

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 233/10
5286270

BETWEEN JOHN VAN DER GRIEND
Applicant

AND PARKER HANNIFIN (NZ)
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Anne-Marie McNally for Applicant
Paul Connor for Respondent

Investigation Meeting: 2 February 2010

Submissions Received: 12 February 2010

Determination: 19 May 2010

DETERMINATION OF THE AUTHORITY

[1] Mr John Van der Griend was employed by Parker Hannifin (NZ) Limited (“PHL”) in February 1981 as a setter/operator. In addition to his primary role he held the role of Dayshift Leading Hand from June 1984 until February 1996. At that time Mr Van der Griend became an Afternoon Shift Team Leader, a position he held until he was dismissed on 8 October 2009. Mr Van der Griend claims the dismissal was unjustified and seeks remedies including reinstatement. PHL denies the dismissal was unjustified.

[2] The issues for determination are whether Mr Van der Griend was unjustifiably dismissed and if so, what, if any remedies should be awarded.

Background

[3] On Friday 11 September 2009 Mr Van der Griend says he asked two of his team members to turn off a machine. In response one of the team members became

abusive, using particularly foul language and told Mr Van der Griend to turn the machine off him self.

[4] The following Monday, 14 September, Mr Van der Griend lodged a formal complaint about the incident with Ms Joey Bianchina Human Resources specialist for PHL. He says Ms Bianchina said she would arrange a meeting at the end of the month with a Union Organiser and Mr Peter Hay, the Factory Manager, who was away on leave at the time and not due back until the end of the month.

[5] On 29 September Mr Van der Griend was called to a meeting where he was advised a complaint had been made about him. Ironically the complaint had come from the same employee Mr Van der Griend had complained about on 14 September.

[6] During the course of the meeting there was some discussion about the use of safety glasses. In particular that manager's were not wearing them as required. Mr Van der Griend was asked to name the managers who were not using safety glasses in required areas. Mr Van der Griend says he was reluctant to name names and even though pushed to do so, did not.

[7] It was common ground that this meeting was not a disciplinary meeting, was constructive and ended amicably. Mr Van der Griend was to be provided with Team Leader training and at the end of the meeting it was agreed that once Mr Hay returned to work, Ms Bianchina would discuss with him options for courses.

[8] Mr Van der Griend also raised in the meeting that a major problem for him stemmed from the amount of time he was required to work as a machine setter while still performing his supervisory duties and that this was, at times, stressful. Ms Bianchina promised to review Mr Van der Griend's workload once Mr Hay had returned from his holiday.

Incident leading to dismissal

[9] The following day (30 September) was pay day and Ms Bianchina arrived at the worksite to deliver the payslips. She was wearing sunglasses and not the required safety glasses. Ms Bianchina was also wearing open toed shoes which are not permitted in the factory under any circumstances.

[10] Mr Van der Griend says he turned off his machine and stepped over to where Ms Bianchina was standing. He commented on the fact that she did not have the appropriate eyewear or shoes to be in the factory. A discussion ensued whereupon Ms Bianchina and Mr Van der Griend disagreed about whether Ms Bianchina had to obey the rules about eyewear and shoes. Mr Van der Griend says that as the discussion progressed he was walking Ms Bianchina towards the exit door. He then made reference to the meeting from the previous day suggesting to Ms Bianchina that Mr McGowan wasn't the appropriate person to raise the morale issue especially if the complaint had been from Mr Dave Perrett.

[11] Ms Bianchina denied the complaint had been from Mr Perrett and asked who had told Mr Van der Griend that it had been. Mr Van der Griend could see Ms Bianchina was uncomfortable discussing the matter and changed the subject back to her lack of safety glasses and footwear.

[12] The conversation also moved onto an issue in relation to the situation regarding Ms Peiti Va and arrangements with respect to payment of wages. The conversation ended with Mr Van der Griend making his views clear that he was not happy that Mr McGowan had discussed the morale issues with him nor was he happy about the situation with Ms Va. Mr Van der Griend expressed his view that the conversations with him about his performance should have been undertaken by Mr Hay and Mr Moran as they were his direct managers.

[13] Mr Van der Griend and Ms Bianchina proceeded to Mr Van der Griend's office where he says he offered Ms Bianchina a chair which he sat on a filing cabinet. He says they discussed the meeting of the day before and he showed her a document from his desk to support his contentions that he was not managing his setting duties. After looking at the document Mr Van der Griend noticed that Ms Bianchina stepped back towards the office door.

[14] Mr Van der Griend says the discussion then turned towards the courses for team leader skills, but Mr Van der Griend was attempting to make the point that the real problem in the factory was with the production schedule he was trying to achieve and he felt that this point hadn't been heard at the meeting the previous day.

[15] Mr Van der Griend says that as Ms Bianchina made to leave the office she told Mr Van der Griend that she wasn't there to beat him up at which time he raised his hands and told her "...ha ha that's okay, I am bigger than you, I'll be okay."

[16] Ms Bianchina told Mr Van der Griend that what he had done scared her. Mr Van der Griend says he did not intend that and felt embarrassed and surprised and at a loss for words. But he didn't think much of it at the time because Ms Bianchina began talking again in a normal way about having to pick up her children so he assumed she had just been having him on.

[17] At about 3.00pm on Friday 2 October Mr Gray advised Mr Van der Griend by telephone that a copy of the complaint letter had been sent to his address. It appears the letter was incorrectly addressed and therefore Mr Van der Griend did not receive it. After making contact with Mr Eugene Setu, a union organiser, a copy was forwarded to him via email on Monday 5 October.

[18] The letter claimed he had not responded to calls which Mr Van der Griend denies. He says he received voice mail messages from Mr Gray to set up a meeting with Mr Hay, Mr Setu and himself. He says both he and Mr Setu attempted to make contact with Mr Hay but Mr Hay was not available.

[19] Mr Van der Griend says that at about 12.30pm he received a voice message from Mr Gray. He says he was advised that Mr Setu would be in touch next week but Mr Gray did not want things to drag on and asked Mr Van der Griend if they could schedule a meeting for that day at 11.00am. Mr Van der Griend says Mr Gray advised him that if Mr Setu was not available he should get another union rep.

[20] The meeting eventually went ahead the next day on Tuesday 6 October. In preparation for the meeting Mr Van der Griend documented his account of the events that had occurred the previous week. His written statement was tabled at the meeting. The meeting ended with Mr Gray advising that he would take Mr Van der Griend's statement to Ms Bianchina and that a second meeting would take place on 8 October. Mr Setu says there was virtually no opportunity for discussion of the issues.

[21] Prior to the meeting on 8 October Mr Van der Griend had prepared a full written response to Ms Bianchina's complaint which he wished to go through at the meeting. However, at the meeting on 8 October Mr Gray advised that the information from the previous meeting had been passed onto Mr McGowan in Australia and that the

instruction was that Mr Van der Griend's employment was to be terminated immediately. Mr Gray refused to enter into any discussion.

[22] Following his dismissal Mr Van der Griend was advised that on 13 October at a team briefing Mr Hay had advised all staff that he had been dismissed for physically harassing a female member of staff.

Determination

[23] Mr Van der Griend says he was unjustifiably dismissed on 8 October 2009. Pursuant to section 103A the Authority must scrutinise the respondents actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[24] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[25] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

[26] The crux of the matter in this case is whether Mr Van der Griend "threw a punch" toward Ms Bianchina or whether he "made a gesture" with clenched fists to demonstrate a point to Ms Bianchina. After its investigation PHL believed Mr Van der Griend had thrown a punch at Ms Bianchina.

[27] Mr Van der Griend provided a written statement of his side of the story in which he makes no mention of lifting his hands in the air but denies any conduct which could have caused Ms Bianchina to have become upset. He states that she was smiling when she left his office.

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

[28] In her original statement Ms Bianchina describes Mr Van der Griend's behaviour as aggressive. She states that Mr Van der Griend "...suddenly jumped forward made a fist and punched his fist towards my face only a few centimetres away." At the investigation meeting Ms Bianchina confirmed his hand was actually 20-30 centimetres away. This was a significant difference in what PHL understood and what Ms Bianchina's evidence was at the investigation meeting. I am satisfied that at 20-30 centimetres Mr Van der Griend's hand was still close enough to Ms Bianchina's face that it would cause concern for her. This accompanied by the stepping forward of Mr Van der Griend would give a person cause for concern.

[29] However, the house rules are clear about what does and does not constitute serious misconduct. Misdemeanours, which may result in warnings, are listed and include "aggressive/argumentative behaviour". In his letter confirming his dismissal and dated 8 October 2009, Mr Van der Griend is advised that "Aggressive argumentative behaviour in the form of physical threats is considered to be serious misconduct." This is clearly not what the code of conduct states. To hold that an action constitutes serious misconduct, when PHL had already determined through its rules, that action would constitute a misdemeanour is to misapply its own rules with regard to conduct.

[30] Further, the decision maker was Mr John McGowan who was based in Australia and was in Australia during the disciplinary process. Mr McGowan made the decision to dismiss after receiving information from Mr Nick Gray. Following the initial meeting on 6 October, Mr Hay and Mr Gray felt they needed to put Mr Van der Griend's statement to Ms Bianchina for her response. The meeting on 6 October was adjourned to allow this process to be undertaken.

[31] Later that evening Mr Gray sent an email to Mr McGowan in Australia and advised of the meeting and his follow-up conversation with Ms Bianchina. By way of summary Mr Gray advised Mr McGowan (verbatim):

Both Peter and I feel that something more than just a discussion has taken place but with no witnesses we can not prove or disprove.
 Given the preceding meetings on the Tuesday, it is very likely that John was highly stressed and feeling under pressure.
 Also that [Ms Bianchina] with her experience would not be fabricating her account of events. We suspect that [Ms Bianchina's] response to John's questioning her that Dave Perrett had laid a complaint that had resulted in the Tuesday's meeting, would have frustrated John, in that [Ms Bianchina] did not divulge his name. Which may have caused John to lose control. This is only supposition.

[32] Mr Gray's suppositions were never put to Mr Van der Griend for his comment or response. The next meeting was held on 8 October. At that meeting Mr Van der Griend had a second written response which he wished to read to those present, however, before any discussion could be entered into, Mr Gray advised that the investigation had been concluded and he would read a letter but would not enter into any discussion or debate. Mr Gray then read a letter advising Mr Van der Griend that his employment was to be terminated immediately.

[33] It is a basic tenet of natural justice upon which procedural fairness is based, that Mr Van der Griend had the right to be heard by the decision maker⁴.

[34] I find that the procedural breaches by PHL in this matter were of sufficient seriousness as to make Mr Van der Griend's dismissal unjustified. An employer acting reasonably and fairly would have classified the conduct firstly as misconduct and considered whether a warning should be issued and secondly, would have ensured Mr Van der Griend was able to put his responses to the decision maker, and had a full opportunity to respond to the additional information gained from the second interview with Ms Bianchina and, in particular, the suppositions arrived at by Mr Gray.

Remedies

Reinstatement

[35] Mr Van der Griend is seeking to be reinstated to his former role at PHL. PHL is opposed to reinstatement. Ms Bianchina's evidence was that she felt that if Mr Van der Griend was reinstated she would have no option but to resign from her employment.

[36] Reinstatement is the primary remedy where it is sought. I have considered Mr Van der Griend's work record which by all accounts is without blemish with the exception of the complaint made about him in September and for which no disciplinary action was taken.

[37] In her oral evidence Ms Bianchina acknowledged that her job is based at a different facility to that in which Mr Van de Griend is employed and she is not required to work frequently with him. Ms Bianchina did tell me that due to Mr Van der Griend's role as a supervisor she will come into contact with him during in-house training sessions. However, I am satisfied that during those occasions when Ms

⁴ *Quinn v Bank of New Zealand* [1991] 1 ERNZ 1060.

Bianchina does have contact with Mr Van der Griend, others will also not doubt be in attendance. This should allay any fears Ms Bianchina has about any possible aggressive conduct from Mr Van der Griend.

[38] Further, it was Mr Van der Griend's uncontested evidence that their shifts only overlap by one and a half hours. Ms Bianchina finishes her work at 5.00pm while Mr Van der Griend's afternoon shift does not commence until 3.30pm.

PHL is ordered to reinstate Mr Van der Griend to his former position or to a position no less advantageous than the one held at the time of the unjustified dismissal by 1 June 2010 pursuant to section 123(1)(a) of the Employment Relations Act 2000.

The parties are also directed to attend mediation to discuss and agree on how Mr Van der Griend's reinstatement's is to be achieved.

Reimbursement of lost wages

[39] Mr Van der Griend has lost wages as a result of his dismissal. Mr Van der Griend gave little evidence as to the attempts he made to find alternative employment immediately following his dismissal. However, he has provided evidence of the attempts he made to find alternative employment from January 2010 onwards.

[40] Mr Van der Griend is entitled to receive reimbursement of lost wages for the period 9 October 2009 to 1 June 2010. I have calculated Mr Van der Griend's loss as being 33 weeks at a gross weekly pay of \$1,490.

PHL is ordered to pay to Mr Van der Griend to sum of \$49,170 gross pursuant to section 123(1)(b) of the Act, within 28 days of the date of this determination.

Bonus payments

[41] Mr Van der Griend also seeks reimbursement for two bonus payments which he says he would have received had he not been dismissed. It was common ground that the first bonus payment, paid out in November 2009 was \$680.00. The second bonus payment has not been quantified, however, I am satisfied this can be achieved by PHL.

PHL is ordered to pay to Mr Van der Griend to sum of \$680 gross and is ordered to calculate and pay to Mr Van der Griend an amount equal to the bonus payment paid to other employees for the quarter ending January 2010. These orders are made pursuant to section 123(1)(c)(ii) of the Act within 28 days of the date of this determination.

Compensation

[42] Mr Van der Griend seeks payment of compensation for humiliation and distress caused by his dismissal. He says he was embarrassed and shocked that he was dismissed. Immediately following Mr Van der Griend's suspension Mr Mike Lightfoot, the New Zealand operations manager, advised all the Factory staff that Mr Van der Griend had been suspended pending the outcome of the result of an investigation. Then, on 8 October Mr Hay advised the Factory employees that Mr Van der Griend had been dismissed for harassing a female employee. These actions by PHL contributed to Mr Van der Griend's sense of humiliation and hurt.

PHL is ordered to pay to Mr Van der Griend to sum of \$7,000 pursuant to section 123(1)(c)(i) of the Act, within 28 days of the date of this determination.

Contribution

[43] I am required to consider the extent to which the actions of Mr Van der Griend contributed toward the situation that gave rise to the personal grievance, and, if required, reduce the remedies that would otherwise have been awarded.

[44] I am satisfied Mr Van der Griend did raise his hand or hands in front of Ms Bianchina. He told me as much during the investigation meeting. However, the evidence does not show that the action was done in a threatening or malicious way. The evidence before the Authority was that Mr Van der Griend was smiling when he did this and that Ms Bianchina was also smiling.

[45] Mr Van der Griend can not be held responsible for the breach by the respondent in not applying its code of conduct correctly or for the significant breach of procedural fairness. I am satisfied Mr Van der Griend did not contribute to the situation giving rise to his grievance and therefore the remedies will not be reduced.

Costs

[46] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Mr Van der Griend may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any submissions in reply being lodged within 14 days. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority