

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gary Sullivan (Applicant)
AND Maxwell Marine Limited (Respondent)
REPRESENTATIVES Graeme Norton for Applicant
Paul Tremewan for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 11 April 2006
SUBMISSIONS RECEIVED 24 April 2006 (Applicant) and 27 April 2006 (Respondent)
DATE OF DETERMINATION 24 July 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant says he was unjustifiably dismissed on 2 December 2005 after several formal written warnings which were also unjustified. He further claims his dismissal was engineered to deny him redundancy entitlements he would otherwise have received, that he was demoted from a supervisory role, and that he was discriminated against on the grounds of age and disability. He seeks declarations on these matters and orders for reinstatement and payment of lost wages, compensation for hurt and humiliation and his legal costs.

[2] In reply the respondent says its disciplinary procedures were carried out in a fair manner and the warnings given and dismissal made were justified. It denies the applicant was demoted or disadvantaged unfairly on the grounds of age or disability or dismissed to avoid redundancy entitlements. It seeks dismissal of the applicant's claims.

[3] The matter was not resolved in mediation. At the investigation meeting witness statements were provided and questions put by the Authority and the parties' representatives were answered by the applicant; Isaac Otineru, an organiser of the National Distribution Union; the respondent's factory manager, Mike Edginton; the respondent's operations manager, Peter Manhire; and the respondent's marketing manager Graham Fleury. The parties provided written closing submissions.

[4] The issues for resolution are:

- (i) whether the warnings given were justified and made after a fair process?
- (ii) whether the dismissal was justified and made after a fair process?
- (iii) whether the applicant was demoted and unfairly disadvantaged on the grounds of age and disability?
- (iv) whether the applicant was dismissed to avoid redundancy entitlements which would otherwise have been made to him.

(v) whether, if the applicant is found to have a personal grievance, he adequately mitigated his circumstances and whether any remedies should be reduced for his contribution towards the situation giving rise to the personal grievance.

The disciplinary process

[5] A letter advising the applicant of his dismissal states this was for “*repeated errors in your work*”. It continues:

We have followed the offence procedure as outlined ... [in] ... your employment contract, and also given you extra opportunities in an attempt to resolve these issues, but to no avail. Therefore we are left with no choice but to terminate.

[6] The applicant’s employment agreement – a collective agreement negotiated between the respondent and the National Distribution Union – sets out a five-step procedure for what are described as “*offences constituting less than serious misconduct*”. What constitutes an offence is not defined.

[7] A “First Offence” is to result in counselling of the employee of their supervisor or manager. The counselling is to be recorded on a “*discipline record form*” and a copy provided to the employee.

[8] A “Second Offence” and “Third Offence” are to result in a written warning, similarly recorded and a copy provided to the employee. The employee is to be “*warned that his/her record is not up to the expected standard*”.

[9] A “Fourth Offence” is to result in a final written warning with the employee warned that their record is not up to standard and “*that any further offence will render him/her liable to dismissal*”. This warning is also to be recorded on the company’s discipline record and a copy provided to the employee.

[10] A “Fifth Offence” is to be considered in a meeting with the manager where the employee is to have “*the gravity of the situation explained*” and “*asked to explain their actions*”. The manager is to consider the answer and outcomes of any investigations before deciding whether to dismiss or not.

The warnings

[11] During 2004 and early 2005 Mr Edginton was concerned at what he called “sloppy work practices”. Staff were cautioned against ignoring procedures for dealing with stock being received, stored and despatched from the respondent’s warehouse. His evidence was that other staff responded to those concerns by being more careful in their work but the applicant did not, resulting in a series of meetings and warnings, and ultimately his dismissal.

[12] At staff meetings in October 2004 and April 2005 Mr Edginton and Mr Fleury talked about problems with stock control and an overhaul of the records systems. The applicant cannot recall whether he attended the April meeting but does remember being at the earlier October meeting.

[13] Between May and December 2005 the applicant was issued with five written warnings, each on a form headed ‘Discipline Record’ – a first written warning dated 12 May, a second written warning dated 15 August, and three “final” written warnings dated 15 September, 23 November and 24 November.

12 May 2005 warning

[14] On 11 May 2005 Mr Edginton called the applicant to a meeting which he was told was a disciplinary matter. The applicant had no earlier advice of the meeting or its purpose. Mr Edginton says he asked the applicant if he wanted a witness to attend but the applicant refused. Mr Fleury also attended the meeting as a company witness.

[15] The applicant recalls at least four items being discussed from a handwritten list held by Mr Edginton.

[16] The warning issued the next day stated that the applicant “*has incorrectly picked and shipped a number of orders to both local and overseas customers*”. Under the heading of ‘acceptable behaviour’ it noted that the applicant’s explanation of not having enough time was accepted for two of the four items raised with him but not the others. It states that “*if there is not enough time/staff that [the applicant] must communicate with [Mr Edginton] so these issues can be resolved.*” Under a heading of ‘what is the employee going to do to fix the problem?’, the warning notes that the applicant “*said he accepted these mistakes occurred and he would work to ensure this would not continue*”. The applicant signed the warning.

15 August 2005 warning

[17] In early August Mr Edginton asked for a further meeting with the applicant. The meeting was delayed for two weeks until the applicant’s union organiser, Mr Otineru, was available to attend.

[18] At this meeting the applicant was given a typed list identifying seven examples of poor work procedures (with dates and details given) – and a general concern about handling of stock and paperwork. These included ordering supplies without providing required details, not recording stock movement for cord reels taken for use in the warehouse, putting stock on wrong shelves, incorrectly receipting goods, and wrongly receipting the amount of a supply.

[19] Mr Edginton went through each point on the list and, at the union organiser’s request, left the room so Mr Otineru and the applicant could talk about the matters raised.

[20] When Mr Edginton rejoined the meeting Mr Otineru told him that he had advised the applicant on the need to be more accurate in his stock-keeping and paperwork.

[21] The applicant complains that the first part of the meeting – at between 10 and 20 minutes long – was too short to properly deal with the issues raised. However Mr Otineru accepted in answer to a question at the investigation meeting that he was not concerned about the length of the meeting, either at the time it was held or when he signed the warning form on his next visit to the workplace around three weeks later.

15 September 2005

[22] On 14 September Mr Edginton asked the applicant to attend a disciplinary meeting the next day. Mr Edginton accepts that he did not give the applicant notice of the specific allegations or provide copies of the documents relating to those allegations in advance of the meeting.

[23] At the meeting on 15 September the applicant was accompanied by another staff member. The concerns put to the applicant are recorded on a discipline record prepared after the meeting and headed “*Final*”. It records problems with filling out packing slips correctly and putting stock on the wrong shelf. The warning sets out what is “*acceptable behaviour*” by stating that:

“all stock is to go in the correct location and product shipped must be correct. These mistakes must stop. Any repeats of this sort of behaviour will result in the termination of

Garry's employment."

[24] Although the applicant refused to sign this form it records that he was "*going to ensure this does not occur again*". A copy of the form was handed to him the following day.

12 October 2005

[25] A further discussion occurred on 12 October where Mr Edginton believed the applicant had incorrectly dealt with paperwork. The applicant showed Mr Edginton an example of the paperwork being in the wrong place and Mr Edginton did not pursue the issue. The applicant says that Mr Edginton said: "I'll let this one slide". However the subject of this discussion was also raised in relation to the applicant's next disciplinary meeting.

16 November 2005

[26] On 16 November Mr Edginton gave the applicant a letter calling a meeting for no later than 23 November. The applicant was advised that the matter was serious and could result in termination of his employment. He was advised of his right to bring a representative. The letter gave details – with dates – of four further alleged examples of problems with stock handling.

[27] The applicant responded with an emailed request for "*written proof and any documentation*" relating to the problems identified, including the 12 October incident. His email suggests he had taken legal advice and would "*need time to check the facts of your allegations and prepare any case on my behalf*".

23 November 2005

[28] The applicant met Mr Edginton on 23 November. He was accompanied by the workplace delegate, Maori Tere, as the union organiser Mr Otineru was not available.

[29] A discipline record form – subsequently signed by Mr Edginton, another company representative, and Mr Tere but not the applicant – records discussion on four problems identified as occurring through October. These included not putting inwards stock in the correct location, taking cartons from elsewhere in the business for use in the warehouse without recording the stock movement, not dealing with an urgent stock order in time for a customer although the stock was available, and wrongly packing an order.

[30] The form records the applicant's comments and the employer's responses, accepting one of the applicant's explanations but rejecting the others. The result was a further final written warning with the following comment noted:

"It has been decided that Garry's final written warning is to stand, and any further incidents of a similar nature may result in his termination."

24 November 2005

[31] The following day a further meeting was held with the applicant about an order where a customer was sent 60 bottles too many of a particular item. The applicant responded that the order was packed in a hurry and he did not check the whole order.

[32] Mr Edginton prepared a discipline record form – also headed as a "written warning – final". It recorded the company's response to the applicant's explanation of the problem discussed as "*not an acceptable reason for such a large error. Our stock control problems continue unabated and a*

lot of these are caused by Garry”.

[33] It continued with the following note:

It has been decided that Garry’s final written warning is to stand, and any further incidents of a similar nature may result in his termination.

[34] The applicant was not given a copy of this warning until 1 December.

1 December 2005

[35] On 1 December a further meeting occurred but there is some conflict in the evidence on it.

[36] Mr Edginton says that he intended meeting the applicant that day only to talk about the outcome of the 24 November meeting, including giving him the further final written warning. However he also says that on this day he gave the applicant a letter identifying two further reported problems and calling for a further meeting “*sometime this week*”. It included the statement that “*due to previous events, the outcome of this meeting could result in the termination of your employment.*” He says the meeting then proceeded to discuss those further issues at the applicant’s request.

[37] Mr Edginton could not provide a signed copy of the letter he says he gave to the applicant but produced, after the investigation meeting, a copy of a letter held on his computer. The applicant does not recall getting the 1 December letter but does not deny he may have been given one.

[38] What is certain is that the parties proceeded to discuss those two further problems. The applicant was accompanied by his union delegate, Mr Tere.

[39] The discipline record form includes a note saying that the meeting was to talk about the 24 November meeting outcome but that the applicant wanted to talk about the two further issues raised that day.

[40] One problem concerned the applicant sending a customer the wrong order. He told Mr Edginton that there was no product number on the paperwork so he sent “*the closest one I could find*”. The other problem concerned failing to count the items of stock in an order.

The dismissal

[41] After considering the applicant’s responses Mr Edginton decided to dismiss him. On the discipline form he recorded the reason in this way:

Due to the fact that Garry’s explanations are not accepted as a valid reason for the mistakes, and that it is believed by Maxwell Marine that his mistakes are the result of carelessness, it has been decided to terminate Garry’s employment.

[42] On 2 December Mr Edginton met with the applicant and dismissed him. The applicant was accompanied at the meeting by the union delegate. He was not given an opportunity to comment on the employer’s findings before being told of his dismissal. He was given a letter of dismissal saying that he was dismissed “*for repeated errors in your work*” and that he had “*failed to change your behaviour*”. The applicant left the premises shortly after.

Approach to whether dismissal justified

[43] The Authority scrutinises the respondent’s decision to terminate the applicant’s employment

according to the statutory test set out in s103A of the Employment Relations Act 2000 (“the Act”):

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 would have done in all the circumstances at the time the dismissal or action occurred.

[44] The minimum requirements for managing poor performance are¹:

(a) *The employee must be given specific reasons for the dissatisfaction and a reasonably specific and measurable improvement should then be demanded by the employer, giving a reasonable trial period, to establish whether the employee is able to achieve the improvement.*

(b) *The trial of the employee’s work must be fair and the results at the end of the trial period considered dispassionately.*

(c) *Warnings for poor performance should be explicit and fair. They should describe how an employee’s behaviour is deemed to be unsatisfactory, give clear information about what improvement will meet the employer’s requirements, and how the improvement will be measured. The purpose is to give an employee an opportunity to improve, and to enable a dismissal to be avoided.*

[45] In this case the measure of fairness is incorporated into the detailed five-step disciplinary process stated in the applicant’s employment agreement.

[46] The minimum procedural requirements an employer should observe are²:

(a) *Notice to the employee of the specific allegation of misconduct and of the likely consequences if the allegation is established;*

(b) *A real and not merely nominal opportunity for the employee to attempt to refute or to explain or mitigate his or her conduct; and*

(c) *An unbiased consideration of the worker’s explanation, free from predetermination and uninfluenced by irrelevant considerations.*

Determination

[47] There is force in the respondent’s argument that it gave the applicant more ‘chances’ to improve his performance than required by the employment agreement’s five-step warning process. The employer did not establish that it had followed the first step of individual counselling, instead relying on advice given to the applicant at general staff meetings, or at least the one he attended in October 2004. However if there was a procedural error at that first step, I am satisfied that was cured by subsequent meetings.³ Similarly I do not accept there was procedural error or unfairness in three of the warnings issued to the applicant being labelled ‘final’.

[48] I accept that the respondent has established there were genuine reasons for its concerns regarding the applicant’s performance. Specific items were identified and explained to the applicant, with clear advice on the improvement required. The opportunity for improvement extended from May to November 2005.

[49] While the standard that the employer must meet is one of fairness and not a counsel of perfection, there is force in the applicant’s argument that on several occasions he was not given sufficient information and opportunity to prepare for the disciplinary meetings. Mr Edginton accepted this was so for the 15 September meeting. That was also clearly the case earlier on 11

¹ *Trotter v Telecom* [1993] 2 ERNZ 659, 680-1.

² *NZ Food Processing IUOW v Unilever NZ* ERNZ Pre-1991 Sel Cas 582, 594; [1990] I NZILR 35, 46.

³ *Rankin v Attorney-General* [2001] ERNZ 476

May, when the meeting was sprung on him, even though he opted to continue without a witness. The meetings of 23 November, 24 November and 1 December – with the additional examples of problems dealt with in each – also occurred so close together there was no real opportunity for improvement or proper preparation by the applicant. In the 1 December meeting the applicant may have insisted on proceeding to talk about the additional issues raised with him that day, but given that he may not have had the respondent's 1 December letter, it is not clear that he was aware at the start of that meeting that the meeting could result in the termination of his employment that day. The following day he was presented with a letter of dismissal with no opportunity to comment on the employer's decision before it was implemented.

[50] Having considered all the evidence I find that the actions of the respondent in dismissing the applicant in the manner which it did were not how a fair and reasonable employer would have acted in all the circumstances at the time. The applicant was given insufficient time and detail to prepare his responses to the examples given in the disciplinary meetings by the employer as demonstrating poor performance. This is not to say that the outcome would necessarily have been different, given the pattern of mistakes identified but rather that the respondent moved too far, too fast, particularly in giving the last three warnings.

[51] For these reasons and to this extent, I find that the dismissal was unjustified and the applicant does have a personal grievance. Before considering matters of mitigation, contribution and remedies, I turn to the other elements of his claim.

Demotion and discrimination

[52] The applicant alleges that on 18 July 2005 Mr Edginton told him he was not mentally and physically able to do the job of team leader and demoted him. I prefer Mr Edginton's evidence that he spoke with the applicant about not being the "communication point" for queries to the warehouse in the afternoon. This was because, under arrangements made when the workplace located from central Auckland to Albany, the applicant left the workplace earlier each afternoon to drive a group of staff back to a central Auckland site. The applicant's payslip confirmed he retained the title and pay of a team leader at all relevant times.

[53] Neither was there sufficient evidence to support the applicant's allegation that he was discriminated against because of a disability (which was that he had a long recovery from post-operative complications following knee surgery). Rather it appears that the applicant was properly supported by a return-to-work plan worked out by ACC with input from an occupational therapist. Mr Edginton was not critical of this except on an occasion where the applicant was not properly following his return-to-work plan.

Redundancy

[54] Similarly I do not accept that the applicant's dismissal was engineered to avoid paying him a redundancy entitlement. There were redundancies in the business shortly after the dismissal but these were in the rope manufacturing section and not the warehouse. The evidence of Mr Edginton and Mr Manhire was that the total number of hours worked by staff in the warehouse remains very similar to the hours worked before the applicant was dismissed.

Remedies

Lost wages

[55] The applicant's evidence stated that he had applied for around 10 jobs since his dismissal but

only gained employment as a census collector for five weeks in February and March. He provided no evidence of his job applications or the nature of work sought. His written statement said he had 20 years of work experience including a range of supervisory roles with good references from previous jobs. Despite this he was not, at the time of the investigation meeting, employed. I am not satisfied from this evidence – both of his experience and credentials – and the general buoyancy of the labour market, that the applicant has done sufficient to mitigate his lost wages. For this reason I limit the award of lost wages under s123(1)(b) of the Act to eight weeks.

Compensation for hurt and humiliation

[56] The applicant gave no specific evidence of hurt and humiliation suffered as a result of the dismissal but described difficulty sleeping and chest pains during some of the period in which he received the five written warnings. For this, and the injury to feelings inherent in being subject to a dismissal found to be unjustified, even to a limited extent, I award the applicant the sum of \$2000 compensation under s123(1)(c)(i) of the Act.

Contribution

[57] Under s124 of the Act the Authority must consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and whether to reduce the nature and extent of remedies awarded.

[58] In this case the applicant's actions contributed substantially towards the situation giving rise to the grievance. The employer's evidence established that the applicant made repeated errors, had a haphazard approach to stock control and storage and was disdainful of the procedures for proper record keeping. His denial of his own responsibility for a number of issues was clear throughout his evidence at the investigation meeting. For these reasons I consider remedies should be reduced by 50 per cent for contribution.

Summary of remedies

[59] After allowing for reduction of remedies for contribution, the respondent is to pay to the applicant within 28 days of this determination, the following:

- (i) four weeks ordinary wages under s123(1)(b) of the Act; and
- (ii) \$1000 compensation for hurt and humiliation under s123(1)(c)(i) of the Act.

Costs

[60] The parties are encouraged to agree any issue of costs between them. If they are unable to do so, the applicant may apply for a determination of costs and the respondent will be provided with an opportunity to reply before that matter is determined.

Robin Arthur
Member of Employment Relations Authority