



applicant is not entitled to the remedies sought and in particular opposes the application for reinstatement which, it says, is neither practical nor appropriate. Accordingly, it declines to provide the remedies the applicant seeks.

[4] The parties attended mediation but were unable to resolve their differences.

### **What caused the problem?**

[5] The applicant's role was to spray paint the ends of the packs of scaffolding planks prior to their being taken off the line and transported to the store/despatch area. Towards the end of the day on 7 September 2006, Mr Corbett began cleaning out the spray equipment to ensure it was clear for the following day. A pack of planks was still on the line and required only the ends to be sprayed to complete the job.

[6] The applicant says those employed on the paint line usually began cleaning up around 4.30pm each day to finish work *just before 5*. On this day, two other employees on the line and the applicant completed the clean up at about 4.45pm and the other two were leaving the line in order to go home. The applicant says he was still on the line at about 4.50pm when he was approached by Greg McConachy, the team leader, who asked him why he had not completed the spraying of the pack ends. The applicant said it was because to do so was a change to the usual routine and a verbal altercation followed. Mr Corbett says:

*... because it was not a reasonable request I just went ahead with preparing to follow the other guys off the site. It was impractical for me to fill the spray line for one pack and I wasn't going to waste paint getting the lines all running again.*

[7] The applicant said they always left the last pack on the line without spraying the ends or strapping it because these tasks could be done the following day by those on the line while the line was being set up for the day's production. This is strongly contested by the respondent. Interestingly, Mr Corbett says:

*... it seemed to me that it was really just Greg flexing his muscles to feel good ordering me about. It may be he was just trying to put me in place because I used to run the line.*

[8] As the applicant was leaving, he was called to the office by Mr Cedric Magic, the production manager of the respondent, who told Mr Corbett that he had received a complaint from Greg McConachy. The pair began to discuss the incident and the applicant said he felt *bailed up* and he accepted that he became verbally aggressive.

Initially, Mr Corbett's evidence was that he was ordered to go back to the line and paint the pack. He later changed this to him offering to go back and paint the pack. He says he went to do this and *I was angry with Greg who had rung Cedric.*

[9] The applicant went back to the paint line and found that the pack had by now been painted by an employee on the late shift using an aerosol can. As Mr Corbett was leaving the paint line, he met Mr McConachy. He says he was angry and asked Mr McConachy why he had telephoned Mr Magic. He says:

*We got quite heated arguing with each other. We were both standing close to each other. In the end I gave him the finger to his face and I walked off. I did not attempt to hit him or use my fists or make any threatening behaviour. I simply gave him the finger and said you've got no solidarity. Peter Kristal was nearby on the forklift when this happened.*

[10] After leaving Mr McConachy, the applicant met the employee who had completed the pack and who told him that if he (the applicant) wanted to keep his job, he had to go and see Mr Magic in his office. The applicant went to the office and found both Mr McConachy and Mr Magic there.

[11] The various participants had differing views of what occurred and what was said by those present, but there was no doubt that the applicant was angry with Mr McConachy and a little less so with Mr Magic. An important issue was the acceptance by Mr McConachy that he had adjusted *the end of the day procedure* without fully informing those on the line about the change and the reasons for it. That was because that shipment needed to be completed and dispatched promptly. The applicant left the office and as Thursday was the end of his working week expected to return on the following Monday.

[12] On Friday, 8 September 2006, Mr Corbett received a telephone call from Mr Magic requiring him to attend a meeting that day with him and the Union representative, Mr Hollingsworth and the site delegate, Mr Nelson.

[13] These two gentlemen had called on Mr Magic before 9am on 8 September 2006 to discuss Mr Corbett's health and whether Mr Magic had access to the applicant's medical file. Mr Magic says he *took the opportunity to tell them about the incident that had occurred the day before between Greg and Johnny.* It was clear that this was the first time they had been formally advised of the incident by the

respondent. However, Mal Grenell, another Union delegate, had advised them that same morning that he had heard something about the incident while on night shift.

[14] In the course of this meeting, Mr Magic produced the complaint from Mr McConachy which had been emailed to him late the previous evening. Mr Magic made it clear that the incident was *a problem*. Mr Hollingsworth says that the respondent later referred to this meeting as a *pre-investigation meeting* and appears to object to this description as Mr Corbett was not in attendance. On the face of it, the description seems apt and it is not a central issue.

[15] At 11am that same day, a further meeting took place involving the same personnel but with the applicant and Mr McConachy also attending. The issues were traversed and Mr Magic later telephoned Mr Hollingsworth during which call he says they discussed suspending Mr Corbett until the disciplinary meeting which was to be held the following Tuesday at 10am. Notes taken by Mr Magic confirm that Mr Hollingsworth was to convey this information to the applicant. Later that day, to ensure the information reached Mr Corbett, Mr Magic telephoned to find he was not aware of the suspension nor of the time of the arranged disciplinary meeting. He advised Mr Corbett verbally and hand delivered a letter of confirmation to the applicant's home letterbox that evening. He then emailed Mr Hollingsworth advising him of the actions he had taken.

### **The disciplinary meeting**

[16] The meeting was attended by those named above and by Mr Brian White, a senior executive with the respondent. The allegations put to Mr Corbett were *behavioural misconduct* in raising his hand in a threatening manner in the direction of Mr McConachy's head within arm's reach and twice stopping short of physically striking him with the open hand, and *verbal abuse* in swearing directly at Mr McConachy. Relevant documents were distributed including copies of Mr McConachy's statement and of the relevant serious misconduct section of the staff handbook which, at 5(g), refers to *physical or verbal violence, including threatening behaviour against any person on company premises, during work hours or while on company business*.

[17] In explaining his complaint, Mr McConachy told the meeting the applicant had failed to explain why he had shut the paint line system down soon after 4.40pm

and that he (Mr McConachy) had rung Mr Magic to advise him of the incident. He then described Mr Corbett's action after the applicant returned from Mr Magic's office. Mr McConachy said he was sitting at the computer completing administration tasks in respect to that order's completion when he was approached by Mr Corbett. In his evidence, Mr McConachy said:

*Johnny approached unseen to me, I looked up and saw him standing there and he let rip. He said did you fucking ring Cedric. I replied yes. He asked why did you fucking do that. I told him I asked you to do something and you refused to. I have had enough. Johnny's tone was loud and threatening. He was in very close proximity. The saying is "in your face" and he really was in my face, he was within half an arm's length of my face. Johnny and I are the same height and stature so we really were eye-to-eye.*

*I was taken by surprise. I had not expected this reaction or behaviour and more abuse followed. I cannot remember exactly what was said. I was in shock by then. The whole incident lasted 1 to 2 minutes. During this time, Johnny raised his hand a couple of times. His hand actions were quite violent and I remember it as an open hand, twice, in speedy and jerky, sudden movements. At that point I was scared and truly thought I could have been hit.*

*When Johnny stalked off, I could tell from his body language that he was really annoyed. In fact, he stormed off still raising his voice as he yelled back to me. It is not the culture of accepted practice in this workplace to have exchanges like this. I have never experienced it before and was shocked.*

[18] The meeting then proceeded by way of a demonstration by the applicant and Mr McConachy of the exchange that took place near the computer. Following this, Mr Hollingsworth made representations on behalf of Mr Corbett saying that the applicant felt victimised and believed he had done nothing wrong. He promoted the view that the whole thing was a misunderstanding and that his member was not at fault.

[19] Mr Magic then put to the applicant a number of options as to why the incident had taken place. He asked, "*because you were angry, because Greg rang me or because you did not finish painting at 1650 or because you did not follow Greg's instructions because you do not accept authority because you are indisciplined*". He appears to have had no reply to this and continued on to briefly outline the number of recorded warnings, both verbal and written and signed by the applicant and by the Union representative at the times in question. Mr Magic then put to Mr Corbett that he had been offered assistance in dealing with his problems but that he had not

changed. Following that, Mr Magic then called an adjournment to consider what action was appropriate.

[20] On reconvening, Mr Magic clarified that the allegations were of behavioural misconduct, that the behaviour was threatening and he did not accept that behaviour. He referred to the house rules which had been revisited very recently with the applicant and in the presence of his Union delegate but that Mr Corbett's behaviour had not changed. He went on to say that he was considering dismissing Mr Corbett but that before he made any decision he asked Mr Corbett whether there was anything in his personal life that he wished him to consider before coming to the decision. Mr Corbett replied *no*.

[21] At that point, Mr Hollingsworth pointed out that Mr Corbett had financial concerns and that the Union would be happy if the company would consider counselling and health assistance. Mr Magic replied he had considered these as Mr Hollingsworth had raised these issues with him previously and so in his deliberations at this time, had considered health and counselling as well as the applicant's financial situation. Mr Magic was well aware of the offers made by the respondent to provide counselling to Mr Corbett at the company's expense. None of these offers was ever uplifted by the applicant.

[22] Mr Magic went on to advise the applicant that he was dismissing him for serious misconduct because of his threatening manner and bad behaviour and verbal abuse against Mr McConachy. He clarified that the dismissal was summary and required Mr Corbett to hand over his access card and locker key and leave the premises.

### **The issues**

[23] In order to determine this matter, the Authority needs to resolve the following issues:

- Was the applicant unjustifiably disadvantaged by:
  - (a) The company raising historical timekeeping issues;

- (b) The company not raising allegations of threatening behaviour after the applicant's second exchange on 7 September in Mr Magic's office;
  - (c) Not being supplied with a copy of any evidence from Mr Magic regarding what witnesses to the exchange may have seen; and
  - (d) The *new allegation of threatening behaviour* and that these were fabricated by Mr McConachy?
- Was the applicant unjustifiably dismissed?

### **The test**

[24] The test to be applied in relation to these issues is set out in s.103A of the Employment Relations Act 2000 and its amendments. This requires the Authority to determine whether a dismissal or an action was justifiable on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

### **The investigation meeting**

[25] The Authority heard evidence from the applicant and from Mr Hollingsworth, both of whom provided written statements of evidence. Five other witnesses appeared under summons and without providing written evidence in support of the applicant. For the respondent, the Authority heard from Mr Magic and Mr McConachy, both of whom provided their evidence in chief in writing.

[26] The appearance of the five summonsed witnesses protracted the investigation meeting by some five hours and much of the evidence adduced was peripheral to the principal issues. The appearance of Mr Kristal was astonishing, as at his request, when approached by Mr Magic who wanted to know what he had seen of the altercation between Mr Corbett and Mr McConachy, made it clear he did not want to become involved. On that basis, Mr Magic excluded him from the respondent's investigation. None of the other four witnessed the critical incident, although Mr Nelson, the site delegate, provided useful background information on the events following the incident.

## **Analysis and discussion**

[27] At the heart of this matter is the applicant's behaviour when questioned by his leading hand as to why he did not spray the ends of the final pack on the line before clearing the paint line and completing the task. Mr Corbett contested that practice and left the area. Mr McConachy telephoned Mr Magic and asked him who the leading hand was in that section. When Mr Magic asked as to the point of the question, Mr McConachy told his manager that the applicant had walked off and as a result he had two other employees complete the task in order to clear the line for the following day and a new client order. What followed that appears to be symptomatic of the applicant's attitude to authority.

[28] Having been appraised of the situation on 7 September 2006, Mr Magic went to the smoko room and told the applicant to come to his office. Once there, the manager asked Mr Corbett *Johnny what happened today. Did you stop the line.* Mr Magic's evidence was that the applicant leant on his desk, thrust his face towards him aggressively *eyeballing* him and said *do you want my job. You can take the fucking job and stick it.* With that, the applicant left the office. Mr Magic said in evidence he was *blown away* by the display of aggression and disrespect.

[29] Mr Magic then went down to the paint line and spoke with Mr McConachy who explained what had occurred. While they were conversing, another employee, Angus, came to them to advise that the applicant was shaking and telling others that he was leaving.

[30] Mr Magic and Mr McConachy then went to the manager's office and the leading hand began to write out a formal complaint. The applicant then appeared in the office doorway displaying what can only be termed an aggressive and belligerent demeanour. Mr Magic had the applicant sit down and asked Mr McConachy to explain what had happened. As he was giving his explanation, the evidence is that Mr Corbett consistently interrupted and yelled over the top of Mr McConachy. Unable to make any progress, and as he had an off-site appointment to attend, Mr McConachy left the office with his written statement incomplete. He emailed the completed letter to Mr Magic later that evening.

[31] The key issue between the parties is the grounds on which the applicant was dismissed. Despite the insistence of the applicant that his dismissal relied

substantially on his previous record of warnings, the letter from Mr Magic to Mr Hollingsworth of 25 September 2006 makes it clear that the dismissal came as a result of the respondent upholding a complaint of threatening behaviour by Mr Corbett against his leading hand. That letter makes reference to the house rules and in particular to that section referred to above in this determination. As the letter states:

*The consequence for a breach of these rules is instant dismissal. Johnny was aware of these rules and understood the consequences for breaching them prior to his actions.*

*From the investigation it was evident that Johnny's actions on 7 September 2006 did breach the house rules and that the company-employee relationship had been deeply impaired and irreversibly damaged by the employee's conduct, therefore he was dismissed.*

[32] Having considered closely the evidence bearing on this matter, the Authority is satisfied that while Mr Magic traversed the applicant's employment history in the course of its investigations, that exercise was contextual rather than substantive. It is clear from Mr Magic's letter that the respondent was not relying on this history with the company but rather on the incident that took place on 7 September 2006.

[33] It was also clear from the evidence that the respondent made its judgment in the light of its genuine attempt to assist Mr Corbett address his personal problems. Those attempts were unsuccessful due to the applicant's refusal to participate. The Authority gained the distinct view of an employer intent on assisting an employee with significant personal difficulties. It attempted to go the extra mile for Mr Corbett but its efforts were unsuccessful due solely to his own refusal to engage.

[34] While Mr McConachy had some difficulty in recalling exactly what the applicant had said to him during the course of the altercation and also the precise nature of the gestures made by Mr Corbett, I have had recourse to the applicant's own evidence on this matter. In his written statement of evidence, Mr Corbett presents a somewhat sanitised version of the actual interchange. However he does say *we got quite heated arguing with each other. We were both standing close to each other. In the end I gave him "the finger" to his face and I walked off ... I simply gave him the finger and said you've got no solidarity.*

[35] The New Zealand Oxford Dictionary 2005 edition provides the following definition of *giving a person the finger*:

*Make a gesture with the middle finger raised as an obscene sign of contempt..*

[36] When this is placed in the context of Mr McConachy's evidence on the actual incident which is referred to and quoted above, the respondent was entitled to investigate the incident under clause 5(g) of the house rules.

[37] What is of significance in respect of the applicant's knowledge of those rules was the applicant's acceptance under questioning that in mid-August 2006 he had been given a copy of the handbook containing those rules and attended a meeting with his Union representative in order to read aloud the conduct rules. He then signed off a document acknowledging that he had read and understood what was written there.

[38] I have reviewed the evidence regarding the company's investigation process with considerable care given the reservations the applicant set out in his statement of problem. I am satisfied that the respondent conducted this process fully and in a fair manner. Notes taken in the course of the investigation and provided to the Authority confirm the integrity of the process.

[39] I thoroughly accept the efforts made by Mr Hollingsworth on behalf of Mr Corbett to mitigate any possible outcome. However, I accept that the decision as to how much weight be given to these pleadings lay in the hands of Mr Magic.

[40] To justify dismissal, usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship: see *Northern Distribution Union v. BP Oil Ltd* [1992] 3 ERNZ 483 (CA). That is a question of fact and degree in the particular circumstances of the given case.

[41] In the circumstances of this case, we have a respondent who made every effort to assist the employee in addressing his personal difficulties and those that were impacting on his performance in the workplace. In the light of the respondent's involving the Union to impress upon the applicant some two to three weeks earlier the need to adhere to company house rules was, in my view, an attempt to impress upon Mr Corbett who was emerging from a period of final warning, his obligations to comply with company policy and behavioural standards. To put it differently, the company was ensuring that Mr Corbett was in no doubt as to the requirements placed on him in respect of his behaviour in the workplace.

## The determination

[42] Returning to the issues set out above in this determination, I find:

- The applicant was not disadvantaged by the company raising historical timekeeping issues in the context of the incident on 7 September 2006. That is because that reference was not relied on by the respondent as the basis for its decision;
- The applicant was not disadvantaged by the company not raising the allegation of threatening behaviour on 7 September 2006 as at that time Mr Magic had not received the full complaint of Mr McConachy;
- Nor was the applicant disadvantaged by not being supplied with evidence from witnesses whom he believed were to appear as part of the investigation. This is because no other evidence, apart from Mr McConachy's, was called by the respondent in its investigation; and
- The applicant was not disadvantaged by the "new" allegation of threatening behaviour because it was not "new" but merely unstated on 7 September 2006. It came to light only on the following day when the full complaint from Mr McConachy was available.

[43] I find the respondent acted appropriately in its investigation of the incident, was entitled to find on the facts that the applicant's actions, particularly in light of its formal reminding Mr Corbett of his need to adhere to the house rules, breached the threshold of serious misconduct and that prior to conveying its decision to Mr Corbett asked if there were any matters in his personal life which needed to be considered. The applicant replied there were not.

[44] I find the employer acted fairly and reasonably in all aspects of the disciplinary process. Standing back and viewing the matter in the round, the actions of the respondent in this particular matter were what a fair and reasonable employer would have done in all of the circumstances of this case. This is particularly so given the staunch refusal of the applicant to accept assistance offered to him.

[45] I find the dismissal of Mr Corbett was justified. The Authority declines to award the applicant the remedies he seeks.

**Costs**

[46] Costs are reserved.

Paul Montgomery  
Member of the Employment Relations Authority