IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 514
5347358

	BETWEEN	EDWARD WANO Applicant
	AND	SKELLERUP RUBBER SERVICES LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	No appearance by, or for, the Applicant Neil McPhail, Advocate for Respondent
Investigation Meeting:	22 November 2011 at Auckland
Submissions received:	None from Applicant 22 November 2011 from Respondent
Determination:	05 December 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Edward Wano, claims that he was unjustifiably dismissed from his employment by the Respondent, Skellerup Rubber Services Limited ("SRS").

[2] Mr Wano claims that he was unjustifiably disadvantaged in his employment by SRS having issued him with disciplinary warnings.

[3] Mr Wano claims that there had been a deadlock between the parties in concluding an individual employment agreement.

[4] Mr Wano further claims that SRS breached good faith requirements by failing to comply with health and safety requirements and to act in good faith towards him.

[5] SRS deny all of these claims made by Mr Wano, and in respect of the unjustifiable disadvantage claim state that no personal grievance was raised with SRS within the 90 day

period specified in s. 114 of the Employment Relations Act 2000 ("the Act"), and SRS does not consent to the raising of a personal grievance after the 90 day period.

Issues

[6] The issues for determination are:

- Whether Mr Wano was unjustifiably dismissed by SRS.
- Whether the claim by Mr Wano that he was unjustifiably disadvantaged by the disciplinary warnings issued to him was raised outside the statutory time frame for bringing such a claim.
- Whether there had been a deadlock between the parties in concluding an individual employment agreement.
- Whether SRS breached the good faith requirements by failing to comply with health and safety requirements and to act in good faith towards Mr Wano.

Failure to adhere to the scheduled timetables and Non-Attendance by Mr Wano

[7] Upon receipt of the Statement of Problem and Statement in Reply, the parties had been directed to mediation. Mediation took place on 12 July 2011 but did not resolve the matter. The following day, 13 July 2011, the parties were contacted by an Authority Support officer and the date of 16 August 2011 was agreed for an Investigation Meeting. The date of the Investigation Meeting and a timetable for witness statements was advised to the parties in writing on 13 July 2011.

[8] Mr Wano failed to adhere to the scheduled timetable, and a Directions Conference took place on 3 August 2011. As a result, the original date set down for the Investigation Meeting of 16 August 2011 had to be adjourned.

[9] At the Directions Conference held on 3 August 2011 Mr Wano advised that he would be represented in the matter by Mrs Lorraine Wano, and a revised Investigation Meeting date of 22 and 23 November 2011 was agreed. A revised scheduling timetable for an amended Statement of Problem, amended Statement in Reply, and witness statements, was also agreed, and advised in writing to the parties on 8 August 2011.

[10] Mr Wano submitted an amended Statement of Problem in accordance with the timetable agreed at the Directions Conference on 3 August 2011, but thereafter failed to adhere to the deadlines set down by the Authority for the filing of witness statements.

[11] In the period between the Directions Conference on 3 August 2011 and 3 November 2011, SKS raised issues related to the lack of clarity in the claims made by Mr Wano in the amended Statements of Problem which had been filed.

[12] The Authority made email contact with Mr Wano and Mrs Wano on several occasions to try to ascertain the reason for the non-filing of witness statements and to address the clarity of claims concerns which had been raised by SKS.

[13] However these matters were not resolved and a further Directions Conference was held on 3 November 2011 to discuss Mr Wano's failure to file any evidence, and to gain some clarity as to the claims the Authority would be investigating at the rescheduled Investigation Meeting. However Mrs Wano unilaterally terminated the Directions Conference by disconnecting her telephone connection before these issues could be addressed.

[14] Further attempts to communicate with Mr and Mrs Wano by email and telephone did not produce a response. Neither Mr Wano nor Mrs Wano attended the Investigation Meeting on 22 November 2011 and an Authority Support Officer was unable to contact either Mr Wano or Mrs Wano on the day of the Investigation Meeting

[15] Given the difficulties encountered in progressing this case, I was satisfied that no good cause had been shown for Mr Wano's failure to attend and I consequently proceeded with the Investigation Meeting pursuant to clause 12 of Schedule 2 of the Act.

Factual discussion

[16] I have accepted the evidence of Mr Jason Guttenbeil, Operations Manager of SRS, and Ms Diane Evans, Group Human Resources Manager of Skellerup. Both Mr Guttenbeil and Ms Evans were questioned by the Authority on the claims made by Mr Wano in both the original and the amended Statements of Problem as set out in paragraphs [1] to [4] above. No reason was found for me to doubt their unchallenged evidence.

[17] I have found the facts to be as follows. SRS is a provider of technical polymer products employing approximately 50 employees. Mr Wano was employed as a Lathe Operator by SRS until his employment was terminated by SRS on 31 May 2011.

[18] On 23 March 2010 Mr Wano had been issued with a Final Written Warning valid for 12 months as a result of unsafe work behaviour in relation to a fire which had started in the roller lathe which Mr Wano was operating.

[19] Mr Guttenbeil said that although Mr Wano had provided him with a letter following the issuing of the warning, the letter had merely provided an explanation from Mr Wano of his view of the matter, and it had not raised a personal grievance. No personal grievance had in fact been raised until the filing of the Statement of Problem on 14 June 2011.

[20] On 4 November 2010 Mr Wano had been issued with a further Final Written Warning in connection with serious concerns held by SRS in relation to Mr Wano's work performance, specifically relating to rollers which had been machined to the wrong size.

[21] Mr Guttenbeil and Ms Evans stated that on that occasion SRS had come to the view that while Mr Wano's conduct constituted gross negligence, there had been a genuine mistake made on his part, and therefore a Final Written Warning rather than dismissal was an appropriate outcome.

[22] Mr Guttenbeil said that Mr Wano had not raised a personal grievance prior to the filing of the Statement of Problem on 14 June 2011.

[23] On 2 May 2011 Mr Guttenbeil said that a customer to whom SRS had supplied a roller had complained that the roller had not been machined to the correct specifications. The roller had been returned to SRS.

[24] Mr Guttenbeil said that SRS had investigated the matter, as a result of which a letter was sent to Mr Wano on 26 May 2011 requesting that he attend a disciplinary meeting on 31 May 2011. The letter written by Mr Guttenbeil stated:

> *We need to meet with you to discuss serious concerns we have about the SCA Roller which you completed and was then supplied to SCA on Monday 2 May 2011.*
>
> *Our QC records state the run out of the roller to be 0.03 mm at both ends and the diameter was within spec, which is acceptable to the Customer.*

> *However, shortly after installing the roller, SCA noticed that it was not running true. They then checked the dimensions and found that the roller was out of round 0.1mm at one end, and 0.03mm at the other. They returned the roller to us for checking and we confirmed that the roller was out of spec.*
>
> *Given that both Koloni and I checked the roller before it left the SRS premises and found it to be in spec, and given that there is no way that the roller could "go out of spec" whilst on the customers premises, we have serious concerns that you may have repositioned it (re-clocked) the roller so that it would pass the QC checks. We need to meet with you discuss these concerns, and investigate any other possible explanations for this situation to occur.*

[25] Mr Wano was informed that dismissal might be a possible outcome, and although he was advised of his right to have a representative present at the meeting, Ms Evans said that Mr Wano had insisted on the meeting proceeding without his having representation.

[26] At the outset of the meeting on 31 May 2011 which was attended by Mr Guttenbeil and Ms Evans, it was explained to Mr Wano that during the investigation into the issue, both the Roller Supervisor, and the Roller Sales and Project Manager, ("the Managers") had been asked for a possible explanation and whether the customer could have done something to cause the roller to go out of specification. Both had separately advised that there was nothing the customer could have done, and that in their view, the roller had been supplied out of specification.

[27] It had been explained to Mr Wano that both the Managers had been asked if it was possible Mr Wano could have set up the lathe incorrectly, and therefore machined the roller out of specification unknowingly, however both had said they did not believe that Mr Wano would have set up the lathe incorrectly.

[28] Mr Wano was informed that the view of the Managers was that Mr Wano had set up the lathe correctly, but then had made errors when machining the roller, and in order to cover up his mistakes, had deliberately reset the lathe prior to the QC checks being carried out.

[29] The letter further explained that two engineers had also been asked the same questions from a technical perspective, and both had concluded that it was not possible for Mr Wano to have unknowingly set up the lathe to show that the roller was in specification when it was not.

[30] Mr Wano when asked for an explanation was unable to provide an alternative explanation, but had said that he had not altered the settings on the lathe.

[31] The meeting was adjourned at this point, and Mr Guttenbeil and Ms Evans had spoken to the customer who had reconfirmed the issues it had had with the roller, and they had spoken again with the Managers and the engineers.

[32] Mr Guttenbeil and Ms Evans had then considered the facts and Mr Wano's explanation and had reached the conclusion that Mr Wano had deliberately reset the lathe in order that the associated paperwork would show that the roller appeared to be within specification.

[33] The meeting was reconvened, and the further investigatory steps taken had been explained to Mr Wano. Mr Guttenbeil and Ms Evans stated they had then explained to Mr Wano that his employment was being terminated on the basis that it was considered that he had deliberately mislead SRS, and they felt that they could no longer have any trust and confidence in him.

[34] Ms Evans explained that she had considered dismissal to be the appropriate outcome on the basis that on this occasion it was considered that Mr Wano had deliberately altered the lathe settings in order to mislead SRS thereby destroying the requisite trust and confidence between the parties, whereas in determining the appropriate outcome of the disciplinary action taken in November 2010, it had been accepted that Mr Wano had made a genuine mistake.

Determination

The Law

[35] Mr Wano was dismissed on 31 May 2011. The amended statutory test applicable with effect from 1 April 2011 therefore applies. The new Test states::

> ***S103A Test of Justification***
>
> *(1) 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 applying the test in subsection (2).*
>
> *(2)The test is 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 or action occurred.*

(3)In applying the test in subsection (2), the Authority or the court must consider –

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4)In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5)The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section soly because of defects in the process followed by the employer if the defects were –

(a) minor; and

(b) did not result in the employee being treated unfairly.

[36] The new Test of Justification still requires that the employer acted in a manner that was substantively and procedurally fair. SRS must show that it carried out a full and fair investigation into the issue of whether Mr Wano's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. SRS must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[37] Although Mr Wano's claim that he was unjustifiably disadvantaged through warnings issued prior to 1 April 2011 and therefore it is the previous statutory Test of Justification which is applicable, I find that similar considerations of substantive and procedural fairness to be valid.

Was Mr Wano was unjustifiably dismissed by SRS?

[38] I find that SRS had substantive justification for finding Mr Wano's conduct in respect of the roller issue to be serious misconduct. SRS carried out a full and fair investigation. The Managers and engineers consulted were extremely experienced, having collectively in excess of 60 years engineering experience.

[39] Ms Evans said, and I accept, that Mr Wano was provided with every opportunity to provide an explanation. However Mr Wano did not provide any alternative explanation to refute that which had been advanced by the Managers and the engineers. Despite this, Mr Guttenbeil and Ms Evans had undertaken further investigation with the customer and the Managers and engineers prior to making the decision to dismiss Mr Wano.

[40] I find that SRS followed a fair and reasonable procedure. Mr Wano was provided with a letter on 26 May 2011 detailing the allegations against him, prior to the meeting on 31 May 2011. Mr Wano was advised in that letter that dismissal was a possible outcome, and advised to have a representative with him at the meeting.

[41] Mr Wano had not had a representative at the disciplinary meeting held on 31 May 2011 but Ms Evans said, and I accept, that Mr Wano had been informed that he was entitled to have a representative, and that the meeting would have been adjourned if Mr Wano had expressed his preference to have, and obtain, representation.

[42] Chief Judge Colgan in *Secretary for Justice v Dodd*[1] confirmed that although serious misconduct would usually constitute grounds for a justified dismissal, this was not necessarily the case in each instance.

[43] Having concluded that serious misconduct had been established, it is the evidence of Mr Guttenbeil and Ms Evans that they gave consideration to the appropriate outcome. The conclusion they had reached was that Mr Wano had committed a deliberate act with the intention to mislead SRS as a result of which they had lost trust and confidence in Mr Wano and had no belief that he would not manipulate the lathe settings in the future.

[44] I find that the decision taken by SRS to terminate Mr Wano's employment was one which a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

---

[1] [2010] NZEMPC 84

[45] For the above reasons I determine find that Mr Wano was not unjustifiably dismissed from his employment with SRS.

Was the claim by Mr Wano that he was unjustifiably disadvantaged raised outside the statutory time frame?

[46] Section 114 of the Act states:

> *(1)Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.*
>
> *(2)For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address."*

[47] The individual employment agreement dated 27 July 2005 and signed by Mr Wano contains at clause 17 an explanation of how to resolve employment relationship problems, and at clause 17.2 a reference to the period of 90 days in section 114 of the Act, in accordance with s 65(2)(vi) of the Act.

[48] Although Mr Wano sent SRS a letter following the Final Written Warning issued to him on March 2010, Mr Guttenbeil's uncontested evidence, which I accept, is that the letter provided Mr Wano's view of what had occurred but raised no personal grievance.

[49] There is no evidence that Mr Wano raised any personal grievance within the 90 period following the issuing of the Final Written Warning on 23 March 2010, nor is there any evidence that Mr Wano raised a personal grievance within the 90 period following the issuing of the second Final Written Warning on 4 November 2010.

[50] SRS does not consent to Mr Wano raising an out of time personal grievance in relation to these Final Written Warnings.

[51] I determine that Mr Wano did not raise his personal grievances regarding unjustifiable disadvantage within the statutory 90 day period pursuant to s 144(1) of the Act.

Had there been a deadlock between the parties in concluding an individual employment agreement?

[52] Mr Wano was issued with an updated individual employment agreement with SRS following the acquisition of the assets of Rubber Services (1965) Limited by Skellerup Industries Limited on 1 August 2005.

[53] In common with all other existing Rubber Services (1965) Limited employees at that time, Mr Wano's employment was transferred to SRS on identical terms and conditions of employment as those which had previously applied.

[54] Mr Wano was provided with a copy of the individual employment agreement with SRS. Ms Evan's evidence was that Mr Wano was given adequate time to seek advice on it, and this advice is outlined in the body of the individual employment agreement, which states:

> *I accept the above position and conditions:*
>
> *1. Prior to entering into this Individual Employment Agreement I was provided with a copy of the intended written Individual Employment Agreement.*
>
> *2. I was advised that I had the opportunity to seek advice about this intended agreement and was given a reasonable opportunity to seek independent advice prior to signing this Individual Employment Agreement.*
>
> *3. I was given an opportunity to raise with my employer any issues regarding my Individual Employment Agreement.*

[55] Mr Wano had initialled all pages of the individual employment agreement, and had signed it immediately below the clauses detailed above.

[56] I find no evidence that there had been a deadlock between the parties in concluding an individual employment agreement.

Did SRS breach the good faith requirements by failing to comply with health and safety requirements and to act in good faith towards Mr Wano?

[57] Mr Guttenbeil and Ms Evans's undisputed evidence is that far from breaching health and safety requirements, SRS had an extremely good health and safety compliance standard.

Mr Guttenbeil said that SRS's heath and safety performance had improved consistently as demonstrated in the annual health and safety audits.

[58] Ms Evans had concurred, adding that SRS had a good and improving TIR (Time Incidence Rate) rate and that any practices which compromised health and safety were not tolerated. In addition SRS had a health and safety committee, and an ACC tertiary rating.

[59] Both Mr Guttenbeil and Ms Evans refuted that SRS breached the good faith requirements towards Mr Wano in any respect.

[60] I find no evidence that SRS breached the good faith requirements owed to Mr Wano.

Penalty

[61] I find that the Applicant's conduct, and that of his representative, to have been both obstructive of, and delaying to, the Authority's Investigation. Section 134A(1) of the Act states:

> *Every person is liable to a penalty under this Act who, without sufficient cause, obstructs or delays an Authority investigation, including failing to attend as a party before an Authority investigation.*

[32] Mr Wano is ordered to pay a penalty of $3,000.00 pursuant to s 135(2)(b) of the Act. I direct that the whole of that amount is paid by Mr Wano to SRS pursuant to s 136 (2) of the Act.

Costs

[62] On behalf of SRS, Mr McPhail seeks reimbursement of the costs of defending the claims made by Mr Wano, in which Mr Wano has been wholly unsuccessful. Mr McPhail is seeking $6,145.09 plus GST. Mr McPhail is also seeking the sum of $668.00 plus GST as disbursements in connection with the travel cost of Ms Evans, who is based in Christchurch, having to attend the Investigation Meeting held in Auckland on 22 November 2011.

[63] In support of the level of claim Mr McPhail submits that the usual tariff-based approach is inappropriate in a case in which the behaviour of the Applicant has been wholly unacceptable.

[64] Whilst I accept the submission regarding the behaviour of the Applicant, I have already addressed this by way of a penalty. In considering the appropriate level of costs I take

into consideration the fact that despite the lack of clarity in the Statements of Problem, the Authority had identified the issues which would form the basis of the Investigation Meeting prior to that meeting and these had been communicated to the parties. The facts at issue were not complex, nor did they require difficult matters of law to be argued. No briefs of evidence were required to be filed, and were not filed, by SRS.

[65] I do accept that the behaviour of the Applicant led to Mr McPhail filing further submissions on behalf of SRS, and I have taken this into consideration in determining the appropriate level of a costs award.

[66] The principles governing award of costs in the Authority have been clearly set out in *PBO Limited (formerly Rush Security Ltd) v Da Cruz*[2]. The normal rule is that costs follow the event and SRS is entitled to a contribution to its costs.

[67] The case took less than half a day's hearing time. For a case of this kind $1,500.00 is accepted as the notional half daily rate, and I consider that it is appropriate to order the full half day notional daily rate in all the circumstances. Accordingly, Mr Wano is ordered to pay SRS $1,500.00 costs, pursuant to clause 15 of Schedule 2 of the Act. In the particular circumstances of this case I also accept the disbursement claim and order Mr Wano to pay SRS $668.00 plus GST.

[68] The Applicant will have 14 days from the date of this determination to lodge a memorandum in respect of the costs award No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority

[2] [2005] 1 ERNZ 808