

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2023] NZERA 292
3172582

BETWEEN JARROD TURNER-MCMILLAN
Applicant

AND CANTERBURY ALUMINIUM
LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Robert Morgan, advocate for the Applicant
Andrew Marsh, counsel for the Respondent

Investigation Meeting: 6 March 2023

Submissions received: Applicant: On the day
Respondent: On the day

Determination: 6 June 2023

DETERMINATION OF THE AUTHORITY

[1] Mr Turner-McMillan was employed for approximately six months by the respondent (CA) as a fabricator. Mr Turner-McMillan resigned. He withdrew his resignation and then resigned again. He was dismissed without notice part way through his notice period for serious misconduct and claims this was an unjustified dismissal.

[2] CA says that it was justified to dismiss Mr Turner-McMillan when and how it did based on its findings that he failed to follow repeated instructions not to use his phone while at his workstation and of his attitude and behaviour towards management was serious misconduct. CA says these things were serious misconduct because they led CA to lose its trust and confidence in Mr Turner-McMillan to continue to do his job.

[3] Mr Turner-McMillan claims he should be reimbursed for wages together with a holiday pay component for the remainder of his notice period (11 days), compensation, and costs.

The Authority's investigation

[4] For the Authority's investigation witness statements were lodged by the applicant and by the respondent for Mr Averill, the managing director; Ms Williams, the production manager; Mr Miller, Jarrod's factory supervisor; and Ms Dix, an office administrator. A brief of evidence lodged by CA from a further employee of CA has not been considered because that person did not appear to be questioned about her evidence. All witnesses that did appear were heard from and answered questions on oath or affirmation.

[5] During the investigation meeting it became apparent that there was a digital recording made of the disciplinary meeting on 17 February 2022. By agreement it was provided and played to the parties, their representatives and me towards the end of the investigation meeting. I then gave the parties time to consult with their representatives and make any submissions about this evidence.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[7] The issues are:

- a. Was CA justified in dismissing Mr Turner-McMillan without notice for serious misconduct?
- a. If the dismissal was not justified what remedies are to be awarded?
- b. Should either party contribute to costs of representation of the other?

Background to the employment relationship problem

[8] Mr Turner-McMillan was employed by CA from September 2021 to 23 February 2022. He did not have the full skill set for the role and needed training or help beyond completing window fabrication. He predominantly did window fabrication. He resigned for the first time

in January 2022. He withdrew his resignation when CA increased overall pay rates and the production manager, Ms Williams invited him to reconsider his resignation.

[9] Mr Turner-McMillan resigned for the second time on 10 February 2022. His individual employment agreement (IEA) required him to give four weeks' notice which he did.

[10] On the 15 February 2022, during his notice period, Mr Turner-McMillan had a verbal exchange on the factory floor at his workstation with Ms Williams. While in dispute what was said it related to Mr Turner-McMillan's phone use. Ms Williams reported this to the managing director, Mr Averill who then arranged to see Mr Turner-McMillan in his office. The meeting was short and ended badly. Mr Averill says Mr Turner-McMillan became aggressive and left the office yelling that Mr Averill was 'a fucking cunt' and that Mr Averill 'would hear from his father.

[11] Mr Turner-McMillan has variously disputed he said these words; that he cannot recall; that if he swore it was not directed at Mr Averill; that swearing happens in a workplace; that if he said these things he was frustrated because he had no one to help him with the tasks of his job. Mr Turner-McMillan also says that he was reacting to the way Mr Averill was speaking to him.

[12] After the informal meeting ended, Mr Averill went down to the factory floor and spoke with Mr Turner-McMillan. He says he verbally suspended Mr Turner-McMillan on full pay and asked him to leave the premises while CA carried out a disciplinary investigation. Mr Averill says Mr Turner-McMillan was too agitated to stay on the premises. Mr Turner-McMillan says Mr Averill told him he was 'sacked' in this conversation. Mr Averill denies he dismissed Mr Turner-McMillan in this conversation. There is a dispute as to whether Mr Turner-McMillan asked whether he was being put on 'garden leave'. Mr Averill emailed Mr Turner-McMillan an invite to a disciplinary meeting (disciplinary meeting letter) on the same day soon after this happened. Mr Turner-McMillan says this was a 'change of heart' and is adamant he was 'sacked' already. Despite this Mr Turner-McMillan attended and took part in the disciplinary process prompted by the disciplinary meeting letter.

[13] The disciplinary meeting letter included:

- a. confirmation of the paid suspension while CA investigated two allegations of serious misconduct;
- b. an allegation of serious misconduct that Mr Turner-McMillan's behaviour had compromised CA's trust and confidence in him based on:
 - i. 'refusing to stop using your phone while at your workstation'
 - ii. 'abusive and foul languaged conversations with the production manager [Ms Williams] and the general manager [Mr Averill]'
- c. that 'in the absence of acceptable explanations' CA may deem the matters to be 'very serious misconduct' and 'any outcome may affect my ability to continue to employ you';
- d. that Mr Turner-McMillan could seek legal advice and bring a support person to the meeting;
- e. that after hearing explanations at the meeting, Mr Averill would 'determine what further investigation or process may or may not be required to resolve my inquiry'.

[14] A disciplinary meeting was held on 17 February 2022. It lasted approximately six minutes. Mr Turner-McMillan attended with a fellow worker as a support person. Mr Averill attended with CA's office administrator, Ms Dix who took handwritten notes that she later typed into a narrative style record. The only people speaking were Mr Averill and Mr Turner-McMillan.

[15] The meeting concluded with Mr Averill saying he would take into account what Mr Turner-McMillan had explained about his phone use and his reaction to being asked not to use it during work time including the way that Mr Turner-McMillan had allegedly reacted to Mr Averill in the informal meeting and at the end of it. There was no mention in that meeting of Mr Turner-McMillan's interaction with Ms Williams.

[16] On 23 February 2022 CA emailed Mr Turner-McMillan with a letter headed 'Outcome of meeting to discuss employment concerns' in which CA terminated Mr Turner-McMillan's employment immediately without notice.

[17] Mr Turner-McMillan raised a personal grievance against CA in a letter dated 25 February 2022 for unjustified dismissal and disadvantage in employment claiming that the

dismissal was unjustified both substantively and procedurally. He only progressed a claim of unjustified dismissal in the Authority.

Was CA justified in dismissing Mr Turner-McMillan without notice for serious misconduct?

[18] Section 103A of the Act requires the Authority to assess whether an employer has shown that its decision to dismiss was justified based on what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. This includes asking whether the employer's substantive reasons were sufficient to justify the dismissal and whether the procedure the employer followed in making the decision was fair. Minor defects in the disciplinary procedure may not support a finding of unfair procedure if they have not had an unfair effect on the employee.

[19] Under s 103A of the Act the following factors are considered to measure an employer's fair process leading to a decision to dismiss

- (a) whether subject to resources available, the allegations against an employee were sufficiently investigated
- (b) whether the allegations were raised with the employee
- (c) whether the employee was given a reasonable opportunity to respond to the allegations
- (d) whether the employer genuinely considered feedback.

[20] To prove it is justified to dismiss an employee, an employer needs to prove its decision was fair and reasonable. The New Zealand Court of Appeal has said this includes having "clear evidence upon which any reasonable employer could safely rely or having carried out reasonable inquiries" finds that on the balance of probabilities "grounds for believing ... the employee was at fault." ¹

[21] It is not for the Authority to re-run the case and decide what it thinks the outcome should have been but rather to examine whether the decision was one that was within the range of what a fair and reasonable employer could have done in the circumstances at the time.

¹ *Airline Stewards & Hostesses of New Zealand Union v Air New Zealand Limited* (1990) 3 NZLR 549 (CA) at 556.

[22] It has been submitted for Mr Turner-McMillan that the investigation process was insufficient relating to the allegations about phone use and Mr Turner-McMillan's behaviour towards management. This as I understand it relates to Mr Averill having confirmed what he confirmed with 'five' others in the workplace about Mr Turner-McMillan's responses at the disciplinary meeting. Against this, it is submitted for CA that there was evidence to support that Mr Turner-McMillan did repeatedly use his phone and that he had behaved the way he did. It submits that any procedural defects in the process could not undermine the substantive finding. CA relies on the Employment Court finding that a procedural defect did not affect the 'reliability of the substantive conclusion reached by the employer'².

Phone use

[23] It is submitted for Mr Turner-McMillan that there is no evidence to support that the issue of his repeated refusal to stop using his phone was formally put to him before the disciplinary process. While that is not denied by CA it submits that this is not relevant. This is because Mr Turner-McMillan did not deny he was asked not to use his phone in the disciplinary meeting but rather said he had not been formally warned or that he needed help to do his job. The disciplinary meeting recording includes Mr Averill doubting the latter was the reason for using the phone and saying that it had never been discussed before.

[24] I find Mr Turner-McMillan was likely asked to stop using his phone on, at the very least, the several occasions that he acknowledged in his oral evidence being 'two to three' times by Mr Miller and 'one or two' times by Ms Williams. He also explained to me that he did not at those times, explain he was using his phone because he needed assistance with his work, was waiting for someone to help him or (as raised in his written evidence later) he was looking up how to do a task on his phone.

[25] Mr Turner-McMillan gave oral evidence that he did not explain these reasons for using his phone when he was asked not to because 'they never asked.' I understood him to mean that those supervising him should have asked him if he could do his job or given him more training or help to do his job. I found this response lacking the maturity of a reasonable employee who,

² *Hines v Eastland Port Limited* [2018] NZEmpC 79

as well as his employer, had an obligation to communicate in a constructive way to maintain the relationship of employment³.

[26] I note further that if Mr Turner-McMillan was looking up how to do tasks, this could easily have been an immediate explanation he could give to the person requesting him to stop using his phone. Arguably a reasonable employer or manager could see this as initiative if this was shown to them. That this was not shown to anyone makes this evidence implausible to me. I also find the recording shows it was not a reason given to Mr Averill at the disciplinary meeting.

[27] CA relied on a clause in Mr Turner-McMillan's employment agreement to say that his repeated refusal to get off his phone at work constituted serious misconduct. That clause includes (*italics for emphasis added*):

Ending employment: Serious misconduct

If, after following a fair process, the employer concludes that the employer has engaged in serious misconduct, the employee may be dismissed without notice.

Serious misconduct is behaviour that fundamentally compromises the employer's trust and confidence in the employee. Serious misconduct includes, but is not limited to:

- Theft
- Sexual or other assault
- Harassment of a work colleague or customer
- Use of illegal drugs at work
- *Repeated failure to follow a reasonable instruction*
- Deliberate destruction of the employer's property
- Actions that seriously damage the employer's reputation
- A serious breach of the employer's policies and procedures

[28] Standing back and considering the evidence before me I am satisfied that CA could reasonably have concluded that Mr Turner-McMillan was repeatedly being asked to get off his phone at work and that it was within scope for CA to consider that the repeated behaviour constituted serious misconduct because it was not in substance denied by Mr Turner-McMillan and the behaviour was included in the IEA as serious misconduct.

³ Employment Relations Act 2000, s 4(1A)(b).

Interaction with Ms Williams

[29] Mr Turner-McMillan said in his oral evidence that the exchange with Ms Williams was just a passing conversation. He mentions nothing about it in his claim or in his written brief of evidence. In his oral evidence he says he was using his phone to check how to do a work task. Ms Williams' evidence is that Mr Miller had earlier raised an issue with her about his frustration with Mr Turner-McMillan being on his phone and not working, that she asked Mr Turner-McMillan to stop using his phone and he refused. She denies he told her that he was looking up something on the phone to help him do his job. She says he was verbally aggressive with her and told her she was the reason everyone was leaving. In her oral evidence she described him getting 'in her space' and that his work colleague began moving towards her. I accept her evidence as straightforward, and that the interaction left her feeling uncomfortable. Mr Averill's evidence is consistent with how he says she relayed the interchange with him. This was then the reason he sought to have an informal discussion with Mr Turner-McMillan soon after.

[30] There was no reference to this matter in the disciplinary meeting. I find a likelihood that coming soon after, it was likely raised in the informal meeting albeit briefly and without time for detail. This would suggest a flaw in the procedure because Mr Turner-McMillan was not given an opportunity to respond to what the allegation about his behaviour to Ms Williams was. However, on its own this interaction with Ms Williams, if it occurred the way she describes, could be something a fair and reasonable employer could consider was serious misconduct. I find that while the interaction with Ms Williams was insufficiently investigated it is likely something that happened. I found Ms Williams a reasonably straightforward witness about what happened and Mr Turner-McMillan vague about what happened and to the extent of him saying he was looking something up about a task, I have already found this implausible.

[31] I find that CA did not fully investigate this allegation but that it was unlikely to have affected the overall outcome as will become apparent when I consider the issue relating to Mr Turner-McMillan's behaviour towards Mr Averill.

Interaction with Mr Averill at the first informal meeting

[32] At the 15 February 2022 meeting in Mr Averill's office only Mr Averill and Mr Turner-McMillan were present. No record of this meeting was taken. Ms Dix witnessed the end of the

meeting when Mr Turner-McMillan came out of the closed-door office. I accept Mr Averill's evidence that he wanted to have an informal chat with Mr Turner-McMillan about what had been raised with him by Ms Williams.

[33] Mr Turner-McMillan says he felt he was 'talked to like a child' in this meeting. He says Mr Averill told him he was 'nothing special' and that he felt 'threatened' and 'blackmailed'. In his oral evidence he explained to me that he felt this way because Mr Averill had said to him 'Do you want to leave here with a reputation'. He later confirmed to me that it was his perception that led him to believe he was being 'threatened'. In his written evidence he claimed Mr Averill bullied him and he reacted to that. By this I take it he wants me to accept that if he became verbally aggressive calling his employer 'a fucking cunt' that this was a reasonable response in the circumstances.

[34] At the disciplinary meeting Mr Turner-McMillan denied more than once as 'false' that he had called Mr Averill a 'fucking cunt' he later said he did not say it 'to your face' or then later did not recall using those words. He has then variously said in his evidence in these proceedings that any swearing was either because that was what people did in a factory environment, or that he was reacting to the way Mr Averill was talking to him. The latter was described in his written evidence as reacting to the way someone bullies you in (for example) a school yard. Mr Turner-McMillan also said in his oral evidence that once he gets upset, he cannot recall what he has said. I found Mr Turner-McMillan inconsistent in his evidence on this issue and as such an unreliable witness.

[35] Mr Averill's evidence is that Mr Turner-McMillan became agitated when he tried to talk to him about leaving the workplace on good terms. He denies he threatened or blackmailed and says that is 'not him'. His evidence is that he remained calm.

[36] Standing back and considering the above I find it likely Mr Averill was most upset about what he considered was the unacceptable and inappropriate reaction from Mr Turner-McMillan when he swore at him and yelled and stormed out of his office. I find this was likely in the context of Mr Averill not getting the opportunity to have the informal discussion he planned. I conclude he probably did not get to address the purpose of what he wanted to discuss before Mr Turner-McMillan reacted. Mr Averill was uncomfortable using the exact expletives used when I asked him about what was specifically said. He said he was not comfortable with

that language. He refers to this situation as being something he had not experienced in his years of management. Ms Dix gave straight forward evidence that supports Mr Averill's evidence about how the meeting ended. She says what she heard and witnessed in her workspace upset her afternoon. Her evidence is that Mr Turner-McMillan swung open the door and 'stormed out' of the office yelling 'fucking cunt' and 'you will hear from my father'. I found Ms Dix a straightforward witness. I prefer the evidence of CA as to how this informal meeting ended.

[37] In his response at the disciplinary meeting, after being given the opportunity over several days in which he could have calmed down and reflected, Mr Turner-McMillan denied swearing at Mr Averill in the manner described or variously said he did not swear 'at him' or that he was frustrated because he had no one to help him with his work, or that he could not recall. Mr Averill's frustration is evident in the recording of the disciplinary meeting.

[38] I find that despite some flaws in the process, it was within scope in the circumstances for CA to find that it could not continue to employ Mr Turner-McMillan. I find that his behaviour was likely at such a level of verbal aggression that it likely unsettled Mr Averill and Ms Dix personally. Mr Turner-McMillan made a form of apology at the investigation meeting. It is submitted for CA that this came too late. I agree. It is the decision making at the time that I must consider. Had Mr Turner-McMillan reflected on his behaviour towards Mr Averill and the impact it likely had, he had the opportunity to have addressed this at the time of the disciplinary meeting. He chose not to do so. It would have been the humanly reasonable thing to do. We may not know what the alternative outcome could have been, but an apology as a reasonable response may well have assisted Mr Averill to see things differently in relation to the remaining days of Mr Turner-McMillan's employment.

[39] I find it reasonable that despite some procedural flaws CA's substantive findings that Mr Turner-McMillan had repeatedly used his phone when asked not to so as well as its finding that his behaviour towards Mr Averill was inappropriate and unacceptable were findings within the scope of what a fair and reasonable employer could have made at the time. I also find it within scope that CA found these matters constituted serious misconduct to the extent it could not have trust and confidence in Mr Turner-McMillan to continue in the workplace albeit for only 11 more working days.

[40] Accordingly for the above reasons Mr Turner-McMillan's claim is dismissed. Should either party contribute to the other party's costs?

[41] Costs are reserved. The parties are encouraged to consider the circumstances of this matter and resolve any issue of costs. If they are not able to do so and an Authority determination on costs is needed CA may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service Mr Turner-McMillan would then have 14 days to lodge any reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[42] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate⁴.

Antoinette Baker
Member of the Employment Relations Authority

⁴ <https://www.era.govt.nz/determinations/awarding-costs-remedies/>. The current tariff applied for a one-day Authority investigation meeting is \$4,500.00 for the first day and \$3,500.00 for each additional day.