent him an email stating –

“I have just reread the email I sent you and can’t see how it can have offended you so badly but I am really sorry if you feel it did. We are friends Vince, there will never be anything else between us. If you can’t handle that then I suggest we stop the banter and the nice lunches and go back to how we were before”.

9. Mr Nutter replied saying that he would respect her feelings and keep his distance. Later that day she told Mr Nutter that the last thing she wanted to do was hurt his feelings, but that the only way she could see to avoid the situation was to keep their relationship strictly professional. She also indicated that she thought it best that the lunches not continue. Mr Nutter replied by agreeing and noting that he did not have any *“expectations”* of her, that he was just following his feelings day by day. He stated that he saw the *“banter”* as partly flirtation and mutual attraction. He noted that he had grown to like her a lot and this had led him to feeling hurt. He agreed that things had got awkward and as she was uncomfortable, that they would call an end to it.

10. Ms U then stated in her memo that nothing happened for the next couple of weeks until her birthday, when Mr Nutter gave her a card and a rose. She told him that he knew what her feelings on the situation were and that she was embarrassed. Mr Nutter asked if she would prefer it if he took the card and rose away and she agreed. He said he was sorry and walked away.

11. At the meeting with Mr Knight Ms U was concerned because she did not want Mr Nutter to think that she was telling tales. She was concerned about the voodoo doll and even wondered if he had a shrine for her in his house. She even saw it as a remote possibility

that if Mr Nutter lost his job and blamed her he might stalk her. She indicated that she found it difficult to look Mr Nutter in the eye these days and that she wanted to be seated away from Mr Nutter.

12. Mr Knight considered that Ms U appeared scared of Mr Nutter. Ms U accepted, once assured that she was to be seated away from Mr Nutter, that she would be fine, and stated that she did not want to be the cause of Mr Nutter being dismissed. Mr Knight, however, indicated that that was a decision for him to make although her feelings would be taken into account.
13. Mr Knight also approached Ms Z. She confirmed what had occurred following the lunch on 17 May 2001. Mr Knight did not know at that point that Ms Z had not actually seen the jersey and hair pulling voodoo doll incident. Ms Z also told Mr Knight that Mr Nutter had put his arms around them in the lift. Ms Z also noted that an email had been sent to her referring to a dating website, where Mr Nutter asked Ms Z whether she had put her “*sexy photo*” on it yet.
14. Ms Z concluded that she and Ms U were now careful around Mr Nutter as they were wary of him. It was her view that Mr Nutter appeared to be “*creepy*”.
15. These interviews did not result in formal complaints against Mr Nutter under Telecom’s staff policies. Rather, Mr Knight determined as a result of his interviews with Ms U and Ms Z that he was going to take the matter up in a disciplinary context with Mr Nutter. He accordingly wrote to Mr Nutter on 20 June 2001. The letter states –

“The purpose of this letter is to request a meeting with you on Friday 22 June at 10am to discuss an allegation of sexual harassment/inappropriate/unprofessional behaviour which has been made against you. Telecom views these issues very seriously and if the allegation is upheld then disciplinary action may be taken against you which may include a final warning or instant dismissal.

Because of the seriousness of the situation you are advised to bring a support person with you. If the suggested time is unsuitable please contact me to arrange an alternative”.
16. When handing the letter to Mr Nutter, Mr Knight asked him to keep the matter confidential.

17. Mr Nutter was very upset about the letter he received. The next day Ms Z reported to Mr Knight that Mr Nutter told her that he had to go to a disciplinary meeting the next day and that as Ms U had put in a sexual complaint against him, because of his history he might “get the chop”. Mr Knight was concerned about this and called Mr Nutter to his office and told Mr Nutter that he was to go home immediately and not talk about the matter any further.
18. The meeting went ahead as planned the next day. At the meeting were Mr Nutter, Mr Knight and Mr Scott, who was there to take notes. Mr Nutter indicated that he did not require a support person. Mr Knight outlined that the purpose of the meeting was to investigate information received, allow Mr Nutter to respond and that further investigations may take place if required. Mr Knight then went through how his concerns had arisen, including his interviews with Ms U and Ms Z. Mr Knight went into detail about the other employees’ concerns about the lunch and the voodoo doll.
19. Mr Nutter confirmed that Ms U’s and Ms Z’s account were basically correct, but insisted that nothing inappropriate had occurred and that nothing at all had happened after Ms U’s response to the voodoo doll incident until her birthday.
20. The issue of the email about the dating site and the “*sexy photo*” was then raised. Mr Nutter said that that was beyond belief. He indicated that it was a dating service he had got off the Time Magazine website.
21. Mr Nutter considered that the complaints against him were “*a catch all*” and disputed whether what had happened constituted sexual harassment.
22. Mr Knight responded that sexual harassment related to Ms U’s rejection of him and him then giving her a red rose.
23. Mr Knight noted that Mr Nutter had earlier been instructed not to use emails for personal use. Mr Nutter replied that this was the company culture. Mr Knight’s concerns over the use of the email about the voodoo doll issue were responded to on the basis that Ms U had started this exchange.
24. Mr Nutter explained that the relationship between him and Ms U had developed incrementally. It had become as a friendship, extended to flirtation, but had ceased

about a month before, as was established by the emails. Mr Nutter acknowledged that he was morally wrong in pursuing Ms U, who was married, and that prior complaints of this nature had been made about him.

