

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 92/08
5104924

BETWEEN DEAN BROUGHTON
 Applicant

AND PLANE BIZ LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Phil Butler, Advocate for Applicant
 Hugh Matthews, Counsel for Respondent

Investigation Meeting: 27 March 2008 at Christchurch

Determination: 3 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Broughton) was employed by the respondent (Plane Biz) as a supervisor.

[2] Plane Biz dismissed Mr Broughton on 11 September 2007 and Mr Broughton complains that that dismissal was unjustified and that he also has suffered unjustifiable actions to his disadvantage and he brings a personal grievance to the Authority in respect of both allegations.

[3] Plane Biz is a company which services aircraft coming and going from Christchurch International Airport. As such, Plane Biz provides all the services required for incoming and outgoing aircraft for the particular airlines that it contracts to.

[4] Mr Broughton commenced employment with Plane Biz in 2004 as a customer services officer but was appointed to the role of supervisor a year later and it was in that role that he was employed when he was dismissed.

[5] The employment relationship between the parties was turbulent. Mr Broughton had health problems and substance abuse issues which impacted negatively on his employment. Plane Biz went out of its way to assist Mr Broughton and to help him come to terms with his own issues.

[6] However, it is plain from the evidence that Mr Broughton's personal issues were impacting on the workplace and there were a number of discussions between the parties at which that impact was discussed. It is common ground that Mr Broughton's most common response to being confronted by his inadequacies was to threaten resignation. By all accounts, this response happened on a number of occasions.

[7] Matters came to a head first in June 2007 when, after one of these altercations between Mr Broughton and Plane Biz, Mr Broughton furnished a letter which Plane Biz treated as a resignation and proceeded to accept.

[8] Mr Broughton's position was that, if he had resigned at all, he had only resigned as a supervisor, wanting to be put back to his original role as a customer service officer. However, as a consequence of Plane Biz's treatment of his letter as a resignation from the company, Mr Broughton raised a personal grievance on 13 June 2007.

[9] That grievance was resolved by a mediation settlement, the terms of which I was told in evidence were that Mr Broughton was reinstated to his position as a supervisor at Plane Biz.

[10] Sadly for both parties, that was not the end of the difficulties. There was an altercation between Mr Broughton and a work colleague on 20 August 2007. The altercation, on the face of it, would appear to have been minor, but must be seen within the context of some of Mr Broughton's work colleagues being unhappy about the fact that Mr Broughton had been reinstated to his position.

[11] In any event, the altercation escalated, Mr Broughton sought resolution from Plane Biz but then refused to participate in Plane Biz's standard resolution process and proceeded on sick leave.

[12] While on sick leave, Mr Broughton reviewed his medical advice, obtained further support and guidance from his medical advisers and in particular an assessment from a psychiatrist which, amongst other things, cleared him as fit to return to work. This information was provided to Plane Biz and a meeting was scheduled between the parties on 11 September 2007.

[13] Both parties were represented at that meeting and, in an effort to meet Plane Biz's perceived needs, Mr Broughton submitted an extensive plan by which Plane Biz could monitor his continuing behaviour. The essence of this plan was a commitment from Mr Broughton that he would submit himself to random alcohol and drug testing at the behest of Plane Biz in order for the latter to satisfy itself that Mr Broughton was in fact now determined to remain substance-free.

[14] In addition, Mr Broughton undertook to provide Plane Biz evidence that he continued to attend Alcoholics Anonymous and that he would continue to seek psychiatric assistance.

[15] Notwithstanding those efforts, Plane Biz determined at the meeting on 11 September 2007 that it had lost trust and confidence in Mr Broughton and accordingly Mr Broughton's employment was terminated by letter dated 12 September 2007.

Issues

[16] It will be convenient to consider the following issues:

- (a) The history of the employment relationship;
- (b) The first *dismissal* and its consequences;
- (c) The 20 August 2007 incident;
- (d) The dismissal.

The history of the relationship

[17] Tony Burke is the airport manager for Plane Biz. In his evidence before the Authority, he describes his relationship with Mr Broughton and is quite explicit in his written brief in describing Mr Broughton as *a friend*.

[18] Mr Burke's brief of evidence catalogues a pattern of conduct by Mr Broughton which seems to have been cyclic in character. Mr Broughton would perform well for a period and then become short tempered and difficult with colleagues. When he was confronted about this behaviour, Mr Burke's evidence (which I accept) was that Mr Broughton would immediately threaten to resign and clearly be irritated that the matter had been raised by his employer at all.

[19] One paragraph from Mr Burke's written brief seems to encapsulate the behaviour very well. It reads as follows:

Dean's (Mr Broughton's) response (to complaints about behaviour) was I may as well quit. I advised Dean that this was not necessary and we could resolve the situation. This became a relatively familiar pattern of conduct. It was not easy to pin Dean down to discuss these types of issue. Dean's immediate reaction would be to fly off the handle, offer to resign and then walk out. That might be followed by Dean taking time off sick, or having days off. Dean then returned to work in a good frame of mind and I was reluctant to take matters further with him, being thankful for his good mood on his return.

[20] In all, Plane Biz witnesses say that Mr Broughton offered his resignation seven times during his employment and while Mr Broughton denies that it was that often, he certainly agrees that it happened at least three times and that *these reactions were not entirely appropriate*.

[21] It is clear that Plane Biz had some idea about Mr Broughton's health and substance abuse issues, although it became clearer as time went on that the information available to Plane Biz was anecdotal and based as much as anything on the personal relationships that Mr Broughton had with various senior managers at Plane Biz.

[22] For instance, Mr Broughton readily acknowledged that he had been lent money by one of Plane Biz's directors, that Mr Burke had tried to look after his health and even attended a doctor with him on one occasion and that Plane Biz had generally *stood by him*. Indeed, Mr Broughton said, while giving evidence, *I think they (Plane Biz) did more than any other employer would to look after him*.

[23] Despite the health issues and the alcohol and drug dependency, Mr Broughton clearly was well regarded by Plane Biz for his technical knowledge of the industry (he had worked for Ansett for many years before joining Plane Biz), and for his concern

and care for other people. The difficulty for Plane Biz was that that concern and care for other people manifested itself most of the time, but not always.

[24] The Authority's strong sense from the evidence was that Plane Biz witnesses were clear that if Mr Broughton could get to grips with his health and substance abuse issues, he could be a useful member of the team.

The first *dismissal* and its aftermath

[25] On 6 June 2007, a Singapore Airlines flight which was being serviced by Plane Biz suffered a major engineering delay. Mr Broughton was at the airport but he was not involved with the Singapore Airlines flight at all and indeed was working two other departures for two other airlines.

[26] Because of the disruption of the Singapore Airlines flight, there were consequential rearrangements of staff for the following day and when Mr Broughton became aware of these arrangements, he took exception to some of those arrangements and subsequently wrote to Plane Biz complaining about those arrangements and seeking to be relieved of his supervisor role and revert to being a customer service officer.

[27] Plane Biz took this letter as a resignation (it had no customer service officer vacancies at the time) and accepted Mr Broughton's letter as a resignation offer.

[28] When the matter was resolved in mediation by an agreement that Mr Broughton be reinstated to his position, it is clear that Plane Biz took prudent steps to try to ease Mr Broughton's reintroduction to the workplace. Plane Biz was aware that some staff were opposed to Mr Broughton returning, although it seems that Mr Broughton was not perhaps as aware of the attitude of others as his employer was. Indeed, Mr Broughton said in his oral evidence that had he known how negatively some of his colleagues regarded his return after the June 2007 dismissal, he might not have wanted to return at all.

[29] Plane Biz also made the point in its evidence that, during the period that Mr Broughton was absent from the workplace, it was a happier workplace than it had been previously.

[30] What is more, Plane Biz gave evidence that a number of its continuing staff would not work again with Mr Broughton if he were to be reinstated to his position again.

The 20 August 2007 incident

[31] Mr Broughton had an altercation with a work colleague which Mr Ward, the manager who investigated the matter, confirmed was a pretty minor verbal disagreement.

[32] Mr Ward sought to talk to both the protagonists but Mr Broughton became *agitated*, refused to participate in the proposed resolution meeting and was sent home by Mr Ward on the basis that it was not safe for him to continue to be at work.

[33] On Mr Broughton's return to work, there was a meeting between him and Plane Biz and this took place on 28 August 2007. Mr Broughton told Plane Biz that he had not been well, that he was suffering from a major depressive illness and had been to see the emergency psychiatric service at Christchurch public hospital. One of the things he was told by the attending psychiatrist was that his extensive use of alcohol was nullifying the effect of his anti-depressant medication and he conveyed this intelligence to Plane Biz at this meeting.

[34] Mr Ward, for Plane Biz, told Mr Broughton at this meeting that Plane Biz was anxious about Mr Broughton's continuing health issues and his apparent failure in the past to take sensible medical advice. Mr Broughton said that he had not wished to do anything to prejudice Plane Biz's position but he did want to continue working for it.

[35] There was a further meeting between the same parties on 4 September 2007 at which Mr Broughton reiterated his desire to return to work but said that he did not wish to be a liability to the company. In that connection, Plane Biz sought detailed medical assessment from Mr Broughton about his condition, what the prognosis was, what medications he was taking and what could realistically be expected in the future.

[36] There was a final meeting between the parties on 12 September 2007 at which Plane Biz wanted to know whether Mr Broughton was fit to return to work in a medical sense and wanted to assess whether Mr Broughton would simply fall into his usual pattern of improving for a time and then sinking back into a negative and unhelpful frame of reference.

[37] In that connection, Mr Broughton, through his advocate, put together a package which he described as *the path forward*. This package consisted of Mr Broughton committing to undergoing random drug tests at the behest of the employer, providing proof that he was attending Alcoholics Anonymous, proof that he was attending his doctor on a regular basis, and making a commitment to resolve the outstanding issues occasioned by the 20 August 2007 incident.

[38] Despite that proposal, Plane Biz formed the view that it had been in this position with Mr Broughton before, that history did not suggest that Mr Broughton was capable of remaining, as it were, *on task* and that there was no reason to think that the present circumstances would be any different. That being its view, Plane Biz reached the decision to terminate Mr Broughton's employment and this was notified to Mr Broughton by letter dated 12 September 2007.

Determination

[39] Mr Broughton seeks permanent reinstatement amongst his remedies. Reinstatement is, of course, the primary remedy, where it is claimed: Section 125, Employment Relations Act 2000. Furthermore, the same section makes clear that reinstatement must be granted unless it is impractical.

[40] At the conclusion of the investigation meeting, I undertook to advise the parties if I was considering reinstatement, so that they could make further particular submissions on the matter. That became the position and a minute of the Authority issued on 29 May 2008 seeking the parties submissions and timetabling them. I was particularly interested in whether the parties had any enthusiasm for reinstatement to a different position in Plane Biz's organisation and indeed whether, in the parties' view, such a course was open to the Authority given the clear words of Section 123 (1)(a) of the Act requiring reinstatement in a position ... *no less advantageous to the employee*.

[41] The Authority has given earnest consideration to this matter and reached the conclusion that reinstatement in any manifestation is simply impractical because of the efforts Plane Biz would need to expend in trying to accommodate him. In the end, the reasonable objections of Plane Biz to reinstatement to a supervisor role apply just as much to any other role in the company.

[42] Furthermore, I am not persuaded that the Authority can contemplate reinstatement to a position *less advantageous* to Mr Broughton without doing violence to the obligation imposed on the Authority by Section 123 (1)(a) of the Act.

[43] However, I am satisfied that, having applied the test in s.103A of the Employment Relations Act 2000, a fair and reasonable employer, having conducted a proper investigation, would not have reached the decision to dismiss Mr Broughton in the particular circumstances that obtained here and accordingly Mr Broughton has a personal grievance and is entitled to remedies. The evidence I heard does not disclose a separate *disadvantage* grievance.

[44] Mr Broughton, in my judgment, went to extraordinary lengths to satisfy his employer that he had realised the wickedness of his ways and had tried to address those issues. I acknowledge that Mr Broughton's history with this company is depressing, but I am not persuaded that the company has ever properly put Mr Broughton on notice that his behaviour was such as to put his position in jeopardy.

[45] Indeed, the factual matrix suggests that there were no warnings administered to Mr Broughton at all during the course of his employment with Plane Biz and that the very minor incident on 20 August 2007 simply became the catalyst for Plane Biz losing its patience with Mr Broughton's continuing health and substance abuse problems.

[46] In my opinion, a fair and reasonable employer would have conducted a more thorough investigation about Mr Broughton's health prognosis, if that was in issue, and amongst other things would have required Mr Broughton to submit himself to Plane Biz's own medical experts in order to establish whether or not the assurances that Mr Broughton brought to the table on 11 September 2007 could be relied upon or not.

[47] Simply reaching the conclusion that what Mr Broughton's medical advisers were saying was not enough is not, in my opinion, the action of a fair and reasonable employer.

[48] I have given consideration to whether Mr Broughton has contributed to the circumstances in which he finds himself and I have reached the conclusion that he has made a significant contribution to his own misfortunes. It is not, in my opinion,

appropriate to apportion blame to people for suffering ill health and so I remove entirely from any contribution element, his depressive illness.

[49] However, his substance abuse is, in my judgment, at least in part a matter which Mr Broughton ought, for his own health and wellbeing, and in the interests of his continued satisfactory employment, to have got under better control and the behaviour that Mr Broughton exhibited as a consequence of that substance abuse is certainly capable of being taken into consideration. I think that the appropriate course of action for the Authority in this circumstance is to reduce the remedies otherwise available to Mr Broughton by 50%.

[50] I direct that Plane Biz pay to Mr Broughton the following sums allowing for a 50% contribution:

- (a) Compensation for hurt, humiliation and injury to feelings in the sum of \$2000.
- (b) Lost wages of \$3625 gross.

Costs

[51] Costs are reserved.

James Crichton
Member of the Employment Relations Authority