

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 198/09
5160299

BETWEEN DAMIEN GARTNER
 Applicant

AND SPOTLESS SERVICES (NZ)
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: John Langford for the Applicant
 Paul McBride for the Respondent

Investigation Meeting: 1 December 2009 at Wellington

Further information: Received 11 December 2009

Determination: 14 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Damien Gartner claims that his dismissal by Spotless Services (NZ) Limited (Spotless) as an electrical supervisor was unjustified, because the *punishment did not fit the crime* and because Spotless had drawn out the investigation for far too long a period of time.

[2] By contrast, Spotless claims that its dismissal of Mr Gartner was justified because, as a result of a thorough investigation, it concluded that it could no longer have trust and confidence in him as an electrical supervisor. This followed a serious electrical shock being suffered by an apprentice while under Mr Gartner's supervision, in circumstances where Mr Gartner admitted that he had fundamentally failed in his supervisory responsibilities.

The Facts

[3] Mr Gartner was employed as an electrical supervisor for approximately three years, following 2½ years as an electrician during a previous period of employment with Spotless.

[4] On 22 January 2009 Mr Gartner was responsible for the direct supervision of an apprentice on an electrical job, during which the apprentice suffered serious injuries after being *hooked up* (i.e. involuntarily acting as a conductor, with no easy way of disconnecting himself) while working on live wires. Due to prompt action by Mr Gartner in dislodging him from his ladder by kicking it over, the apprentice (who had been working on the wires in the ceiling) was saved from further injury. He did, however, sustain a serious burn and was temporarily rendered unconscious. Mr Gartner returned the apprentice to work, notified Spotless of the accident and then the apprentice was taken to hospital.

[5] Spotless has a zero tolerance policy over safety issues and an incident of this sort had to be immediately reported to its Australasian Chief Executive. Five days later, Spotless had the matter investigated by its National Safety, Health and Environment Manager and an electrical engineer. That report was then provided to Mr Tim Davidson, the National Operations/Contract Manager in the Facilities Maintenance/Management division of Spotless, who works in Auckland. A copy of the report was also provided to the Electrical Workers' Registration Board, which had already been made aware of the incident. Mr Davidson did not act on the report immediately, and was on leave between 18 and 27 February 2009.

[6] The report found that the apprentice received a serious electric shock while working on live wires. In terms of causation, it was found (quoted *verbatim*):

Immediate Cause(s)

Failure to observe (or use) warning/safety devices – no attempt was made to isolate the area and there was insufficient testing for live cables.

Root Cause(s)

Failure to follow process/procedure – an examination of the apprentices training records show that he was instructed in Unit Standard :15851 – demonstrate knowledge of electrical safe working practices and unit standard :15852 – demonstrate knowledge of

electrical testing to ensure safety. The apprentice failed to follow standard electrical safety procedures.

Organisation-Supervision – the level of supervision afforded to the apprentice was inadequate in this incident, (ref Electrical workers registration board – supervision procedures for trainee electricians issued April 2007, sections 3.4, 3.5, 3.6 and 3.7.)

Process/procedure – there was no risk assessment or permit completed for working on Live equipment.

Corrective actions

1. *All electrical workers must have appropriate isolation (lockout/tagout) training.*
2. *All electrical workers must be provided with or have easy access to “isolation kits” that include sufficient numbers of tags, locks and any other isolating devices deemed necessary.*
3. *Head lamps must be provided to all staff whose activities require work in areas where light is poor and both hands are required to carry out the work safely.*
4. *“Working on Live equipment” permits are to be implemented within the Managed Services business and are to be used for any “live” work.*
5. *The apprentice is to be reassessed for competency in relation to electrical safe work practices and testing by an independent registered assessor/inspector. The apprentice must only be permitted to perform work that involves less technical ability and low safety risk associated until such time as he is satisfactorily assessed as competent by an independent assessor/inspector.*
6. *The findings of this report are to be submitted to the divisional manager for disciplinary action against the supervisor with a minimum recommendation of a formal written warning. Consideration should also be given to suspending the supervisor from his duties with regard to apprentices until such time as he undergoes training in communication skills, trainer and assessor skills.*
7. *The process for recruitment and selection of apprentices and their supervisors is to be formally reviewed.*
8. *The findings of this report are to be submitted to the divisional manager for disciplinary action against the apprentice with regard to his poor progress and attendance with regard to his training.*
9. *Procedures for Level 1 incidents should be promulgated to ensure that investigations are conducted in a timelier manner and that care is taken to preserve evidence and minimise reconstructed memory.*

[7] After returning from leave Mr Davidson decided to undertake the disciplinary investigation recommended in the report. Mr Gartner was invited to a disciplinary meeting to address three allegations which, in essence, arose from the one incident, namely:

- (a) Failure to follow safety requirements;

- (b) Failure to follow product handling procedures which resulted in a serious safety situation; and
- (c) Wilful, deliberate or negligent acts which cause injury or damage.