25. Mr Nutter concluded by stating that once he realised Ms U's negative reaction to him giving her the rose, he asked if she wanted him to take it back and did so, and apologised. After that he did not approach her.
26. Mr Knight told Mr Nutter that he would consult with Human Resources, review his notes, and then meet with Mr Nutter again. Mr Nutter asked if the sexual harassment issue could be dealt with separately from the other issues, but Mr Knight indicated this was not appropriate because the situation occurred as the result of a whole series of events, which were related.
27. Another meeting was set down for the next Monday and Mr Nutter was told not to come back to work before then.
28. Mr Nutter then stated that he had no prospect of another job, given his age and his state of health (he had had a number of heart attacks) and he was worried because this would ruin him.
29. Mr Knight concluded by stating that he was obliged to investigate the matter and that he would look at the dating website, as Mr Nutter had requested him to. Mr Nutter indicated that he was happy regarding how the investigation had gone.
30. The notes that I have used as a basis for determining the above facts were gone through by all parties at the conclusion of that meeting. Mr Nutter made a number of alterations to those notes and was basically satisfied with the general thrust of them at that time.
31. Mr Knight's checking of the website confirmed that it was a dating agency website, where people could put photos of themselves as part of the information they provided to the website for the purpose of attracting dates.
32. The next week Mr Knight was told by Ms U that she did not believe she could work any more at Telecom if Mr Nutter was still there, as she considered his intentions entirely inappropriate.

33. Mr Knight did not undertake any further interviews, as although there were differences in detail Mr Nutter did not dispute the core of events that had occurred.

34. Mr Knight determined to dismiss Mr Nutter. At the planned meeting on 25 June 2001 Mr Knight told Mr Nutter so and handed him a letter which stated –

“I have completed my investigation into the events we discussed on Friday and concluded that you have acted in a significantly inappropriate and unprofessional manner.

Of particular concern are your communications and actions regarding obtaining clothing fibres and hair from a female employee for a voodoo doll, as well as other inappropriate and disturbing comments by you to female employees. The impact that this behaviour has had on the women concerned is significant.

I have considered your recent behaviours in light of your previous history of instances of a similar nature; in particular the fact that on repeated occasions your behaviour has caused a number of female employees to be disturbed and upset by unwanted attention from you. Your propensity to ‘misunderstand’ the wishes of female employees and acting inappropriately has previously been brought to your attention and you have already received cautions from me, and professional counselling for this. Despite this, you have repeated the same type of behaviour. Vince, I have already given you a second chance and the opportunity to refrain from this type of behaviour, yet you do not appear to have taken this to heart. I have an obligation to protect Telecom employees from such behaviour, and as recent events are representative of your continued inappropriate/unprofessional behaviour, I have decided to dismiss you from employment with Telecom.

Your employment will be terminated effective 5pm, 25 July. Until then your attendance at work is not required.

I would again like to offer you professional psychological counselling. I strongly suggest you acknowledge to yourself that your repeated ‘misunderstanding’ of others and your consequent behaviour is causing serious problems for yourself and others, and that you take my offer and seriously seek to overcome this problem”.

35. The first incident referred to occurred some two years previously and involved a female employee who had concerns about Mr Nutter’s intentions which she raised on two separate occasions. On the second occasion Mr Knight told Mr Nutter that he was to stay away from the employee in future. That was the end of the matter as that was acceptable to the other employee.

36. The second incident had occurred a year previously and involved a written complaint by a female employee of harassment of her by Mr Nutter. It went to a formal disciplinary

meeting in July 2000. The complaint related to a series of allegedly inappropriate communications from Mr Nutter, both directly and by email. The employee had, subsequent to the complaint, left the employment of Telecom therefore removing the possibility of further “harassment” from Mr Nutter.

37. No formal disciplinary action was taken. However, Mr Nutter was instructed not to use Telecom’s email system for personal emails any longer, which was accepted by Mr Nutter. Mr Nutter was told that any repetition or continuation of this sort of behaviour would be unacceptable and he agreed to attend counselling.

38. Mr Nutter challenged the justifiability of his termination immediately. The matter has not been able to resolved and it has therefore come to the Authority for determination.

The Law

39. The parties were well aware of the new cases with respect to dismissal grievances, which reflects well on Mr Nutter's research on the topic. This was a dismissal on notice, but it was for serious misconduct and implemented with immediate effect - despite payment for the period of notice. I have therefore assessed the justification for the dismissal on the basis that it is for serious misconduct, albeit that an allegedly lesser penalty was imposed. As the Court of Appeal held in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 at 487 –

“Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is in an essential of the employment relationship. In the context of a personal grievance claim under the Labour Relations Act, questions of procedural and substantive fairness are also relevant. In the end the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances”.

40. The test was reassessed recently in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, where the Court of Appeal held at 457–

“The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of “could” rather than “would”.

... The burden on the employer is not that of proving to the Court the employee's serious misconduct but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct".

41. Thus in a disciplinary setting, if an employer has to determine the motives for an employee's actions, the employer is entitled to some leeway in that it can make its own assessments in these circumstances, provided they are ones open to a fair and reasonable employer (see for instance *Drummond v Coca Cola Bottlers NZ Ltd* [1995] 2 ERNZ 229).

42. The requirements of procedural fairness were set out fully in *New Zealand Food Processing Union v Unilever New Zealand Ltd* [1990] 1 NZALR 35 at p 46 –

"What that procedure should be in any particular case is a question of fact and degree depending on the circumstance of the case, the kind and length of the employment, its history and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.

The minimum requirements can be said to be:

1. *notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
3. *an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person".

Determination

43. Mr Nutter is correct in his submission that he received no prior detail of the substance of the allegations. However, he was in no way prejudiced by this because he knew exactly

what the allegations were, as he accepted in evidence. He knew that it related to the interactions between him and Ms U.

44. Mr Nutter is also correct where he claims that he was not allowed any opportunity to comment on the results of the continuing investigation after the disciplinary meeting. That is because those investigations did not disclose anything new that had not been previously discussed with Mr Nutter. In fact Mr Nutter's views were confirmed with respect to the dating service website. There was no prejudice to Mr Nutter therefore.
45. Mr Nutter also claimed that the entering into a new employment contract with him on 10 August 2000 meant Telecom could not rely on any previous misconduct to justify dismissal. He is correct in that regard. However, the previous incidents were not brought up again to justify his dismissal. His dismissal was for misconduct with respect to Ms U. It remained within Mr Knight's discretion though, to take into account the previous episodes in determining whether or not he could have continued trust and confidence in Mr Nutter following the series of incidents.
46. I turn now to the details of the decision to dismiss. As set out in his letter of 25 June 2001, Mr Knight decided to dismiss Mr Nutter because of his continued inappropriate/unprofessional behaviour, which he considered he had an obligation to protect Telecom employees from. In this regard he noted Mr Nutter's communications and actions regarding obtaining clothing fibres and hair from a female employee for a voodoo doll, as well as "*other inappropriate and disturbing comments by you to female employees which has had significant impact on them.*"
47. While the investigation conducted by Telecom was not perfect for the reasons given above, it was sufficient, particularly as Mr Nutter knew what was being investigated and did not in fact disagree with many of the fundamental facts. Rather, it was Telecom's interpretation of those facts with which Mr Nutter disagrees. He is entitled to his opinion. Neither he nor the Authority is able to substitute their decision for that of Telecom where dismissal was one response a reasonable and fair employer could take. I am sure that Mr Nutter is right when he states that he meant to cause no harm or offence to fellow female employees that he is interested in. However, Mr Knight holds a wider brief than Mr Nutter. He is responsible as a manager for ensuring that all employees are

safe from harassment, including ensuring that an environment does not exist that is likely to give rise to harassment.

48. Mr Knight concluded, as was open to him, that Ms U had been “*spooked by the particular attentions of Mr Nutter*”, that this was the third occasion when Mr Nutter’s actions had led to such an impact on a female employee and that these attentions were entirely inappropriate. Mr Knight concluded that he had no confidence in Mr Nutter in terms of the possibility of him never acting inappropriately again. It was Mr Knight’s view that “*the negative impact on female employees could not be prevented without removing Mr Nutter from the workplace.*”
49. That is not necessarily a conclusion that the Authority would have reached, having seen and heard Mr Nutter in person, but it was clearly one a reasonable and fair employer could have concluded. That being so, it is not for the Authority to substitute its judgement for that of Telecom. In this context it matters not that the voodoo issue was one that could not be taken seriously by any reasonable and fair employer. Rather what matters is that a fellow employee was spooked by Mr Nutter’s behaviour and it was open to Telecom to conclude that this behaviour could potentially happen again.
50. I do not accept that there has been any disparity of treatment towards Mr Nutter or any unfair targeting of Mr Nutter by Mr Knight. Mr Nutter was not the subject of any formal disciplinary proceedings over performance matters by Mr Knight as his manager. I do not accept that Mr Knight had a grudge against Mr Nutter - for instance he visited him at home after he had had a heart attack. I also do not accept that any of the complaints made about Mr Knight by Mr Nutter about Mr Knight’s general behaviour have any great substance. For instance, just because one employee had put inappropriate comments in a work-related chat room (which did not lead to any formal complaint) and that person was not disciplined, does not mean that Mr Nutter was treated in a disparate way when he was dismissed for inappropriate and unprofessional behaviour (see for example *Samu v Air New Zealand* [1995] 1 ERNZ 636 (CA)).
51. It follows that as Telecom’s actions were ones that a fair and reasonable employer could take that Telecom have justified Mr Nutter’s dismissal and his claim is dismissed accordingly.

Costs

52. Costs are reserved.

G J Wood
Member of Employment Relations Authority