

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 248/09
5090250

BETWEEN PHILLIP DODANIS
 Applicant

AND WAIKATO DISTRICT
 HEALTH BOARD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Scott for Applicant
 Anthony Russell for Respondent

Investigation Meeting: 1 and 30 April 2009 at Hamilton

Submissions Received: 18 May 2009 from Applicant
 15 May 2009 from Respondent

Determination: 29 July 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Phillip Dodanis was employed as a storeman by Waikato District Health Board ("WDHB") in its warehouse from 1991 until he was dismissed in January 2007. Mr Dodanis says his dismissal is unjustified as WDHB relied on past misconduct to justify the dismissal. Mr Dodanis seeks reinstatement among other remedies. WHDB denies the claims.

[2] The issue for determination is whether Mr Dodanis was dismissed unjustifiably and if so what, if any, remedies should be awarded.

Unjustified dismissal

[3] Pursuant to section 103A the Authority must scrutinise the WDHB's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant

dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[4] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer (*Toll New Zealand Consolidated Ltd v Rowe*, AC39A/07, unreported, 19 December 2007, Shaw, J).

[5] Although the Authority does not have unbridled licence to substitute its decision for that of the employer (*X v Auckland District Health Board* [2007] 1 ERNZ 66) it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome (*Air New Zealand v Hudson* [2006] 1 ERNZ 415).

[6] In or around 1995/1996 the WDHB contracted out the vast bulk of its warehousing requirements to an independent contractor, ProPharma. Mr Dodanis was opposed to the contracting out of the services and displayed a negative attitude toward the company.

[7] In 1999, after being told that he would need to have any overtime authorised by his appropriate manager Mr Dodanis wrote a letter to management in which he communicates his displeasure at management and in particular the decision to require overtime to be approved. During a meeting called to discuss the letter Mr Dodanis accepted he was at fault and advised that he had sent the letter in anger.

[8] In early 2005 and out of frustration Mr Dodanis began writing on the bin lids in red ink "FUCKING HEAVY". He says he did this out of concern for his colleagues around the hospital. He says his only intention was to warn others that the bins were particularly heavy, and to prevent injury. The WHDB instructed Mr Dodanis to desist in writing on the bin lids and he complied.

[9] In late 2005 Mr Dodanis compiled a letter to his manager with regard to the non-approval of a period of annual leave for January 2006. Mr Dodanis advised his manager that irrespective of the fact that his application for leave had not been

approved he intended to be absent for three weeks of January 2006. The tone of the letter was considered offensive. Mr Dodanis, true to his word, took unauthorised leave in January 2006. In his letter Mr Dodanis states that he had "...been dicked around." and that Mr Scheepers (his manager) had "...play[ed] stupid little barstadisation games..." and that he would "...no longer tolerate being stuffed around by someone who's got nothing else to do, but collect a fat salary, and get his jollies, dicking people around."

[10] On 5 January 2006 Mr Scheepers declined Mr Dodanis' application for leave and advised Mr Dodanis that any failure to return to work on 9 January would be regarded as serious misconduct. Mr Dodanis subsequently took sick leave for the period from 9 – 12 January 2006 claiming that he had the flu.

[11] In February 2006 Mr Dodanis was the subject of a complaint from a fellow storeman. Mr Dodanis acknowledged that he had threatened the employee with a punch in the mouth. Following a disciplinary meeting Mr Dodanis was issued with a warning. That warning concludes with the following statement from Mr John de Fluiter, Manager for purchasing and distribution:

You are reminded that failure to meet performance requirements and/or any further allegations of inappropriate behaviour or other forms of misconduct may lead to further disciplinary action being taken and may place your continued employment at risk.

[12] There were two incidents which lead to Mr Dondanis being dismissed for serious misconduct, a letter written by Mr Dodanis purportedly on behalf of WDHB and the writing of expletives on product bin lids received into the warehouse and distributed widely around the Hospital.

Letter to ProPharma

[13] On 30 November 2009 Mr Dodanis says he was involved in a near-miss incident when dealing with a loaded pallet which had arrived at WDHB from ProPharma. Pursuant to the requirements of the DHB Mr Dodanis completed an incident report. The incident report completed by Mr Dodanis does not report that the incident was a "near miss" but does indicate that when the pallet fell over it missed Mr Dodanis' face by "...1-2 inches".

[14] Following the incident Mr Dodanis contacted ProPharma by telephone to advise them of the incident. He says he did not receive the response he had

anticipated and in anger he wrote directly to ProPharma to express his feelings about the incident. I have set out the contents of the letter verbatim:

To the Manager,

On the 30th November 2006 at approximately 07-45am I took a pallet of cleaning goods to the Corp Centre as per attached incident report.

This is the second time this type of incident has occurred the difference being this time it nearly took my face with it.

I rang your organisation, which seem to have found it all very amusing.

Being on the receiving end, I DID NOT!

I have suggested remedies in the past, but to no avail.

Therefore, im writing to you direct, perhaps somebody will get off their butt and do something!

This is the catalyst of long running stuff-ups from your organisation, ever since you've had the contact to supply the hospital.

One of the suggestions I made in order to prevent any similar accidents, was to revert back to using "CHEP" pallets, if the right plastic pallets couldn't be used. I was informed that there were none, as your suppliers required a one for one swap.

I personally don't particularly give a SHIT! About your suppliers, I gave your organisation one hundred and eighty plus "CHEPS" when the store was contracted out to your MONEY GRUBBY BASTARDS!

Let me make it abundantly clear to you, get your people to pull their heads out of their own arses and start improving their service to somewhere above the amateur level.

TEN years you people have had the contract, and it's been nothing but downward CRAP!

If this situation occurs again, I wont be bothering going up the chain of command to complain as they also sit on their hand and do nothing. I will however be informing OSH and any other organisation, that I could possibly utilize in order to nudge you people into reality.

Finally in conclusion let me briefly say "FUCKING WAKE UP"

I hope this hasn't upset your complacency too much.

[15] Mr Dodanis signed the letter: P.T. Dodanis (Storeman) Waikato Hospital.

[16] The letter was not addressed to an individual and was opened by a female member of the administration staff at ProPharma.

[17] On or about 4 December Mr Dodanis asked Mr Richard Neal, the Inventory Supply & Distribution Service Manager, whether a response to his letter had been received. Mr Neal says Mr Dodanis gave him a copy of the letter at the same time, Mr Dodanis says he gave a copy of the letter to Mr Neal at a later date and in response to a request for the letter from Mr Neal, who was unaware of the letter at the time it was sent.

[18] It is common ground that Mr Neal had a copy of the letter and he raised the tone and contents of the letter with Mr Dodanis's manager, Mr de Fluiter. Mr Dodanis acknowledges that the letter contains inappropriate language, but maintains he sent the letter in desperation. He says that WDHB and ProPharma had continued

to disregard his safety and the near miss incident was the last straw. Mr Dodanis says that for a number of years unevenly loaded pallets had been a serious, yet ignored safety issue.

[19] Mr Dodanis was requested to attend a disciplinary meeting and advised that the allegations were of a serious nature and that dismissal was a possible outcome. At the disciplinary meeting Mr Dodanis acknowledged that the language, tone and manner of the letter were abusive.

[20] Mr Dodanis says that the letter was written in the heat of the moment having suffered a very serious near miss incident. That explanation was not accepted by the WDHB and neither is it accepted by the Authority.

[21] The letter was written well after both the incident and the phone call to ProPharma. I consider it more likely than not that Mr Dodanis had had an opportunity to cool down after the incident but was intent on making his opinion's known to ProPharma.

[22] WDHB say that at the disciplinary meeting on 16 January 2007 Mr Dodanis explained that he wrote the letter at home at night after the incident and sent it three days later. At the investigation meeting Mr Dodanis told me he wrote the letter out in longhand and gave it to a typist to type up who then sent it to ProPharma. That explanation is simply not credible. The letter was not on WDHB letterhead; the letter received by ProPharma was signed by Mr Dodanis that could only have been done after typing and before being posted, therefore it is unlikely the letter was posted by anyone other than Mr Dodanis; and finally, the letter was not set in a professional way (as compared with other correspondence from WDHB) and contained both spelling and grammatical errors.

Bin lids

[23] Subsequent to the letter incident, on 20 December 2006, WDHB received a formal complaint from Mr Grant Blackler, the Business Manager – Hospital and Corporate for ProPharma. The complaint was in regard to allegations that lids of ProPharma's bins had been marked in red pen with offensive graffiti in that the bins

had all been marked “FUCKING HEAVY”. The compliant alleged that ProPharma’s property was being damaged by the WDHB and that the language was offensive.

[24] Included with the complaint were photographs of the bin lids. This complaint was the subject of the same disciplinary meeting which dealt with the contents of the letter sent by Mr Dodanis to ProPharma.

[25] Mr Dodanis does not deny that he wrote on the bin lids, but he says the writing was done 8-10 months earlier. He says WHDB did not investigate this issue properly in that it failed to interview a key witness who could have advised that Mr Dodanis had not been writing on the bin lids.

Serious misconduct

[26] The law relating to serious misconduct is well settled. The definition of the kind of conduct that would justify summary dismissal is not possible, for it is always a matter of degree. What is usually 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 NZ Ltd* [1990] 3 ERNZ 483).

[27] Mr Dodanis was dismissed for serious misconduct being the letter written to ProPharma, a contractor to WDHB and for writing on the bin lids owned by ProPharma.

[28] On any level the letter written by Mr Dodanis can only be viewed as offensive and abusive, something he himself conceded at the disciplinary meeting on 16 January 2007.

[29] I am satisfied that after being told to desist from writing on the bin lids in 2005 Mr Dodanis did so. The reappearance in 2006 of the offending writing corresponds with the letter being written to ProPharm. Mr Langman’s explanation provided to WDHB on 25 August 2008 is not credible. Mr Langman says that the explanation for the writing looking apparently fresh is that red ink is lighter and fades much quicker than black ink and that Mr Dodanis only used red ink.

[30] The photographs provided to the Authority showed the writing to be in red ink. It follows that if the writing was done some 8-10 months prior to the dismissal, then the ink would have faded considerably. That was not the case from the photo's produced to the Authority. It was open to WDHB to reject Mr Dodanis' explanations and conclude that he had recommenced his earlier conduct of writing on the bin lids.

[31] At the investigation meeting Mr Dodanis explained that the use of expletives such as he used was common practice in the workplace. While that might be the case the bin lids were not just exposed to other storemen working for WDHB. They were also transported around the hospital and back to ProPharma, thereby exposing a wide range of employees to his statements.

[32] Mr Dodanis's conduct in the writing of the letter and the recommenced action of writing on the bin lids after being expressly instructed not to do so was conduct an employer acting fairly and reasonably would consider as destructive of the basic trust and confidence necessary in the employment relationship.

[33] Mr Dodanis says that in making its decision to dismiss WDHB wrongly took into account his entire work history and that this breached WDHB's obligations of fairness.

[34] In considering this complaint by Mr Dodanis I have accepted the submissions made on behalf of WDHB with regard to the guidelines to be considered pursuant to section 103A. The guidelines, as referred to in *Fuaiva v Air New Zealand* [2006] 1 ERNZ 806 include a requirement that an employer take into account the history of employment of an employee, among other things.

[35] It was therefore not only appropriate, but a requirement that WDHB take into account the history of Mr Dodanis employment which included regular discussions about his conduct with management, counselling with regard to his previous actions, formal warnings for similar misconduct and opportunities to attend EAP sessions.

[36] I find WDHB's actions and how WDHB acted, were what a fair and reasonable employer would have done in all the circumstances at the time the

dismissal occurred. I therefore find Mr Dodanis does not have a personal grievance for unjustified dismissal.

[37] Had I found that Mr Dodanis was unjustifiably dismissed, I would have declined to award him any remedies on the basis that I would have considered him wholly responsible for the situation that led to his dismissal.

Costs

[38] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Waikato District Health Board may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority