

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 200
5405150

BETWEEN BRENDAN TURNER
 Applicant

A N D BURNSWICK GRANGE
 PARTNERSHIP
 Respondent

Member of Authority: M B Loftus

Representatives: Simonette Boele, Counsel for Applicant
 Gary Clarke, Counsel for Respondent

Investigation Meeting: 24 September 2013 at Timaru

Submissions Received: At the investigation meeting

Date of Determination: 25 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Brendan Turner, claims he was unjustifiably dismissed by the respondent, Burnswick Grange Partnership, on or about 30 August 2012.

[2] Burnswick accepts it dismissed Mr Turner but claims the decision was justified.

Citation of the respondent

[3] When initially filed, the statement of problem identified Brunswick Grange Partnership as the respondent. Burnswick identified the error and the citation was subsequently changed by agreement.

Background

[4] The parties agree Mr Turner's employment with Burnswick was *permanent / no fixed hours*. Work was only offered when available and the weekly hours could fluctuate with anything from 2 to 60 being worked in any given week.

[5] Burnswick is a labour supply operation. It employs staff who then perform various tasks on a client's property using equipment the client provided.

[6] As already said, Burnswick accepts it dismissed Mr Turner. The decision stems from two incidents. These had been preceded by various complaints from at least five of its staff concerning Mr Turner's behaviour and reticence about working with him though none of these complaints was raised or discussed with Mr Turner.

[7] Mr Turner accepts he has an anger management problem. He also accepts he was on various courses of medication which affected his mood. His therefore became erratic with his use of the medication which further exacerbated the situation.

[8] On the night of 22 June 2012, Mr Turner's temper got the better of him and verbal disagreements led to a couple of inappropriate actions. One involved the hurling of a shovel at a colleague, Mr Cossor, though normal work continued for a period thereafter.

[9] There was then another incident involving a second colleague, Mr Nunns. A problem arose with machinery Mr Turner was operating and Mr Nunns attempted to get his attention. Mr Nunns failed to do so and, in his words, *tapped Mr Turner on the shoulder from behind*. Mr Turner responded by kicking Mr Nunns. This resulted in significant bruising and was followed with Mr Nunns telling Burnswick he no longer wished to work with Mr Turner.

[10] There is confusion as to whether or not Mr Nunns spoke to one of Burnswick's principals, Ms Vanessa Mehrrens, before or after Mr Turner rang to tell her of the incident. Notwithstanding that, it is clear the ensuing conversation between Mr Turner and Ms Mehrrens did not canvass detail. Essentially Mr Turner advised Mr Nunns' injury resulted from the two *horsing around* but the explanation was not accepted by Ms Mehrrens. That is perhaps understandable given Mr Turner's admission he initially thought it was Mr Cossor he kicked and Mr Cossor was not

someone he would have qualms about hurting. He did not feel the same about Mr Nunns. He attempted to apologise but it was not accepted.

[11] After a short discussion between Ms Mehrstens and Mr Turner, she decided she was going to issue a warning. The warning was confirmed in writing the following day and advised Burnswick had concluded Mr Turner's actions in both assaulting and abusing a colleague was unacceptable. It went on to advise Burnswick required Mr Turner attend anger management counselling and failure to do so *may result in the termination of your employment.*

[12] As events transpired Mr Turner did not attend anger management counselling but nor did Burnswick follow up on the issue. Ms Mehrstens says that until the [second] incident of 29 August 2012 his performance and conduct was satisfactory.

[13] On the night of 29 August Mr Turner was operating a machine on a site near Ashburton. It was emitting a loud piercing shriek which gave him cause to seek assistance from a mechanic employed by the owner of both the site and the machine, Mr Hewson.

[14] When the mechanic, Mr Cavill, arrived there was a brief verbal exchange and Mr Turner then left the scene while Mr Cavill remedied the problem. When work proceeded Mr Cavill attempted to give Mr Turner some instruction over the use of the machine. This was occasioned by the fact it had received a structural alteration which meant there had been changes to previously advised operating instructions. Mr Cavill says both he and Mr Hewson were advising operators of the changes as opportunities arose.

[15] Mr Cavill's observations were not well received by Mr Turner and an increasingly heated exchange followed. It is accepted by both it was loud and they frequently used expletives. The altercation finished with Mr Cavill departing the scene. He says he decided to report the incident to Mr Hewson and then did.

[16] Mr Hewson, then rang Burnswick and spoke to Mr Mehrstens, another member of the partnership and is said to have advised he no longer wanted Mr Turner on his premises. Ms Mehrstens was told of the conversation by her husband and it was followed by a letter from Mr Hewson which arrived the following day. It says Mr Turner's manner was abusive and unhelpful and observed Mr Hewson had personally encountered similar behaviour in the past. The letter goes on to advise:

Due to these two altercations we recognise there is a need for this employee to be managed more closely. We are unable to provide this level of support and would like him replaced immediately with an employee who is more suitable to work.

[17] Ms Mehrtens says she considered this, her belief the owner of the other site to which Burnswick provided services would also be unwilling to have Mr Turner on its site and the previous complaints from other staff. She decided to dismiss Mr Turner and sent a text which, Mr Turner says, read:

Your final pay will not be paid until equipment is returned. Check the mailbox there is a letter there for you.

[18] Ms Mehrtens accepts she sent the text but cannot remember the exact wording. It was followed by a letter dated 30 August 2012. It reads:

We wish to inform you as at 30/08/12 you are in breach of your contract with us, as per house rules in schedule 1. This resulting in immediate dismissal. As from 30/08/12 you are no longer employed by Burnswick Grange Partnership.

[19] The rules being quoted are contained in a schedule to Mr Turner's employment agreement. They advise:

Breach of any of the following rules by the employee shall be treated as serious misconduct and may result in summary (immediate) dismissal.

...

- 4 *Fighting, bullying or harassment of other employees ...*
- 6. *Causing disruption in the workplace by unacceptable behaviour.*

[20] Mr Turner's immediate response was to send a text to Mr Cavill. It says *thanks for getting me fired* before adding, amidst a liberal sprinkling of expletives, that Mr Cavill had better watch his back.

[21] Mr Turner's more considered response was to seek legal advice and commence proceedings for unjustified dismissal which led to today's investigation meeting.

Determination

[22] As already said Burnswick accepts it dismissed Mr Turner. In doing so it also accepts it is required to justify the dismissal.

[23] Section 103A of the Employment Relations Act 2000 (the Act), states the question of whether a dismissal is 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 could have done in all the circumstances at the time the dismissal ... occurred.

[24] In applying the test the Authority must consider whether:

- (a) Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- (b) The employer raised its concerns with the employee prior to taking action;
- (c) The employer gave a reasonable opportunity for response;
- (d) The employer genuinely considered the explanation before taking action; and
- (e) Any other appropriate factors.

[25] In essence points in 24 (b) to (d) summarise that which has long been accepted. An employer is required to put issues in its mind, allow an explanation and consider them.

[26] Here there was no compliance with these requirements. Ms Mehrtens accepts she had no contact with Mr Turner between hearing of the alleged incident on 29 August and deciding to dismiss.

[27] I have also considered the issue of resources and the fact Burnswick is a small trader, but conclude that does not excuse the extent of these deficiencies. If nothing else they could have sought assistance as they have done in the past with, for example, drafting of the employment agreements. Not even the most basic requirements of natural justice were considered and I note the Employment Court's conclusions in *The Salad Bowl Ltd v Howe-Thornley* [2013] NZEmpC 152. At paragraphs 94 and 95 the Court noted such all-encompassing failures were neither excusable nor minor (and therefore irrelevant pursuant to section 103A(5)).

[28] Turning to the reasons for dismissal. Ms Mehrtens says three factors were in her mind: Mr Hewson's demand Mr Turner be removed; her belief the other site to which Burnswick sent staff would not accept his presence and the previous complaints.

[29] Putting aside issues emanating from case law about third party interference, the first factor may have validity but that does not excuse the failure to discuss it and the possibility of alternate employment with Mr Turner.

[30] The other two face greater hurdles. Ms Mehrtens accepts her second concern related to a fear which was, at that time, unsubstantiated. While a subsequent letter from the client suggests the fear might be well founded, Ms Mehrtens did not know that when she decided to dismiss having not then discussed the issue with the client. There are also the previous staff complaints. Ms Mehrtens concedes these were raised by staff prior to the June incident and she chose to ignore them at the time. She cannot now take them into account, especially given the nature of the alleged improprieties and her failure to allow Mr Turner an opportunity to comment.

[31] The dismissal must be unjustified and that conclusion leads to a consideration of remedies. Mr Turner seeks wages lost as a result of the dismissal and compensation for hurt and humiliation pursuant to section 123(1)(c)(i) of the Act.

[32] Section 128(2) of the Act provides the Authority must order the payment of a sum equal to the lesser of that actually lost or 3 months ordinary time remuneration. Mr Turner seeks six weeks wages with that being the period he took to secure alternate employment. Six weeks is less than three months so, pending a possible reduction for contribution, the claim should be awarded in full.

[33] As said in opening, Mr Turner's weekly hours fluctuated. Tax records produced during the investigation show his average weekly earnings were \$613.70 gross. I consider that an appropriate figure to use which leads to a conclusion his loss totalled \$3,682.20.

[34] While Mr Turner also seeks an award under s.123(1)(c)(i) no figure was proposed and there was absolutely no evidence to support the claim. I also have Mr Turner's admission, when answering questions, that just after the incident of 29 August he told a colleague he expected his actions would see his dismissal. He

expected it and when I combine that with the lack of evidence upon which to base an award, I conclude one cannot safely be made.

[35] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Turner contributed to his dismissal in any significant way. The answer is yes, he did.

[36] Ms Boele conceded the fact when giving closing submissions and Mr Turner admitted, when answering questions, his behaviour had been bad throughout. To that I add the evidence which shows he had an anger management problem he did not address. There was also the medication and his decision not to use it which the evidence suggests made him susceptible to engaging in inappropriate behaviour as he did and which led to his dismissal. Having considered the evidence and Mr Turner's other admissions, I conclude his remedies should be reduced by 30%.

Conclusion and orders

[37] For the above reasons I conclude Mr Turner has a personal grievance as he was unjustifiably dismissed.

[38] As a result the respondent, Burnswick Grange Partnership, is ordered to pay Mr Brendan Turner the sum of \$2,577.54 (two thousand, five hundred and seventy seven dollars and fifty four cents) gross as recompense for wages lost as a result of the dismissal.

[39] It is normal costs follow the event but in this case the successful party has only sought an order they lie where they fall. That is not a proposition a respondent would normally challenge and if it chose to do so, a costs award can be revisited. Therefore, and in order to save the parties additional cost and effort, I order costs lie where they fall.

M B Loftus
Member of the Employment Relations Authority