Determination Number: AA 90/05
File Number: AEA 306/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	David Scown (Applicant)
AND	Bougen Transport (Respondent)
REPRESENTATIVES	Paul Scown, for applicant Dianne Bromhead, for Respondent
MEMBER OF AUTHORITY	Janet Scott
INVESTIGATION MEETING	28 January 2005
DATE OF DETERMINATION	11 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Scown submits he was unjustifiably dismissed from his employment. To remedy his alleged grievance he seeks lost remuneration and compensation pursuant to s 123(c) (i) of the Act.

The respondent submits that Mr Scown was justifiably dismissed.

Background

Mr Scown commenced employment with Bougen Transport in July 2002. He was employed as a truck driver/hiab operator.

On 1 July 2003 Mr Scown received a final written warning for serious misconduct for "abusing and threatening another employee". That employee was Mr Crake, operations controller. Mr Scown did not challenge the justification for this final warning. The final written warning advised Mr Scown "*If you repeat this behaviour in future your employment will be terminated"*

On 16 October Mr Scown was involved in a further incident with the company's operations controller, Peter Crake. It was alleged that he verbally abused Mr Crake and drove off in a dangerous manner that could have caused injury to Mr Crake. Following two meetings held to inquire into the matter Mr Scown was dismissed from his employment.

Legal Principles

Serious Misconduct

The time honoured test to be applied in consideration of a decision to dismiss summarily is that set out in *Northern Distribution Union v BP Oil* [1992] 3 383 CA.

> *"For a discussion of the kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgement in BP Oil NZ Ltd v Northern Distribution Workers Union [1989] NZLR 580. Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs of is destructive of that basic confidence or trust that is an essential of the employment relationship……..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"*

The Court of Appeal in *W & H Newspapers v Oram* [2000] 2 ERNZ modified its thinking in respect to the test above stating:

> *"Bearing in mind 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", used in the formulation expressed in the second BP oil case."*

In *Petersen v Board of Trustees of Buller High School CC 7/02* the Chief Judge described the following essential elements of procedural fairness.
"……

The minimum requirements can be said to be –

(a) notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;

(b) a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and

(c) an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

This needs however, to be considered in light of other guidance contained in the above decision.

"However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements 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". NZ Food Proccessing IOUW vUnilever NZ Ltd [1990] 1 NZILR 35,46 & ERNZ [1990] Sel Cas 582, 595

Evidence

It is the respondent's position that the earlier incident (June 2003) amounted to serious misconduct and it would have been justified in dismissing Mr Scown at that time. However, the company decided to give him another chance, but on the basis of the final written warning given to him at that time that if there was a repeat of the behaviour in question his employment would be terminated.

On 16 October 2003 Mr Scown was asked by the operations controller , Peter Crake, to leave the yard and go to a job. Mr Scown's response to Mr Crake was abusive and he refused a direction to get out of his truck to discuss the matter. Mr Scown put the vehicle into gear and drove off narrowly avoiding running over Mr Crake's foot.

A meeting was held the next morning to inquire into the incident. Present at that meeting were Mr Crake, Mr Scown and Alan McLeod, transport manager. The allegations were discussed. Mr Scown denied being abusive towards Mr Crake and submitted Mr Crake misheard him. (Mr Scown advises Mr Crake has a hearing problem). The meeting concluded with Mr Scown taking leave on the understanding the matter would be referred to Alan Cornish, General Manager and that a meeting would be held between Alan and David following the Labour Weekend break.

The planned meeting took place on 28 October. Prior to that meeting Mr Scown was contacted and advised the company viewed the situation seriously and he was invited to bring a representative to the meeting. Mr Scown attended the meeting alone. He was questioned about this and gave his agreement to proceed without representation. Mr Cornish advised Mr Scown the matter was viewed seriously. Mr Scown was invited to comment. Mr Cornish's evidence was that Mr Scown's body language was negative from the outset of the meeting. He did not deny the allegations. His only response was *" I know you are going to sack me and as far as I am concerned you haven't followed the correct procedure and given me three written warnings, I have checked this with the Union"*.

Mr Scown was advised that he had been clearly warned about his behaviour and the consequences if he repeated that behaviour. The company viewed the conduct very seriously. Equally important was the company's concern that this conduct could occur with a customer and involve personal harm. The company felt it had a duty to act. Mr Scown was dismissed. He was given a week's pay.

Mr Scown's position is that he was not given a proper opportunity to be heard. He believes the decision to dismiss him was predetermined. He denies abusing Mr Crake and submits that Mr Crake was abusive towards him on the morning of 16 October when he tried to explain to Mr Crake that he had taken time out to clean his vehicle and window screen because the start time for the job he was assigned to had been amended from 7.30am to 8am. He also submitted he believed he was entitled to three written warnings before being dismissed.

Discussions and Findings

<u>Credibility</u>

Mr Scown submits he was not provided with the Employee Handbook given to employees when they commence work with the company. This contradicts the documentary evidence provided to the Authority. On 23 July 2002 when he commenced employment with Bougen Transport Mr Scown signed an Employee Declaration declaring that he had read and clearly understood the contents of the Bougen Transport Employee Handbook and that he undertook to comply with the policies and conditions set out in that book. The handbook in question clearly sets out Bougen's employment

policies. They are a comprehensive set of policies covering health and safety, discipline, sexual harassment and misconduct among other policies.

It is not credible for Mr Scown to now claim he has not received and was not aware of the company's policies. His claim to this effect affects his credibility overall and where there is a dispute in the evidence it is the evidence of the company's witnesses that I prefer.

Findings

The company's policies are clear concise and communicated to all employees in an effective manner which ensures those policies are known to and acknowledged by employees. Section 7 of the handbook sets out examples of conduct that constitutes serious misconduct the penalty for which could be dismissal. Abusive and/or threatening behaviour to other employees/contractors or customers is included in this list of examples. Documentary evidence submitted demonstrates Mr Scown had read, understood and accepted the company's policies.

On 1 July 2003 Mr Scown acknowledged receipt of a final written warning for *'abusing and threatening another employee'*. He was put on unequivocal notice that if he repeated this behaviour his employment would be terminated. Mr Scown did not challenge the justifiability of that warning and it stands according to its tenor.

On 16 October – just three months after receiving this written warning – Mr Scown was involved in another incident with the operations controller, Mr Crake which led to new allegations against him that he had abused Mr Crake and driven off in a dangerous manner. Mr Scown was called to a meeting the next day when the incident and the employer's concerns were put to him. Mr Scown denied the allegations. The company representatives acceded to his request to take a holiday. The matter was deferred to be dealt with by Mr Cornish, General Manager who was himself on holiday at that time.

Mr Cornish returned from leave on 23 October. I find he interviewed Mr Crake and Mr McLeod. He was satisfied Mr Crake was credible in his description of the events of 16 October but knew he must hear from Mr Scown. Mr Scown was invited to meet with Mr Cornish on his return to work on 28 October. He had been telephoned before his return to work to advise the time of the proposed meeting on 28 October and advised of his right to representation.

Mr Scown attended the meeting without a representative. Mr Cornish raised this and Mr Scown advised the person he had asked to attend wasn't available. Mr Scown was asked if he was prepared to continue the meeting without a representative. Mr Scown agreed to continue the meeting. Mr Cornish put it to Mr Scown he had met with Mr Crake and Mr McLeod. He advised the company saw the conduct complained of very seriously. Mr Scown was asked if he had anything to add.

There was an element, here, of Mr Cornish taking the allegations made as gospel. There is a danger in such an approach of the employer being seen to have predetermined the matter. That is how Mr Scown described his dismissal.

I find however taking the matter in the round there was no predetermination in this case. Despite the way Mr Cornish put the company's concerns to Mr Scown on the morning of 28 October there is no doubt in my mind that Mr Scown was being given a real opportunity to put his side of the story – an opportunity he did not utilise effectively. He could have described to Mr Cornish the degree of provocation he claimed had occurred in the incident with Mr Crake that day. He could have reiterated his previous denial of the events of 28 October. He did none of those things. Instead he

himself predetermined the matter – saying *"I know you're going to sack me*" and protested he had not received three written warnings.

There is no statutory obligation on employers to give a worker three written warnings. There is a clear statement in Clause 8 (Termination) of the Individual Employment Agreement between the company and Mr Scown which describes the warning system which applied to Mr Scown's employment.

In all Mr Scown offered nothing to Mr Cornish that day that could weigh in his favour in considering whether dismissal was an appropriate outcome. Mr Cornish was entitled to arrive at the decision to dismiss taking into account the information available to him at the time including the fact that Mr Scown had had a final written warning for similar conduct only three months previously.

Determination

Mr Scown's dismissal was justified and he is not entitled to the remedies he seeks.

Note: To be entirely fair to Mr Scown it is appropriate that I record that the company had no problem with his performance and advised he is a good driver/hiab operator.

Costs

Neither party were represented by legal counsel so costs are not an issue.

Janet Scott
Member of Employment Relations Authority