

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2019] NZERA 671
3058612

BETWEEN	JACKSON DILLON Applicant
A N D	TUFFNELL DRAINAGE LIMITED Respondent

Member of Authority:	Peter van Keulen
Representatives:	Mary-Jane Thomas, counsel for the Applicant John Shingleton, counsel for the Respondent
Investigation Meeting:	9 September 2019
Submissions Received:	9 September 2019 from the Applicant 9 September 2019 from the Respondent
Date of Determination:	21 November 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Jackson Dillon worked as a labourer/class 2 driver for Tuffnell Drainage Limited from late 2016.

[2] Mr Dillon was dismissed on 7 September 2018 for events that occurred on 18 August 2018 when he had not followed an instruction correctly and had then responded badly to being told what to do, storming off and breaking a window of a Tuffnell Drainage truck.

[3] Mr Dillon says the dismissal was unjustified as Tuffnell Drainage did not investigate the incident and allegations arising out of it appropriately, Tuffnell Drainage was biased and

had predetermined the outcome, it did not consider relevant information in the course of deciding the outcome and it turned its mind to irrelevant material. He also says the dismissal was not substantively justified.

[4] In the course of dealing with the alleged incident, Tuffnell Drainage suspended Mr Dillon. Mr Dillon says this was also unjustified.

[5] So, the claim lodged by Mr Dillon is based on two personal grievances of unjustified disadvantage and unjustified dismissal.

[6] Tuffnell Drainage has responded to the claim lodged by denying that its actions in suspending and then dismissing Mr Dillon were unjustified. It has also lodged counterclaims against Mr Dillon alleging:

(a) Mr Dillon breached his employment agreement and the duty of good faith in the way in which he behaved on 18 August 2018.

(b) Mr Dillon breached his employment agreement by his conduct toward another employee during his employment, conduct that it only became aware of after Mr Dillon was dismissed. Alternatively, Tuffnell Drainage says this subsequent discovered misconduct is relevant to remedies if I find it did unjustifiably dismiss Mr Dillon.

(c) Mr Dillon breached his employment agreement by covertly recording a meeting on 20 August 2018.

[7] I have investigated these matters and this determination resolves them.

Issues

Unjustified disadvantage

[8] In order to resolve the unjustified disadvantage grievance I need to consider the following:

(a) By suspending Mr Dillon did Tuffnell Drainage cause disadvantage to Mr Dillon's employment or a condition of his employment; and

(b) If so, was Tuffnell Drainage's action justified?

Unjustified dismissal

[9] In order to resolve the unjustified dismissal grievance I must decide whether Tuffnell Drainage's actions and how it acted were what a fair and reasonable employer could have done in all of the circumstances¹. This involves assessing:

(a) Whether Tuffnell Drainage followed a fair process in coming to the conclusion to dismiss?

(b) Whether the decision to dismiss was substantively justified?

Remedies

[10] If Mr Dillon is successful with his unjustified disadvantage claim and/or his unjustified dismissal claim then I will need to consider remedies, this will include an assessment of whether the alleged conduct, which is subject of the counterclaim, means Mr Dillon should not receive any remedies. I will also need to consider contribution if I do award any monetary remedies to Mr Dillon.

Breaches by Mr Dillon

[11] The claims of various breaches by Mr Dillon involve a factual analysis of what occurred and whether this amounts to a breach as alleged. If there has been a breach, I must then assess if a penalty or penalties should be imposed.

The events on 18 August

[12] On Saturday 18 August 2018, Mr Dillon was assisting the Tuffnell Drainage foreman and one other employee to remove hoardings on a site.

[13] As will become clear later in this determination there are issues in this case about alleged bullying of Mr Dillon by the foreman. The issue of bullying was not resolved by Tuffnell Drainage and it was not part of my investigation to determine if the alleged bullying had occurred or not. For the record, the foreman denies any bullying of Mr Dillon. However

¹ Section 103A of the Employment Relations Act 2000.

as there is no finding of whether bullying occurred or not I believe it is appropriate to protect the foreman's identity as otherwise identifying him in this publically available determination may cause some harm or embarrassment to him given the nature of the allegations; I will refer to the foreman as EPR.

[14] EPR and the employee were holding a hoarding when EPR told Mr Dillon to hammer the bottom of the hoarding they were holding to remove it. Mr Dillon went to another hoarding which was connected to the one being held and started hammering that.

[15] The employee and EPR both say that they then told Mr Dillon to move to the correct hoarding and hit that. Mr Dillon did not move and continued to hit the wrong hoarding. EPR then told Mr Dillon to do as he was told and come down to the right hoarding. They then say that in response to this Mr Dillon "lost it", dropping the sledge hammer he was using and angrily confronting EPR yelling at him to "go on ... do it", being a reference to hitting him. Mr Dillon then gave EPR the fingers and stormed off.

[16] Mr Dillon says the instruction to hit the hoarding that the employee and EPR were holding was not clear, this is why he hit the other hoarding where he did. Then he says EPR yelled at him, swearing and abusing him, which he responded to by swearing back at EPR. Mr Dillon says EPR then came up to him in an aggressive manner, with his fists clenched and he thought he was going to hit him, which he responded to by saying to EPR "go on then, do it". He then gave EPR the fingers and left.

[17] Both EPR and the employee say EPR did not confront Mr Dillon nor did he act aggressively towards him. They say his outburst and goading of EPR appeared to be in reaction to EPR telling Mr Dillon to hit the right hoarding at the correct end.

[18] Mr Dillon then went to the Tuffnell Drainage truck he had been driving, got his gear out of it and slammed the driver's door. He did this so hard the window shattered.

[19] Mr Dillon then left the site he had been working at. After he left he called Warwick Tuffnell, a director of Tuffnell Drainage and the operations manager, to tell him what had happened. Mr Tuffnell did not answer that call but called Mr Dillon back about half an hour later and they spoke then. Mr Dillon told Mr Tuffnell that he had had a dispute with EPR over removing the hoardings and that he was sick of being bullied by EPR. Mr Tuffnell

replied that he would speak to EPR and meet Mr Dillon on Monday morning to discuss what had occurred. Mr Dillon did not tell Mr Tuffnell about breaking the driver's door window of the truck.

[20] Mr Tuffnell then went to the site and spoke to various employees, including EPR, about what had happened between EPR and Mr Dillon.

[21] When Mr Tuffnell was on site he also noticed the broken window in the truck.

Meeting on 20 August

[22] On the morning of Monday, 20 August 2018, Mr Tuffnell met with Mr Dillon. This meeting had not been prearranged, it appeared to be an impromptu chat about the events that had occurred on 20 August. Mr Dillon did have sufficient warning of the meeting to be able to activate the recording function on his phone, so all of the meeting was recorded without Mr Tuffnell's knowledge.

[23] Having listened to the recording of the meeting and having read the transcript it appears to me that there are three areas of discussion that are relevant:

- (a) A discussion about the broken window in the truck. Mr Dillon said he might have caused it when he shut the door of the truck but he did not remember doing it. He also said he did not know if he broke it, but if he did break it then he would have offered to pay for it.
- (b) A discussion about what happened when Mr Dillon was told to hit the hoarding, to help remove it. Mr Dillon explained how he had misunderstood the instruction from EPR and how EPR had reacted to him hitting the hoarding in the wrong place.
- (c) Mr Dillon raising complaints about how he had been treated by EPR and that he did not feel safe coming to work. This included Mr Dillon saying "I'm just sick of his shit all of the time, I always get his shit, nothing is ever good enough, it's I'm always getting yelled out, he's always abusing me, threatening to smash me."

[24] The meeting ended with Mr Tuffnell telling Mr Dillon that he would consider what he had heard from him and the other employees and decide what would happen next.

Investigation and commencement of a disciplinary process

[25] Mr Tuffnell then spoke to EPR and the employee who had been working with him on 18 August 2018 again about what had occurred. He obtained statements from them and one other employee who confirmed that the truck window had not been broken when he saw the truck earlier that morning. Mr Tuffnell also took some photos of the broken window.

[26] Having investigated the incident on 18 August 2018, Mr Tuffnell decided to commence a disciplinary process with Mr Dillon. He did this by sending Mr Dillon a letter that set out the investigation findings and explained Tuffnell Drainage's concerns about the possible behaviour including that this might amount to serious misconduct which in turn might lead to dismissal. The statements from employees and photos of damage to the truck were included with the letter.

Suspension on 24 August

[27] On 24 August 2018, Mr Tuffnell received complaints from another employee that Mr Dillon had been behaving erratically and the employee was concerned about him. The behaviour complained of included, driving at excessive speed, not wearing health and safety gear and damaging trees.

[28] Mr Tuffnell responded to this by calling Mr Dillon and telling him he had received complaints about his behaviour, explaining what the complaints were, and then he told him he was thinking about suspending him. Mr Tuffnell suggested that they discuss this later that day.

[29] Mr Tuffnell and Mr Dillon met later that day and discussed the complaints. Mr Tuffnell told Mr Dillon he was concerned about Mr Dillon's safety and the safety of other employees. Mr Tuffnell then repeated the proposal to suspend Mr Dillon and asked Mr Dillon if he had anything to say about it.

[30] Mr Dillon explained what had happened in the events complained of. Mr Tuffnell then told Mr Dillon he was suspended on pay.

[31] Suspending an employee does cause disadvantage to his or her employment or a condition of his or her employment. So, the issue with Mr Dillon's suspension is, was it justified? This is answered by assessing whether it was effected through a fair process and whether it was substantively justified.

[32] In this case I am satisfied that Mr Dillon's suspension was justified.

[33] First, the process was short and carried out quickly, but I believe that was appropriate given the concerns about Mr Dillon's behaviour. Through the process Mr Dillon was given warning of potential suspension with an explanation for why suspension was being considered, he was then given a subsequent opportunity to discuss the events and the possible suspension before a decision was made. It is also clear that Mr Tuffnell considered what Mr Dillon had to say before he suspended him.

[34] Second, given the behaviour complained of and the concern about Mr Dillon I believe suspension was substantively justified.

Disciplinary process

[35] The disciplinary process with Mr Dillon advanced through a meeting on 29 August 2018, which Mr Dillon attended with a support person. Then there were various exchanges of correspondence about further investigations in response to issues raised by Mr Dillon, a statement of preliminary findings and an opportunity for Mr Dillon to comment on that preliminary position before a final decision was made, which he did.

[36] Having carried out the process Mr Tuffnell concluded that Mr Dillon had:

- (a) Come to work intent on confronting EPR;
- (b) Refused to follow a reasonable instruction;
- (c) Become belligerent toward EPR;
- (d) Behaved insubordinately;
- (e) Walked off the site;
- (f) Caused damage to Tuffnell Drainage property by behaving recklessly; and

(g) Not reported the damage to a supervisor or Mr Tuffnell when he had an opportunity to do so.

[37] Mr Tuffnell then concluded that this amounted to serious misconduct and that summary dismissal was the appropriate sanction.

[38] I have set out the process very briefly because it is my view that there is no issue with it; Tuffnell Drainage carried out a fair process, subject to one concern which I will address separately. In summary, Tuffnell Drainage conducted an appropriate investigation, Tuffnell Drainage raised its concerns and provided relevant information to Mr Dillon, Mr Dillon had ample and more than adequate opportunity to respond to the concerns and information, which he did, and Tuffnell Drainage considered his responses.

Allegations of bullying

[39] The one aspect of the disciplinary process that raises an issue for me is Tuffnell Drainage's handling of Mr Dillon's statement throughout the process and immediately before it commenced, that he was bullied by EPR.

[40] Prior to 18 August 2018, Mr Dillon complained on one occasion about EPR's treatment of him. That complaint related to an incident that occurred on 23 May 2018, when Mr Dillon says EPR made a homophobic slur directed at him and threatened to hit him. Mr Tuffnell investigated the complaint and determined that EPR had threatened Mr Dillon but had not used homophobic language. EPR was given a warning in respect of the threat.

[41] There were no other complaints made by Mr Dillon before 18 August 2018. Mr Dillon did not raise a personal grievance in respect of the alleged behaviour. However, the allegations of bullying are relevant to the unjustified dismissal as in addition to saying he simply misunderstood the instruction from EPR, Mr Dillon said he reacted to EPR yelling at him when he was not doing what he had been told to do. And, importantly, he says he reacted as he did because he was sick of being bullied by EPR.

[42] Mr Tuffnell dealt with this explanation by speaking to one employee who was working with EPR and Mr Dillon removing the hoarding, about whether there was any bullying by EPR during the incident. Because of what that employee advised him and

because of his previous investigation into the one alleged incident on 23 May 2018, Mr Tuffnell appears to have downplayed Mr Dillon's explanation.

[43] In my view, this investigation was insufficient. Mr Dillon's explanation was that he had been bullied over time by EPR. That allegation and explanation required consideration of the relationship between EPR and Mr Dillon over the period of time they had worked together, not simply an analysis of two specific interactions. This is so not just because of the nature of the allegation – that Mr Dillon was always getting yelled at and EPR was always abusing him and threatening to smash him – but for two other aspects. First, of the two specific incidents investigated, Mr Tuffnell was satisfied there was no bullying behaviour on 18 August 2018 but he was satisfied that EPR had threatened Mr Dillon on 23 May 2018, so there was at least one incident that supported Mr Dillon's allegations. And, second, during the disciplinary process Mr Tuffnell was given a copy of a message sent by Mr Dillon to another employee on 17 August 2018, which complained about EPR bullying him. In this message Mr Dillon says:

IDK what to do about [EPR] don't know who else to ask I just spent the past half hour sitting in the truck crying he just bullies me non stop I haven't felt this [way] since I was in school it's getting to the point I'm not sure I can still work here it's just constant where nothings ever right for him

[44] For these reasons, Tuffnell Drainage should have done more to investigate and understand Mr Dillon's allegations to see if it did support his explanation for his behaviour thus providing mitigating circumstances for it to consider.

Unjustified dismissal

[45] In terms of process and outcome, I find that Tuffnell Drainage did not properly investigate the allegations of bullying offered by Mr Dillon as an explanation for his behaviour on 18 August 2018. Consequently, Tuffnell Drainage did not sufficiently consider Mr Dillon's explanation as it affected the decision that the behaviour, which Tuffnell Drainage found had occurred, amounted to serious misconduct or that dismissal was the appropriate sanction. There was a possible explanation for Mr Dillon's conduct, which was mitigating and this would have influenced the decisions of whether the behaviour was serious misconduct and/or whether dismissal was the appropriate sanction. And Tuffnell Drainage dismissed this explanation too readily, failing to consider it properly.

[46] As a result, I conclude that Tuffnell Drainage unjustifiably dismissed Mr Dillon.

Zero remedies for Mr Dillon

[47] As part of my assessment of remedies that Mr Dillon may be entitled to for his unjustified dismissal, I will first consider the position advanced by Tuffnell Drainage that Mr Dillon's conduct whilst employed was so egregious I should not award him any remedies.

[48] In setting out this position, counsel for Tuffnell Drainage relied on *Xtreme Dining Ltd t/a Think Steel v Dewar*² where a full bench of the Employment Court considered the circumstances in which the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance. The Court said:

[216] We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with "equity and good conscience". The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[49] It is clear from *Dewar* that this assessment is not limited to misconduct discovered after termination of employment as was the case in *Salt v Fell*³.

[50] In a subsequent decision, *Lawson v New Zealand Transport Agency*⁴ Judge Corkill applied this assessment and concluded:

[320] That misconduct, together with the misconduct of which the Agency had knowledge prior to dismissal, leads to a conclusion that the totality of inappropriate behaviours was sufficiently egregious as to warrant a finding there should be no remedies under s 123 of the Act.

² *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136

³ *Salt v Fell* [2008] NZCA 128

⁴ *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165

[51] Also in *Emmerson v Northland District Health Board*⁵ Judge Corkill said:

In short, the question is whether there is sufficiently egregious misconduct, either known or unknown to the employer, which should lead to a conclusion that it would be contrary to equity and good conscience to award any remedies for the dismissal grievance.

[52] Based on this case law it is clear to me that I must assess the conduct complained of and assess whether the totality of inappropriate behaviour, both that known before the dismissal and that discovered after the dismissal, is sufficiently egregious so that no remedies should be granted.

[53] The behaviour by Mr Dillon that Tuffnell Drainage complains of includes:

- (a) Harassing another employee through various text messages and snapchat messages – I do not consider it necessary to identify this employee in a publically available determination, as I believe that may cause some hardship or embarrassment to her; I will refer to this employee as IFL.
- (b) His behaviour towards EPR on 18 August 2018.
- (c) Breaking the window of the truck on 18 August 2018.
- (d) Not advising Mr Tuffnell that he had broken the window on the truck.
- (e) Covertly recording the meeting between himself and Mr Tuffnell on 20 August 2018.

[54] My assessment of this issue starts with the observation that none of the underlying events that occurred or actions attributed to Mr Dillon that make up the behaviour complained of by Tuffnell Drainage are denied. Mr Dillon does however not concede that his behaviour amounts to misconduct or egregious behaviour, so for example he says his messaging of IFL was not harassment or in any way untoward or unacceptable rather it was simply banter between colleagues who were friends.

[55] In terms of Mr Dillon messaging IFL, IFL's evidence was that this was a regular occurrence both during work time and outside of work, sometimes late in the evening after Mr Dillon had been out drinking. The messaging varied but at times included:

⁵ *Emmerson v Northland District Health Board* [2019] NZEmpC 34

- (a) What IFL considered inappropriate references to her such as “wifey”, “babe” and “fag hag” and inappropriate use of emoji’s such as a kiss emoji.
- (b) Sexual innuendos and explicit sexual references or pictures.
- (c) Photos of IFL taken during work, which were also shared with other employees.

[56] IFL says the messages were often inappropriate and offensive. She says did not want them but she did not know what to do in response, so she just ignored them. She also said she felt the pictures of her were used at least on one occasion to embarrass her or make fun of her amongst other employees.

[57] IFL says Mr Dillon also did other things that she was uncomfortable with. He would message her whilst driving and he would talk to her about his sexual experiences.

[58] Mr Dillon says he thought IFL was a friend as well as a colleague and that she did not mind the messaging. He says the messaging was just what he did with his friends and it was just meant to be fun and not offensive.

[59] Mr Dillon explained this behaviour by playing down the effect and his intentions. He says he was not aware IFL found his messages offensive and the one time she did complain to him about a photo he had taken he deleted it.

[60] Mr Dillon’s counsel tried admirably to support Mr Dillon in her submissions by explaining the messaging as just what young people do and explaining the sexually explicit material and sexual innuendos as humour.

[61] I understand the points being made. There is a balance between banter or jokes between friends and colleagues and unacceptable or inappropriate references or humour. There is a difficulty is assessing the line when people are not told their behaviour is unacceptable.

[62] There is also the point that objectively the behaviour may not cross that line even if the recipient says it does – as has been said recently, just because you are offended does not mean a person is being offensive.

[63] Despite counsel's efforts to persuade me on this, I do not accept that Mr Dillon's behaviour towards IFL met an acceptable standard. In fact, I think it fell well below that and his behaviour was not only unwelcome and unwanted, it was offensive. Ironically, he expected respect, tolerance and professional interactions from EPR but could not see that he should display the same standard of behaviour to others.

[64] Taking this further it seems to me that Mr Dillon's messaging to IFL and her other concerns about his behaviour was symptomatic of two areas of concern that Tuffnell Drainage had about Mr Dillon's conduct at work and outside of work as it impacted on employees:

(a) First, he used his mobile phone for taking photos and messaging too often at work and to the detriment of his work and at the expense of some of his colleagues who were the subject of his perceived jokes. Two clear examples of this are messaging whilst driving in the work truck on many occasions and showing a photo of IFL to other employees which was embarrassing and demeaning for her.

(b) Second, Mr Dillon was overt with his references to sex and sexuality, maybe because he liked to shock people or because he thought it was entertaining. Two examples of this include the explicit messages sent to IFL and producing a sexually explicit object at a company first aid course.

[65] Based on the evidence I heard in my investigation I accept these concerns and find that Mr Dillon's conduct at work fell below acceptable standards and some of his behaviour offended or embarrassed his colleagues.

[66] The other behaviour complained of requires less analysis.

[67] Mr Dillon did covertly record the meeting on 20 August 2018 and whilst this is legal, it is a breach of good faith and it does little to support a productive employment relationship.

[68] Mr Dillon's behaviour on 18 August 2018, including reacting to EPR and breaking the truck window occurred. However, given my findings about the significance of the alleged bullying by EPR and that if that did occur it might explain and/or mitigate the behaviour, I do not find this behaviour can be considered in my assessment of egregious behaviour that might impact on remedies.

[69] Mr Dillon did lie about breaking the truck window. Mr Dillon knew he had broken it and made a decision not to tell Mr Tuffnell about this.

[70] So, summing up, Mr Dillon: engaged in unwanted, inappropriate and sometimes offensive interactions with employees, particularly IFL; made unnecessary, inappropriate and excessive use of his mobile phone at work; covertly recorded the meeting on 20 August 2018 and lied about breaking the truck window.

[71] I find this behaviour was egregious and in equity and good conscience I believe it is not appropriate to award Mr Dillon any remedies for his unjustified dismissal.

Penalties

[72] Given that the actions complained of that support Tuffnell Drainage's claim for penalties comprise the behaviour that has disentitled Mr Dillon to any remedies, it is, in my view, inappropriate and unnecessary to impose any penalties on him.

Outcome

[73] Tuffnell Drainage acted in a justified manner when it suspended Mr Dillon and this grievance is dismissed.

[74] Tuffnell Drainage unjustifiably dismissed Mr Dillon however, given Mr Dillon's egregious behaviour at work he is not entitled to any remedies for this grievance.

[75] I will not impose any penalties against Mr Dillon.

Costs

[76] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the

date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority