

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 310
5396990

BETWEEN

venu basani
Applicant

AND

BP OIL NEW ZEALAND
LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: V Basani in person
P Muir and R Rendle, counsel for respondent

Investigation Meeting: 12 June 2013

Determination: 19 July 2013

DETERMINATION OF THE AUTHORITY

A. BP Oil New Zealand Limited's action in dismissing Venu Basani was justified.

Employment relationship problem

[1] BP Oil New Zealand Ltd (BP) employed Venu Basani as manager of a BP service station in Herne Bay (the service station). It dismissed him summarily for serious misconduct. Mr Basani says the dismissal was unjustified, and has raised a personal grievance.

[2] The alleged misconduct was that Mr Basani falsified a record required to be completed as part of BP's Health Safety Security Environment (HSSE) inspection procedures.

[3] BP deals with hazardous and dangerous substances, particularly petroleum products. Its system for managing the health and safety risks associated with these products included conducting a monthly HSSE inspection. Pre-printed checklists to be used in the inspection were contained in booklets issued quarterly by a third party.

The checklist included 7 pages detailing the numerous items to be checked and what the check is to comprise, as well as providing space for comments. An eighth page provided space for listing any follow up actions necessary.

[4] On 14 August 2012 Darren Coe, the area manager to whom Mr Basani reported, and Jason McMenammin, the manager to whom Mr Coe reported, visited the service station. During the visit Mr McMenammin asked to see the completed HSSE checklist for July 2012. The document should have been in a safety zone cupboard in the service station storeroom. The storeroom is locked and a numbered access code is required for entry.

[5] A completed booklet for the quarter April to June 2012 (Q2) was located in the cupboard, but the booklet for the quarter July to September 2012 (Q3) - which should have included the completed July checklist - was not. Instead the materials included only a replacement page for the July checklist, which had been circulated separately when a variation was made to the standard checklist. The page included a modification date of 27 July 2012, and was completed. However Mr Basani assured Messrs Coe and McMenammin that the full inspection had been conducted.

[6] When he was asked again for the full checklist Mr Basani replied that he did not know where it was. He sought assistance from the employee who had special responsibility for store safety at the service station, Satish Barji. It was Mr Barji's job to conduct the inspection, then discuss the outcome with his manager at the end of the month before both of them signed off the completed checklist. Mr Barji advised that the booklet for Q3 had not arrived and he had escalated the matter to Mr Basani. For his part, Mr Basani said he had followed up with the third party supplier but had not had an opportunity to draw the absence of the booklet to his own managers' attention.

[7] Mr Coe and Mr McMenammin were not satisfied with Mr Basani's responses and his inability to provide the completed checklist. They advised him they would discuss matters further.

[8] A meeting was convened for that purpose on 16 August 2012. During the meeting Mr Basani handed Mr Coe a document purporting to be the completed July checklist. The document was an earlier checklist modified for July, signed by Messrs Basani and Barji, and dated 31 July 2012. The circumstances meant Mr Coe doubted

whether the inspection had been carried out and the checklist signed on 31 July. He suspected the document was created after the 14 August visit.

[9] After further investigation Mr Coe concluded the document was not a genuine record. By letter dated 24 September 2012 he confirmed Mr Basani was summarily dismissed for serious misconduct.

The issues

[10] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000. It concerns 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. In applying the test the Authority must consider whether the employer: sufficiently investigated the allegations before dismissing the employee; raised its concerns with the employee before dismissing the employee; gave the employee a reasonable opportunity to respond; and genuinely considered the explanation before dismissing the employee.

[11] The issues are:

- (i) did BP follow a fair and reasonable procedure in reaching its conclusions;
- (ii) was its finding of serious misconduct one a fair and reasonable employer could make; and
- (iii) was dismissal an appropriate sanction.

Did BP follow a fair and reasonable procedure

[12] On the morning of 15 August Mr Coe advised Mr Basani that a disciplinary meeting would be conducted the next day. He followed the conversation up with a letter explaining the purpose of the meeting, advising of the possibility of termination of employment, and inviting Mr Basani to bring a support person or representative to the meeting. A support person accompanied Mr Basani for two of the meetings which followed, and a representative attended the final disciplinary meeting.

[13] The 16 August meeting was part of an investigatory phase. Mr Basani told Mr Coe the completed checklist had been found some time between 7.30 and 8.00 am on

15 August. Mr Basani also said he had suggested that a twinked version of an old checklist be used for the July inspection, and Mr Barji did this. However he had not mentioned this on 14 August, even after Mr McMenammin raised alternative methods of recording an inspection when a booklet was not received.

[14] Mr Basani went on to say he and Mr Barji had reviewed the completed checklist together, and signed it on 31 July. When asked why the existence of the document had not been raised on 14 August when it could have been, Mr Basani explained that he could not respond because Mr Coe and Mr McMenammin were intimidating and trying to incriminate him. He was scared. He said in evidence that on 14 August that Messrs Coe and McMenammin spoke in loud voices and he kept asking them not to humiliate him.

[15] On 17 August Mr Coe visited the service station to conduct further enquiries. While there he found the booklet for Q3 in a cupboard above Mr Basani's desk. The booklet was blank.

[16] Mr Coe spoke to Mr Barji. He asked Mr Barji how the booklet got there, since Mr Barji and Mr Basani had advised it was not received. Mr Barji said he did not know, although he said in evidence that he found it in a box of his own records and gave it to Mr Basani. That evidence itself is at odds with the rest of his evidence that he kept the checklist in the safety zone cupboard, and it would be left out of the cupboard only for brief periods if he was called away while working on it. When Mr Coe asked about the procedure used in signing off the July checklist, Mr Barji said he completed the checklist and either gave it to or left it for Mr Basani to sign.

[17] Mr Coe also spoke again with Mr Basani on 17 August.

[18] He asked Mr Basani, too, to account for presence of the Q3 booklet in his office in the face of the earlier statements that it was not received. He advised Mr Basani the third party supplier had no records of enquiries being made of it regarding the non-delivery of the Q3 booklet. He also asked Mr Basani to explain the differences in his account of the signing of the July checklist, and Mr Barji's. Finally he asked Mr Basani to explain the failure on 14 August to mention the completion of a checklist for July, despite producing the page dated 27 July.

[19] As well as repeating his concerns about intimidation, Mr Basani explained that on 14 August Mr Barji was prevented from locating the checklist. That explanation was not accepted because Mr Barji had simply ended his shift and been permitted to leave. Mr Basani also said he did not know who put the booklet in his office. Mr Coe advised Mr Basani that he believed the July checklist had been falsified (that is, created) after the 14 August visit. He offered Mr Basani access to files and CCTV footage, in order to identify material that might rebut this.

[20] Both parties viewed the CCTV footage. Mr Coe found the footage for 31 July inconclusive. Footage for the relevant period on the morning of 15 August showed Mr Barji was out of view of the camera for several minutes, and subsequently took an unidentified item to Mr Basani. It, too, was inconclusive. At the time Mr Basani did not raise any issue in respect of it.

[21] Similar issues were traversed again at a meeting on 20 August. Mr Basani continued to allege that the company was intimidating him. Mr Coe repeated that he believed the checklist had been falsified, although he offered the opportunity to provide information to different effect. He also advised that he proposed to terminate Mr Basani's employment. A further meeting would be held to address these matters before a final decision was made.

[22] Mr Basani took a period of sick leave. The final disciplinary meeting was convened on 20 September. The representative suggested there had been miscommunication over the whereabouts of the checklist. He said its completion had been delegated to Mr Barji, and Mr Basani had no reason to believe the document was anywhere other than in the safety zone cupboard. BP's view of events was harsh. The representative pointed to Mr Basani's 7 years of service, and asked that he be given the benefit of the doubt. Mr Basani himself said he was being blamed for something Mr Barji did, and again repeated that he was being intimidated.

[23] Mr Coe did not accept there had been any intimidatory conduct or any miscommunication, and did not accept Mr Basani's explanations. He concluded that Mr Basani was guilty of serious misconduct and that summary dismissal was an appropriate sanction. The meeting was reconvened on 24 September, and Mr Basani was advised of the outcome.

[24] From the foregoing I find:

- the allegations against Mr Basani were sufficiently investigated before action was taken against him;
- the employer's concerns were raised with Mr Basani before action against him;
- Mr Basani had a reasonable opportunity to respond; and
- Mr Basani's explanations were considered before action was taken against him.

[25] I find that BP followed a fair and reasonable procedure.

Was the finding of misconduct one a fair and reasonable employer could make

[26] In concluding Mr Basani had falsified the July checklist Mr Coe took into account that:

- when Mr Basani was asked on 14 August to produce the July checklist, the only document available was the single page dated 27 July;
- a checklist completed and signed off on 31 July should have been placed in the safety zone cupboard;
- there were several opportunities on 14 August to attempt to locate a completed checklist if it was elsewhere;
- the existence of a modified but completed checklist could have been raised on 14 August but was not;
- Messrs Barji and Basani said on 14 August that the Q3 booklet had not been received, but Mr Basani's assertion that he followed up on the failure to deliver it was not accepted;
- the booklet was found in Mr Basani's office 3 days later, with no adequate explanation of how it got there; and
- Messrs Barji and Basani gave inconsistent accounts of the completion and signing of the checklist on 31 July.

[27] Mr Basani also accused Messrs Coe and McMenammin of seeking to retaliate against him because of a concern he had expressed recently. Although he was the

immediate manager, he was not involved when disciplinary action against Mr Barji was being considered in respect of an unrelated matter. There were no reasonable grounds for the accusation. A wish for retaliation played no part in the actions of Messrs Coe and McMEnamin.

[28] I find in addition that Mr Coe was entitled to reject the explanation that Mr Basani's feelings of intimidation caused him to respond as he did. When asked to expand on the nature of the intimidation, Mr Basani referred to tone of voice, and said voices were raised on 14 August. I do not accept there was any intimidation. As indicated by Mr Basani's approach to raising the matter during the disciplinary process in particular, I find it more likely Mr Basani used the allegation in an effort to deflect the scrutiny being applied to his conduct and his responses.

[29] Finally, on the information he had Mr Coe was entitled to regard Mr Basani's responses as lacking in credibility. For the same reasons I did not find Mr Basani to be a credible witness.

Was dismissal an appropriate sanction

[30] The terms of Mr Basani's employment were contained in the parties' written employment agreement, and in company policies and procedures. Particular terms included:

- ensuring his knowledge of and compliance with BP's policies;
- acting to,
 - ensure staff awareness of HSSE and risk management to the highest level, and
 - be a role manager in the areas of safe work practices;
- ensure HSSE audits including daily and weekly store inspections are carried out,
- complying with BP's health and safety procedures; and
- creating information which accurately reflects transactions and events, including HSSE performance information.

[2] The Code of Conduct also provided that an employee must never make deliberately false or misleading entries in a record, or falsify a record. In giving an example the code posed a question of whether a weekly test could be skipped, or done later with the results backdated. The answer was 'no' – doing so was effectively falsifying data.

[31] In considering what action to take, Mr Coe took into account that:

- a final written warning was not appropriate as Mr Coe no longer had trust and confidence in Mr Basani;
- Mr Basani was aware of the importance of health and safety and of his obligations under the Code of Conduct;
- Mr Basani did not acknowledge the seriousness of the matter, or any wrongdoing;
- in attempting to blame Mr Barji, Mr Basani was not recognising his own responsibilities as manager; and
- the allegations of retaliation and intimidation also showed a lack of insight into his responsibilities as manager.

[32] The misconduct found to have occurred was well within the actions amounting to serious misconduct, of which Mr Basani was aware. The conduct was also inconsistent with Mr Basani's additional obligations and responsibilities as manager, and I accept further that he failed to recognise any responsibility in the matter. Mr Coe had good reason to lose trust and confidence in Mr Basani.

[33] Mr Basani said he was treated in an unfair manner because he is Indian. That matter was not raised as a separate personal grievance, but rather as a reason why the disciplinary action and dismissal were unjustified. I do not accept that BP acted as it did because Mr Basani is Indian, rather it acted for the reasons set out above.

[34] Mr Basani alleged that other employees had breached HSSE procedures, or failed to produce necessary documents when required to, but were not disciplined because they were not Indian. I do not accept the allegations as evidence that Mr Basani was treated as he was because of his ethnicity. To the extent that a broader

question of disparity of treatment may arise, none of the incidents involved the falsification of a record. Accordingly the incidents are not comparable.

[35] I record for completeness that a disciplinary process was commenced with Mr Barji, but he resigned before any outcome was reached.

[36] Overall I find the conclusion that dismissal was an appropriate sanction was one a fair and reasonable employer could reach.

[37] Mr Basani's dismissal was justified.

Costs

[38] Costs are reserved.

[39] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from receipt of the relevant memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority