

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 259
5406633

BETWEEN DUANE BISHOP
 Applicant

AND ROTORUA REALTY
 SERVICES LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: W Lawson and G Burt, counsel for applicant
 M Forsyth advocate for respondent

Investigation Meeting: 18 April and 15 May 2013 at Rotorua

Submissions received: 24 May 2013

Determination: 19 June 2013

DETERMINATION OF THE AUTHORITY

- A. Rotorua Realty Services Limited suspended Mr Bishop unjustifiably but no remedy is awarded in respect of the suspension.**
- B. Rotorua Realty Services Limited dismissed Mr Bishop unjustifiably.**
- C. Rotorua Realty Services Limited is ordered to pay to Mr Bishop \$2,400 as reimbursement of remuneration lost as a result of the unjustified dismissal.**
- D. Rotorua Realty Services Limited is ordered to pay to Mr Bishop \$3,000 as compensation for injury to his feelings caused by the unjustified dismissal.**

Employment relationship problem

[1] Rotorua Realty Services Limited (RRSL) is in business in the real estate industry, operating as LJ Hooker Rotorua. From July 2009 it employed Duane Bishop as a property manager in its rentals division. The rentals division managed residential tenancies on behalf of landlords, and dealt with tenants and landlords over

matters affecting the properties in question. Individual property managers were allocated particular tenancies to manage.

[2] After suspending Mr Bishop in May 2012, RRS� dismissed him citing his failure to follow instructions. The cited ground arose out of difficulties between Mr Bishop and his immediate manager Katherine Cross. Mr Bishop has raised personal grievances in respect of the suspension and the dismissal.

[3] Mrs Cross was appointed as manager of the rentals division in November 2011. In a previous working relationship, with another employer, she had been Mr Bishop's supervisor. Because of the circumstances in which that relationship ended Malcolm Forsyth, RRS�'s managing director, discussed the prospect of Mrs Cross' appointment with Mr Bishop before proceeding with the appointment. He understood from the discussion that the appointment would not cause a problem.

[4] The parties disagree about whether, at the time, Mr Forsyth explained Mrs Cross was to be Mr Bishop's manager and not simply a colleague. I find it likely he did. Mrs Cross was recruited because the incumbent office manager, who had been Mr Bishop's immediate manager, found managing both the rentals and real estate divisions was too onerous. That manager retained responsibility for the real estate division, while Mrs Cross was to take responsibility for the rentals division. In addition, because of a recent history of difficulties in the rentals division, Mr Forsyth considered the division needed leadership and direction. Such was the concern about communicating this to Mr Bishop - since Mrs Cross was to be the person who would take that role - Mr Forsyth's fellow shareholder in RRS� attended the meeting with Mr Bishop where the matter was discussed.

[5] It was common ground that Mr Bishop asked expressly whether Mrs Cross would be employed as a property manager – or in other words to the same position and at the same level as his. I consider it unlikely that the answer was 'yes'. It is likely that Mr Bishop misconstrued the answer. As a result Mr Bishop says he did not become aware of Mrs Cross' management position until her employment began. When he became aware of it his first reaction was to tell Mr Forsyth he refused to work with Mrs Cross as his manager, although he would work with her as a colleague. After further discussion during November and December Mrs Cross' status as manager was confirmed to him, and he indicated he would acquiesce.

[6] Unfortunately there were problems. Mr Bishop says Mrs Cross micro-managed him, picked on him, and bullied him. Mrs Cross and Mr Forsyth believe Mr Bishop was unwilling to take instructions from Mrs Cross, and repeatedly failed to act in accordance with property management procedures Mrs Cross attempted to implement. They cited a written warning dated 23 December 2012, issued following a failure to act on an instruction not to provide work to a particular tradesperson. They also cited a written warning 20 March 2012, issued following an alleged indication from a tenant of unwillingness to deal with Mr Bishop.

[7] These and other difficulties culminated in an incident which began with an emailed message from Mr Bishop to Mrs Cross, dated Wednesday 2 May 2012. The message protested at the short notice Mr Bishop believed he had received of certain mediations scheduled in the Tenancy Tribunal, and in which he was expected to participate. He said he was notified of them only that morning. He also queried the role of a newly-appointed property manager. His stance was he had been told that person was experienced, or would be able to 'hit the ground running'. If that was the case, that person could participate in at least one of the mediations in question.

[8] Mrs Cross replied, in a message expressing a different view. Although she did not express this at the time, in her view the Tenancy Tribunal had notified RRSL of the mediations on 19 April 2012, the mediations were diarised, the properties in question were under Mr Bishop's management when the mediations were scheduled, the mediations required only a brief phone conversation, and it was Mr Bishop's job to participate in them. Mrs Cross also wanted to know whether Mr Bishop's message meant there was an issue with the performance of the new property manager.

[9] Mrs Cross sought to discuss these matters later on 2 May. Mr Bishop questioned why at least one mediation was not given to the new property manager, while Mrs Cross sought to discuss why Mr Bishop had made the statements he did in his message. She says Mr Bishop was hostile during the resulting meeting, while Mr Bishop says he did not like the way the meeting was being conducted. He was referring to his view that he was being spoken over, and was not being heard. He left the meeting and went home.

[10] When Mr Bishop reported to work on Thursday 3 May, Mrs Cross attempted to resume the discussion. She says she asked him to explain why he left the meeting,

when all she wanted to do was discuss why he made certain statements in his message. She perceived Mr Bishop to be resistant and unresponsive.

[11] Mr Bishop again perceived Mrs Cross was not listening to him, and was talking down to him. He told her he had left the meeting for those very reasons the previous day. When she responded that, as manager, she needed to be able to talk to him, he said she was disrespectful and talked over him. When she said she was the manager, she had implemented systems which were to be followed, commented that he had been given a free rein for too long, and said he was to do as he was told, he refused to continue. Again he walked out of the meeting.

[12] Mrs Cross told Mr Bishop to return or he would be suspended. When he refused, she asked him to go home. He refused. Mrs Cross began to gather his bag and some personal items, and took his arm to encourage him to leave.

[13] Two other staff members were in the vicinity, were aware of the altercation, and became upset. They asked the manager of the real estate division to assist. Because of the upset she observed the manager advised Mr Bishop to go home, which he did.

[14] Both Mrs Cross and the manager of the real estate division reported the matter to Mr Forsyth.

[15] Mr Forsyth spoke to Mr Bishop on Saturday 5 May. He says he advised Mr Bishop there would be a meeting on Monday 7 May to discuss the continuation of Mr Bishop's employment, with reference to the 3 May incident as well as the earlier warnings and other issues arising since Mrs Cross' appointment. As he put it at the 7 May meeting, he had asked Mr Bishop to come to that meeting with suggestions about 'how to move forward'.

[16] During a discussion with Mr Forsyth in the weekend of 5 and 6 May, Mr Bishop indicated his intention to report for work on the morning of 7 May. Before the discussion he did not consider himself under suspension. For his part Mr Forsyth was uncertain of whether Mr Bishop had been suspended. On or about 6 May, however, Mr Forsyth advised Mr Bishop he was suspended.

[17] Mr Bishop says there was no indication the 7 May meeting was disciplinary, rather he thought it was to discuss the 3 May incident and the suspension. He believed the overall purpose was to identify 'where to from here'.

[18] The meeting went ahead on 7 May. It covered:

- Mrs Cross' concern about Mr Bishop's disregard of her instructions, with particular reference to his,
 - refusal on 2 May to continue discussions about the 2 May email,
 - refusal on 3 May of instructions first to continue discussions and then to leave the office,
 - reaction to the requirement that he participate in the Tenancy Tribunal mediations,
 - failures to act on requests to provide coverage over lunch hours, as set out in an emailed message dated 17 April 2012, and
 - including on the company's records a tradesperson not on the list of preferred tradespeople, after the 23 December warning;
- Mr Bishop's concerns that Mrs Cross talked down to him and did not respect him, with particular reference to the 2 and 3 May discussions; and
- whether Mr Bishop would accept instructions from Mrs Cross as his manager.

[19] Mr Bishop said at the 7 May meeting he would accept instructions from Mrs Cross 'within reason.' He said he wanted to give his opinion if he did not agree with an instruction, as, for example, he did in respect of the lunch hour coverage issue. He was asked whether he would abide by an instruction if, after he gave his opinion, the instruction stood. He said he would if he felt listened to. He also said if he still did not agree with the instruction he would go to Mr Forsyth.

[20] The meeting then turned to how the parties could move forward. Mr Bishop said he wanted to be shown some respect. The meeting ended with Mr Forsyth indicating a decision would be made by the end of the day. He told Mr Bishop the decision would concern the suspension, and the aspects of Mr Bishop's relationship with Mrs Cross which had been discussed.

[21] Later on 7 May Mr Bishop was informed by telephone that he was dismissed. The dismissal was confirmed in a letter also dated 7 May. The letter said the reason for the dismissal was:

The giving and accepting of instructions is an integral part of a successful Property Management division. We have spoken to you on several occasions regarding this and issued a first warning on the 23rd December 2011 and a second warning on 20 March 2012. Despite this there has been no change in behaviour.

[22] Mr Bishop was given one month's notice of the termination, and was not required to attend the workplace during that period.

Issues

[23] The test of the justification for an employer's actions is set out in s 103A of the Employment Relations Act 2000. The test concerns whether the action was one a fair and reasonable employer could take in the circumstances at the time.¹

[24] The test requires a consideration of whether the employer: sufficiently investigated the relevant allegations before imposing the dismissal; raised its concerns with the employee before taking that action; gave the employee a reasonable opportunity to respond; and considered the explanation genuinely before taking action.² The Authority may take other factors into account³, but must not determine the dismissal to be unjustified if any defects in the process were minor and did not result in the employee being treated unfairly⁴.

[25] With reference to the test, the issues are:

- (i) was Mr Bishop's suspension justified;
- (ii) was the dismissal justified in that RRS�,
 - sufficiently investigated the allegations against Mr Bishop,
 - gave him a reasonable opportunity to respond,
 - considered his explanations genuinely before deciding the outcome, and

¹ S 103A (2)

² S 103A (3)

³ S 103A (4)

⁴ S 103A (5)

- took the action a fair and reasonable employer could take in the circumstances at the time; and
- (iii) if the suspension or the dismissal were not justified, is Mr Bishop entitled to orders for,
- the reimbursement of lost remuneration, and
 - compensation for injury to his feelings.

Was the suspension justified

[26] The parties' written employment agreement provided at 15.3:

The Employer may ... suspend an employee on full pay if it needs to conduct an investigation into the employee's conduct as an employee ...

[27] The evidence about the precise circumstances of the suspension was unclear. Mr Bishop accepted the prospect of suspension was raised on 3 May, but did not accept Mrs Cross' account of when it was raised. Mrs Cross said she warned Mr Bishop she would suspend him if he did not remain and continue the discussion. He replied 'you can't do that' and went out to his desk. Mrs Cross followed him and told him to go home. I accept Mrs Cross' account as likely, but also find it likely that she did no more than threaten suspension if Mr Bishop did not remain in the meeting. She did not go on to say to Mr Bishop after he left the meeting that he was now suspended.

[28] For his part Mr Bishop did not go home because he considered he had been suspended, and there was no suggestion he remained absent on 4 May because he considered himself under suspension. The existence of a suspension did not crystallise until 5 or 6 May.

[29] Even if the suspension occurred before 5 or 6 May, the procedure used in imposing it did not comply with obligations to put the prospect of suspension to Mr Bishop and obtain his response before acting.⁵ In those respects it was not justified.

⁵ As now contained in s 103A but also discussed by the Employment Court in authorities such as *Tawhiwhirangi v Attorney-General in respect of the CEO of the Department of Justice* [1993] 2 ERNZ 546 and others

[30] A suspension can be justifiable if the employer has good reason to believe the employee's continued presence in the workplace may give rise to some other significant issue.⁶ That was not the case for a suspension imposed on 5 or 6 May. If the suspension occurred on 3 May, a cooling-off period would have sufficed to address the prospect of further disruption in the workplace.

[31] For these reasons I find the suspension was not justified.

Was the dismissal justified

1. Did RRS� sufficiently investigate the allegations against Mr Bishop

[32] As expressed in the letter of dismissal, Mr Bishop was dismissed for failing to follow instructions and in reliance on the earlier warnings. However the real problem was a broader one of Mr Bishop's apparent unwillingness to accept Mrs Cross' authority, and his adverse view of how she exercised that authority. It incorporated Mrs Cross' attempts to introduce new procedures into the office, and Mr Bishop's reaction to those attempts. The problem came to a head on 2 and 3 May.

[33] To the extent that there was an investigation of any of this, it took the form of discussions during the meeting of 7 May. Mr Bishop's behaviour on 2 and 3 May was discussed, and he and Mrs Cross gave their accounts of the incident. There was also a limited discussion about Mr Bishop's failure to use a tradesperson on the approved list, and a more detailed discussion about Mr Bishop's willingness to accept Mrs Cross' authority.

[34] However it was not clear that the meeting was intended to be disciplinary and that the termination of Mr Bishop's employment could result. I also consider references to the future of Mr Bishop's employment were too vague to amount to an indication that dismissal was a possible outcome. They were also capable of being understood as references to the way in which the working relationship between Mr Bishop and Mrs Cross would be conducted in future.

[35] Further, it was not clear that Mr Bishop's behaviour on 2 and 3 May was being addressed in a disciplinary context, together with the additional concerns about his refusal to act on instructions. Nor was it clear that any inability to resolve the issues

⁶ *Singh v Sherildee Holdings Ltd (t/as New world Opotiki)* AC 53/05, 22 September 2005

between Mrs Cross and Mr Bishop could result in his dismissal. While the discussions identified areas of disagreement between Mr Bishop and Mrs Cross, they should have been used to identify the basis for further disciplinary investigation rather than amounting to the investigation itself. Points of concern should have been followed up in a formal disciplinary meeting, and put directly to Mr Bishop for a response in that context. They should not have been relied on as reasons for dismissal on 7 May and without further reference to Mr Bishop.

[36] For these reasons I find the investigation was not sufficient.

2. Did RRS� give Mr Bishop an opportunity to respond to the allegations

[37] Mr Bishop had an opportunity to give his view of events, but the opportunity to respond to allegations against him was tainted by the flaw identified above.

3. Did RRS� consider the responses genuinely before deciding the outcome

[38] The decision was made following the discussion on 7 May, and in that respect the outcome of the meeting was not predetermined. Otherwise the decision was tainted by the flaw identified above.

4. Was dismissal the action a fair and reasonable employer could take

[39] The above flaw was serious and meant dismissal was not the action a fair and reasonable employer could take in the circumstances at the time. It was fatal to the justification for the dismissal.

Remedies

A. The suspension

[40] On either view of when it was imposed, the suspension was in effect for a very brief period before the dismissal. In the circumstances I am not satisfied any loss was suffered as a result of the associated personal grievance. There will be no order for the payment of a remedy.

B. The dismissal

1. Reimbursement of remuneration lost as a result of the grievance

[41] Mr Bishop obtained alternative employment commencing on 23 July 2012. He received one month's pay in lieu of notice from RRSL, and lost a further 6 weeks' remuneration. On a salary of \$40,600 pa, the loss is \$4,684.62.

[42] That amount must be reduced if Mr Bishop contributed in a blameworthy way to the circumstances of his grievance. He was unreasonably defiant when Mrs Cross sought to discuss the 2 May email message with him, and he should not have refused to engage in discussion with her on 2 and again on 3 May. By then he was aware of her status as his manager. While he may have misunderstood that was to be the case when she was recruited I do not accept the misunderstanding was the result of any misrepresentation by RRSL. His view that she talked down to him or over him was how he interpreted her reaction to his response when she attempted to do her job. He displayed a continuing reluctance to accept Mrs Cross' authority to a degree that I do not consider justified, and I do not consider his interpretation of her conduct towards him was well-founded.

[43] For these reasons I reduce the amount I would otherwise have awarded. RRSL is ordered to reimburse Mr Bishop for lost remuneration in the sum of \$2,400.

2. Compensation for injury to feelings caused by the grievance

[44] There was evidence of injury to Mr Bishop's feelings as a result of his unjustified dismissal. However, to reflect Mr Bishop's contribution to the circumstances of his grievance, I reduce the amount I would otherwise have awarded in respect of the injury.

[45] RRSL is ordered to compensate Mr Bishop for injury to his feelings in the sum of \$3,000.

Costs

[46] Costs are reserved.

[47] 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 in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority