

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA405/09
5158029**

BETWEEN

ALLISTER TAYLOR
Applicant

AND

BAE SYSTEMS AUSTRALIA
SHIPBUILDING (NZ)
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Michael O'Brien, Counsel for Applicant
Stuart Dalzell, Counsel for Respondent

Investigation Meeting: 21 September 2009

Submissions Received: 15 September 2009 from Applicant
15 September 2009 from Respondent

Determination: 17 November 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Allister Taylor, says that he has unjustifiably dismissed by the respondent, BAE Systems Australia Shipbuilders (NZ) Limited ("BAE Systems" or "BAE"). The respondent denies that the dismissal was unjustified.

[2] Mr Taylor seeks:

- Reimbursement of lost wages;
- Payment of redundancy compensation;
- Interest on the lost income;

- Interest on the redundancy compensation;
- Compensation pursuant to s 123 (1) (c) (i) of \$10,000;
- A declaration that the respondent breached its obligations of good faith;
- A penalty of \$10,000 for the breach;
- A declaration that the respondent breached the employment agreement;
- A penalty of \$10,000 for the breach;
- That the penalties be paid to the applicant.

[3] Mr Taylor had been employed by BAE Systems and its predecessors for thirteen years when his employment was summarily terminated on 30 March 2009. At the time of the termination Mr Taylor held the role of Manager General Operations.

[4] The respondent was established in Whangarei in 1993 as Transfield Whangarei Limited to fabricate ship modules for the ANZAC ship project. The company underwent a number of name changes and in 2008 became BAE Systems. The company built modules for the ANZAC ship project until 2003 when employee numbers were significantly reduced awaiting the award of Project Protector. This project was to provide seven new vessels for the New Zealand Government. The project was ultimately awarded to the company's parent company in Australia. As a result the company contracted to its Australian parent company to build four 55 metre inshore patrol vessels at Whangarei.

[5] BAE Systems engaged contractors in his Whangarei operation, including EPTEC New Zealand Ltd ("EPTEC"). As the Whangarei operation was coming to completion, EPTEC gave a number of its employees notice of redundancy.

[6] On about 16 March 2009 Mr Taylor asked one of EPTEC's employees, Mr Wayne Clarke, who had been made redundant and who was working out his notice, whether he would be interested in doing some paid work for Mr Taylor after he had finished with EPTEC. Mr Taylor wanted his roof painted.

[7] On 18 March Mr Clarke told Mr Taylor that he did not have any real work to do for EPTEC. He said that he and another EPTEC employee, Mr Bruce Kake, who had also been made redundant, could do the painting later that week. Mr Taylor said he took Mr Clarke at his word that he was able to do the painting at that point. At that stage Mr Clarke was EPTEC's Team Leader at the Whangarei site.

[8] Mr Taylor said in his role he was not responsible for managing the day-to-day work the EPTEC contractors did. That had been overseen by another BAE Systems' Manager, Mr Darren Holder, and after he had returned to Australia it had been managed by Messrs Dan Johnston and Richard Barren. Mr Taylor said that at various stages he had full responsibility but when the company set up Project Protector the Project Protector Manager looked after the day to day building of the ships and he had responsibility for the administration of the business. He picked up additional pieces along the way and accepted whatever else came along. For about four weeks he had signed the charge sheets and when he was not there it fell to other BAE employees. In February/March there were about three or four signatories for the EPTEC charge sheets. There appears to have been very much an ad hoc arrangement regarding responsibility for some of the tasks as Project Protector wound down.

[9] Mr Gwydion Sherwood was employed as a supervisor for EPTEC and worked at the BAE Systems Whangarei site until December 2008, when the Whangarei operations were winding-up and he returned to Australia. He and Mr Clarke were in touch regularly over the telephone. During a telephone call on either Monday 16th or Tuesday 17th of March, Mr Clarke mentioned that there was little work left at the site and that Mr Taylor had offered him and another painter some work painting Mr Taylor's house. Mr Sherwood mentioned that to his manager, Mr Joe Viglione, EPTEC's General Manager. Mr Sherwood did not tell Mr Clarke it would be inappropriate for him to paint Mr Taylor's roof.

[10] On 19 and 20 March Mr Clarke and Mr Kake painted Mr Taylor's roof. Mrs Taylor paid them \$200.

[11] Mr Taylor said he was not at home when the roof was being painted but he knew the painters were at his house on those days.

[12] On 23 March Mr Clarke dropped off EPTEC's timesheets for the week of 16 to 20 March. Mr Taylor was working at his desk when Mr Clarke dropped them off and he told him to leave them on the side cabinet.

[13] Until January/February the EPTEC timesheets had been signed by Mr Holder. When Mr Holder returned to Australia that duty fell to Mr Taylor. Mr Taylor said he signed the timesheets for the previous week without checking them properly as he was in a rush. At the time he signed the timesheets he was unaware that Messrs Clarke and Kake had claimed the painting hours on their wage claims with EPTEC and this was reflected in the timesheets as maintenance for the dates 19 and 20 March 2009. The timesheets were authorised by Mr Clarke for EPTEC and then authorised for the client, BAE Systems, by Mr Taylor.

[14] On or about 19 March 2009 Mr Paul Thomas, the past Project Manager, of BEA Systems was contacted by Mr Viglione. Mr Viglione relayed to Mr Thomas Mr Sherwood's account of a conversation he had had with Mr Clarke earlier that day regarding the painting at Mr Taylor's house, assisted by Mr Kake. On 20 March Mr Thomas advised Mr Spiro Papaioannou (the then Project Manager) who subsequently spoke to Mr Eamon Sweeney (the existing Project Manager) on 23 March. At that stage BAE asked Mr Viglione to send through copies of the painters' timesheets for 19 and 20 March. It was then revealed that Messrs Clarke and Kake had claimed they had worked on 19 and 20 March when they were painting Mr Taylor's roof.

[15] When Mr Sherwood spoke to Mr Clarke he told Mr Sherwood that he had met with Mr Taylor on the morning of Monday 23 March and discussed what he and Mr Kaka would put on their timesheets. He said Mr Taylor had told him to put the time down as maintenance and to make it look normal.

[16] Mr Mark Cox is the Head of Employee Relations for BAE Systems Australia Ltd. He said that as the most senior person on site Mr Taylor was responsible for managing all work conducted on the site which included responsibility for sub-contractor work. There did not appear to be a job description for Mr Taylor and Mr Cox was unclear regarding how payments for invoices were made.

[17] When he was made aware of the matter Mr Cox and Mr Chris Harvey, Manager, Project Management and Planning, went to New Zealand to meet with Mr Taylor and to investigate the matter.

MONDAY 30 MARCH 2009

7.30am meeting with Mr Taylor

[18] Mr Cox explained that they were there to discuss a serious matter and asked Mr Taylor if he wanted a support person, but he said he did not.

[19] He then explained that the issue was an alleged breach of company policy regarding a sub-contractor. No company policy was given to Mr Taylor nor was any specific breach of the policy identified and specified (and no company policy has since been produced either to the applicant or to the Authority). Without being given the opportunity to comment Mr Taylor was suspended on full pay and told that his employment could be in jeopardy. The employment agreement contains no provision for suspension. Mr Taylor was asked not to contact any employees or sub-contractors.

[20] Mr Taylor asked for further details. He was told it related to two painters working at his house and more details would be provided once a full investigation had been completed. No mention was made of the timesheet issue.

[21] At this stage Mr Taylor asked Mr Cox if he could take with him some stainless steel brackets that were sitting on the floor near the desk. Mr Taylor said he had paid for those on a private basis and told Mr Cox the name of the company. Mr Cox said he did not let him take them as he had no proof he had paid for them. Mr Taylor later phoned Mr Cox and gave him the names of two contact people and asked if the brackets could be released as he had builders at his house. Mr Cox refused, saying they would not be released until the investigation had been completed. It is evident that Mr Cox had already formed an adverse view of Mr Taylor's honesty.

10.30am – telephone interview with Mr Viglione

[22] Mr Harvey and Mr Cox had a teleconference with Mr Viglione. Mr Viglione said that in order to avoid union problems EPTEC had agreed to keep the two painters on site for January and February to assist with any touch up paint work on the four ships while contractual issues with the Ministry of Defence were resolved. It had also been agreed that the painters would be available to site management to undertake other non-painting work such as general clean ups and emptying rubbish bins. The painters had run out of work at the beginning of the week of 16 March.

[23] He understood that Mr Sherwood had spoken to Mr Clarke on 19 March and that Mr Clarke had told him he was doing some off-site work painting Mr Taylor's roof.

[24] He understood from Mr Sherwood that Mr Clarke had told him that Mr Taylor had told Mr Clarke to put the painting time down as maintenance. Mr Viglione had sent the timesheets to BAE Systems at BAE Systems request. Mr Viglione said he thought the main issue was whether Mr Taylor had instructed the painters to submit timesheets recording the hours as maintenance.

11.32am – telephone interview with Mr Clarke

[25] Mr Clarke said Mr Taylor had asked them to paint the roof which they had done; it had taken ten hours and they had been paid \$200 each. He completed timesheets and submitted them to Mr Taylor. He denied that there had been any conversation with Mr Taylor about the timesheets. When he gave evidence during the hearing Mr Clarke said at no stage during the phone call or afterwards had any BAE representative asked him about the allegations regarding the instruction by Mr Taylor to put the time down as maintenance and to make the timesheets look normal.

[26] He said he had decided to put the time down as maintenance. Mr Kake had not been aware he had done that. Mr Clarke said he knew it was wrong but was very worried about not having an income once he had been made redundant. He regretted his actions and had not realised the effect they would have on Mr Taylor.

[27] Monday 30 March 2009 – telephone interview with Mr Thomas

[28] Mr Thomas said he had been contacted by Mr Viglione who told him that the two painters had been painting Mr Taylor's roof. He subsequently communicated this to Mr Papaioannou. He did not speak to Mr Taylor.

Afternoon meeting with Mr Taylor

[29] Mr Taylor was told that he would have an opportunity to respond to the information gathered. Mr Taylor said he was not provided with a copy of the notes of the witness interviews, although Mr Cox and Mr Harvey read from their notes of the interviews. Mr Taylor said he had difficulty in taking in all the information that he was being given.

[30] Mr Taylor said that during the two meetings on 30 March he was not informed that a possible outcome was his instant dismissal and they did not tell him he could bring a lawyer to the meeting.

TUESDAY 31 MARCH

10am meeting with Mr Taylor

[31] Mr Taylor was accompanied by his son-in-law, Mr Grant Nicholson. Mr Taylor asked Mr Cox to recap on the facts for the benefit of Mr Nicholson. Mr Cox said Mr Taylor had sent Messrs Clarke and Kake to his house to paint the roof on 19 and 20 March and that he had paid them each \$200. He had not notified either BAE Systems or EPTEC of any of this and EPTEC had only found out about this after Mr Sherwood had spoken to Mr Clarke. Mr Taylor had approved timesheets for the days on which the work was done, which recorded the painting as maintenance chargeable to BAE Systems. He also said that according to Mr Clarke, Mr Taylor had told him to record the painting time as maintenance. Mr Cox did not tell Mr Taylor that Mr Clarke had denied having a conversation with Mr Taylor and said he had just submitted the timesheets as normal. Neither did Mr Cox tell Mr Taylor that he had not put the allegations regarding the specific details of the conversation with Mr Sherwood to Mr Clarke for his comment.

[32] Mr Taylor responded that he had approached Mr Clark with an offer of work once he was redundant and that he purchased the paint that was to be used. On 17 March Mr Clark told him he could do the work later that week. Mr Taylor said he did not think EPTEC or BAE would be prejudiced by this as there was no other work to be done. It never occurred to him that they might try to double dip by charging the time to EPTEC/BAE Systems. On Monday 23 Mr Clark had come to this office with the timesheets. Mr Taylor was busy and told him to leave them on the desk. He did not tell Mr Clark to put down the time as maintenance or to charge the time to EPTEC.

[33] He later signed the timesheets without reviewing them and returned them to EPTEC. Later on that night he had wondered about the timesheets and made a mental note to double-check that they were correct. When he met with Mr Sherwood in the morning, they discussed the timesheets being incorrect and that they would need to be redone. Mr Sherwood had come to him before he had an opportunity to look at them

and correct them if necessary. He thought Mr Sherwood had asked Mr Clarke to correct the timesheets which he re signed and then gave to Mr Sherwood. He ripped up the old ones and they were in his office. He was unsure whether the timesheets had been corrected on the Tuesday afternoon or Wednesday morning.

[34] Mr Cox asked Mr Taylor about the timesheet process. He said that Mr Sherwood had originally sent the timesheets to Australia and then it was Mr Clarke. He wasn't sure when the change had taken place.

[35] Mr Cox said that at that stage he thought Mr Taylor's conduct was extremely poor if not dishonest. He and painters had arranged the work themselves without notifying anybody. In fact Mr Clarke had told Mr Sherwood on the 17th, prior to starting the work. He likely had signed the timesheets without reading them, but at the very least he had signed them without checking. He had done little or nothing to actively address the problem once the penny had finally dropped.

[36] Mr Cox said that in that context he was sceptical about Mr Taylor's denial. However, they decided to adjourn in order to speak again with the painters' employers to clarify the events regarding resubmission of the timesheets and to consider in general Mr Taylor's response to the allegations.

10.50am – telephone interview with Mr Viglione

[37] The purpose of the call was to check Mr Taylor's responses regarding the submission of the amended timesheets. Mr Viglione said the timesheets had been resubmitted at the insistence of EPTEC and that he had instructed Mr Sherwood to take that action. He was happy for Mr Sherwood to be contacted.

[38] Mr Viglione's understanding was that the timesheets had been corrected only at Mr Sherwood's insistence when he referred to them to Mr Taylor.

10.55am – meeting with Mr Sherwood

[39] Mr Sherwood said he learned from Mr Clarke that both he and Mr Kake were at Mr Taylor's house on 19 March. Later on 23 March he had sighted the timesheets and then raised the matter with Mr Clarke who had told him that Mr Taylor had instructed him to fill out timesheets for the painting time, record the time as maintenance and to make the timesheets look normal. Mr Sherwood then told Mr

Clarke to submit amended timesheets. He said that the first Mr Taylor knew about the amended timesheets was when Mr Clarke gave them to him for authorisation. Mr Sherwood also told him that when he approached Mr Taylor about the falsified timesheets, he was a bit sheepish about the matter and said he had thought about the matter on the weekend.

[40] Mr Cox said this seemed to contradict Mr Taylor's statement that he had not given the matter a second thought until the Monday night. The "matter" in question is clearly the matter of the timesheets and Mr Taylor could not have considered that over the weekend because the timesheets were not submitted until the Monday.

[41] Mr Cox said Mr Sherwood also differed from Mr Taylor's account of events surrounding the re-submission of the timesheets. Mr Taylor's version was that he had agreed to sign corrected timesheets. Mr Sherwood's account was that he had instructed Mr Clarke to submit corrected timesheets and the first Mr Taylor knew about that process was when Mr Clarke presented them. There was no evidence that Mr Cox had told Mr Sherwood that Mr Taylor had said he had had a conversation with him in the morning regarding the timesheets.

1.40pm dismissal meeting

[42] When the meeting reconvened Mr Cox did not tell Mr Taylor he had spoken again to Mr Viglione or that he had spoken to Mr Sherwood and that in Mr Cox's view what Mr Sherwood had said contradicted what Mr Taylor had said regarding the matter of resubmission of the timesheets. This was a material consideration in the dismissal and it was not put to Mr Taylor for his comment. The view that Mr Taylor was lying was not put to him for his comment either. Mr Taylor was given no opportunity to comment on the proposed penalty.

[43] Before the meeting commenced Mr Cox had decided to summarily terminate Mr Taylor's employment. He told Mr Taylor that the company had concluded that he had engaged the painters without the prior consent of either EPTEC or BAE Systems and that he had gained personally from the painting arrangement as it was less than the going commercial rate. This appears to be the first time that this specific allegation was raised. Mr Taylor had paid for the paint and, if he had intended to gain personally, by conniving with Mr Clarke and Mr Kake, would not have paid the painters at all. Mr Cox maintained that Mr Taylor had signed the timesheets knowing

that the painters had been working for him on 19 and 20 March; that there had been a conversation between him and Mr Clarke regarding the timesheets and that he only changed the timesheets after being presented with revised timesheets by Mr Clarke.

[44] He told Mr Taylor he had been expected to act in accordance with the company policies and expectations – the company policies had not been provided. When I asked Mr Cox about the policy issue he said he was referring to the House Rules. Mr Cox ultimately clarified during the hearing that the breach of policy that was being referred to was a falsification of timesheets which was set out as serious misconduct in the House Rules.

[45] Mr Taylor was told to collect his personal belongings and leave the site.

[46] On 2 April the respondent wrote setting out the reasons for the dismissal. The three grounds relied on for the summary termination were that Mr Taylor:

- (i) did not seek or gain approval prior to making arrangements to engage company sub-contractors for his private use;
- (ii) gained personal financial benefit from this arrangement; and
- (iii) attempted to mislead or defraud the company of monies by approving timesheets that he was obviously aware were incorrect.

Justification

Suspension

[47] There was no contractual provision for suspension. The respondent says that the decision to suspend was taken on the basis that Mr Taylor's remaining on site would impede a proper investigation. The only two people to whom BAE spoke during the investigation who were on site were Mr Sherwood and Mr Clarke. The other people were based in Australia. This is not one of those cases in which the circumstances are so unusual or exceptional (*Singh v Sherildee Holdings*, AC 53/05, 22 September 2005, Couch J; *B & D Doors Ltd v Hamilton*, (2008) 8 NZELC 99,258) that a suspension without a contractual provision or consultation was justified.

[48] I agree with the applicant that there are a number of aggravating features to the suspension which include escorting Mr Taylor to his vehicle and prohibiting him from removing the brackets.

[49] Mr Taylor suffered an unjustified disadvantage.

Dismissal

[50] Section 103A requires that the Authority consider BAE's actions and whether those were what a fair and reasonable employer would have done in all the circumstances at the time.

[51] The reasons for dismissal were those recorded in the letter of 2 April and provided orally at the meeting on 31 March.

[52] One of the respondent's grounds was that Mr Taylor did not seek or gain prior approval. Mr Sherwood said EPTEC did not have a problem with its employees doing private work provided the company was not being asked to pay for the work. Mr Clarke volunteered his services and Mr Taylor took him at his word. Mr Taylor had an obligation to act in the best interests of his employer. The Conflict of Interest Policy in the individual employment agreement states that it is inappropriate for employees to engage in any activity that causes detriment to their employer.

[53] Had there been work for the painters to do (Mr Viglione said there was none and the painters went fishing on the Friday after they had finished painting the roof in the morning) Mr Taylor would have deprived BAE of labour and caused a detriment to his employer. Having said that, it would have been wiser for Mr Taylor to alert EPTEC and BAE to his proposal.

[54] The claim that Mr Taylor gained a personal benefit cannot stand. Not only was he not given an opportunity to comment on it (it was not referred to until the dismissal meeting) but he did not gain a personal benefit. His proposal to the painters was to provide a benefit to them once their jobs had disappeared. If Mr Taylor had not paid the painters and had not corrected the tie sheets and BAE Systems had borne the cost, then there would have been a personal benefit at the company's expense.

[55] The allegation that Mr Taylor attempted to mislead or defraud the company cannot stand. Mr Cox did not tell Mr Taylor that Mr. Clarke had denied having a conversation with him regarding the timesheets. Mr Cox accepted that he had not told Mr Clarke what Mr Sherwood had alleged he had said. Mr Cox did not follow up on Mr Clarke's denial once he became aware of it. Judging by Mr Cox's actions in refusing to release the brackets there is more than a suspicion that he had already formed an unfavourable view regarding Mr Taylor's honesty. Mr Cox accepted that he had decided not to release the brackets because Mr Taylor was being investigated for fraudulent activity. This was a very serious allegation and the investigation into it was woefully lacking.

[56] Mr Cox appears to have drawn adverse conclusions about Mr Taylor on the basis of his and Mr Sherwood's accounts of the correction of the timesheets. The information provided by Mr Sherwood was not revealed to Mr. Taylor for his comment; and Mr Taylor's position does not seem to have been put to Mr Sherwood. Where there was a conflict in the evidence of Mr Sherwood and Mr Taylor during the hearing I prefer Mr Taylor's evidence. Mr Sherwood's recollection was, understandably given the passage of time, hazy.

[57] Mr Cox could have concluded that Mr Taylor had been careless in that he did check the timesheets before signing it but he could not reasonably reach a conclusion that Mr Taylor had misled or attempted to defraud the company.

[58] Mr Taylor had an unblemished work record and been with the company for many years. He was given no opportunity to comment on the proposed penalty.

[59] Mr Taylor's actions may have been foolish or careless but they did not constitute serious misconduct and did warrant a summary dismissal.

REMEDIES

Compensation

[60] Mrs Taylor and Mr Nicholson gave evidence regarding the distress occasioned by the termination. Mr Taylor said he felt like a criminal. He and his wife had been anticipating having a redundancy payment to help them with their retirement. He said he was embarrassed and felt a failure in that he was not able to provide for his wife as he had planned. He felt angry and had difficulty sleeping. He was also distressed by

the fact that senior BAE representatives, with whom he had established excellent working relationships failed to make contact. He felt he was being treated like a leper. He was disappointed that he would not be able to witness the closing events for the delivery of the four new ships to the New Zealand government after so much commitment to the Project. He had organised functions for the “Keel Laying” and “Naming Ceremonies” for the four vessels. He felt angry and upset that the action taken by BAE Systems would impact on future employment opportunities in Australia and New Zealand. He had secured some contracting work but one of the directors of a company he was supervising had questioned the nature of his departure from BAE. He had explained the situation but felt that his name and reputation were forever tarnished.

[61] Mr Taylor was both unjustifiably dismissed and unjustifiably disadvantaged. As a result of both the dismissal and the suspension he suffered humiliation and distress. An appropriate award is \$7,000.

Lost remuneration

[62] He found work as a contractor starting at the beginning of May which was the date on which his employment with BAE would have ended and his redundancy taken effect.

[63] He quantified his losses as follows:

- Salary between 1 April and 30 May of \$27,761.54
- Redundancy entitlements of \$117,988.26 which comprise:

Redundancy notice of one month paid in lieu - \$13,880.77

Job search allowance - \$6,940.38

Loyalty payment - \$6,940.38

Redundancy compensation - \$90,226.73.

[64] BAE is to pay Mr Taylor the lost remuneration for April and May.

[65] BAE is to pay Mr Taylor his redundancy entitlements. The respondent did not challenge the amount of the redundancy entitlements. If there is a dispute and the

parties are unable to resolve it leave is reserved to return to the Authority on this issue.

[66] BAE is to pay interest on the lost remuneration and the redundancy entitlements at the rate of 4.79%. The interest on the lost remuneration is payable from 1 April 2009 and on the redundancy entitlements from 1 June 2009.

Contribution

[67] Pursuant to s 124 I must consider the extent to which the actions of the employee contributed to the situation which gave rise to the personal grievance; and if those actions so require reduce the remedies accordingly. Mr Taylor's actions did contribute to the situation giving rise to the personal grievance. The question is whether those actions require a reduction in remedies. For conduct to require reduction it must be blameworthy.

[68] Mr Taylor should have exercised greater diligence in checking the time sheets. This action was blameworthy. A reduction of 20% is appropriate. That reduction is to apply only to the two month's lost remuneration and the compensation award, not the redundancy payments: *Yukich v Carter Holt Ltd* [2004] 1 ERNZ 78.

Breach of good faith and employment agreement and penalty

[69] I did not have submissions on what constitutes the alleged breach. Section 4 (1A) provides that the parties are to be responsive and communicative and that when an employer is proposing to make a decision that will, or is likely to, have an adverse effect on an employee's employment, must provide access to information. Mr Cox did not provide Mr Taylor with relevant information. That was a breach of good faith. However, I decline to award a penalty because I have found that the employer's actions were unjustified. The same reasoning applies to the claim for penalty for breach of the employment agreement.

Costs

[70] If the parties are unable to agree on the issue of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum

Dzintra King
Member of the Employment Relations Authority