[8] In essence, the concerns of Spotless were that, through Mr Gartner's negligence, the apprentice had been injured. The negligence involved failure to follow safety requirements and adequately supervise the apprentice.

[9] At the disciplinary meeting on 9 March, Mr Gartner chose, after a couple of questions, not to answer any further questions and instead to respond in writing to a series of questions which Spotless undertook to provide him. Subsequently, Mr Gartner was provided with eleven questions to answer and a copy of the incident report. On 16 March, Mr Davidson went on leave again, not to return until 27 March.

[10] In the meantime, Mr Gartner was approached by his boss and a representative from Human Resources to suggest that he stand down from his supervisory role in the interim. In the spirit of cooperation, Mr Gartner agreed to do so.

[11] On 20 March, Mr Gartner provided a reply to the questions. He stated that, with hindsight, he accepted that he did not comply in all respects with the requirements of the Electrical Workers' Registration Board supervision procedures for training electricians. He accepted that he only worked on live wires because he did not want to activate circuit breakers, as they may have shut down power to the whole of the building they were working at. However, he did accept that where safety was a factor, time should not have come into the equation. He stated that his mistake was that he assumed that the apprentice was working on the correct cable, which was why he could not understand how the apprentice had tripped the circuit breaker in the way that he later said that he did. He had no recollection of the apprentice telling him he had received a small electrical shock or any other such warning sign. He also stated that he did not seek to evade responsibility in relation to the incident.

[12] Another disciplinary meeting took place on 15 April. After further discussion based on the questions, the parties adjourned and Mr Davidson returned to inform Mr Gartner that he was being summarily dismissed because of his accepted failure to follow safety requirements. Mr Davidson's reasons for dismissal were that the events constituted serious misconduct under Spotless' employment agreement and health and safety policies. In his view, Mr Gartner had seriously breached health and safety

policies by having anyone, let alone an apprentice, work on live wires, which Mr Gartner accepted was a bad decision. Instead, as Mr Gartner accepted, time should not have been an issue and the matter could have been done after work hours.

[13] The apprentice was concerned about how to do the work and asked Mr Gartner to show him how to do so. This was seen by Spotless as a *red flag* that Mr Garner should have responded to. Mr Gartner agreed that he had taught the apprentice how to do the work and incorrectly assumed that he would be okay at doing it. There was some dispute about whether the apprentice made Mr Gartner aware of the small shock he had suffered doing the work, which Spotless believed he had - but that was not vital to the issues at hand; it was one of several *red flags* that Spotless believed should have led Mr Gartner to act differently. In any event, Mr Gartner agreed that the apprentice said that he was not confident to continue, but that Mr Gartner decided he should press ahead anyway, because the apprentice was not a confident person.

[14] Spotless believed, and Mr Gartner now accepts, that he then advised the apprentice to use an alternative connection method, which was not an approved practice, something Mr Gartner well knew.

[15] Spotless also considered that Mr Gartner failed to ensure the apprentice was provided with full safety equipment. While Spotless did not provide this equipment, that was said to be no reason for Mr Gartner to ensure the work was not done safely. He accepted that in accordance with best practice rubber gloves, a shock-proof ladder and protective face wear should have been provided, although none of that equipment, other than the shock-proof ladder, would have assisted in these particular circumstances.

[16] The seriousness of the accident was such that there could have been a fatality and Mr Gartner acknowledged that as well. In Mr Davidson's 32 years of experience as a registered electrician, this was the closest incident he had come across to a fatality at work.

[17] Recognising Spotless' and Mr Gartner's duty of care to an apprentice, its zero tolerance of unsafe work practices, Mr Gartner's awareness of his supervisory responsibilities and his disregard of them, Mr Davidson concluded that Mr Gartner had committed serious misconduct through gross negligence. He considered whether or not Mr Gartner could continue to work without supervisory responsibilities, or do

some other work which did not have direct safety implications, but concluded that these options were not appropriate. This was because they would require a restructuring of the business and that his failings were so serious that dismissal was the only option. Mr Davidson concluded that he simply could not trust that another issue might not arise whereby the consequences could be even more serious.

Determination

[18] The Authority must determine, on an objective basis, by considering whether Spotless' actions and how Spotless acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. Here there is no issue as to how Spotless acted, i.e. the process used, other than the issue of delay.

[19] While I accept that Mr Gartner was upset about the length of time that it took to conclude the disciplinary process, he was not, however, prejudiced by this fact because he was paid throughout this period. In addition, Spotless has explained that because of the seriousness of the allegations it had to deal with the matter thoroughly, and that any other delays were a result of Mr Davidson being on leave and because of Mr Gartner's choice to respond in writing. It would be quite inappropriate to criticise Spotless in these circumstances. While Mr Gartner's concerns were understandable, Spotless' actions were, however, justified. Mr Gartner would have been just as upset had the matter been dealt with a lot more quickly, because without doubt the result would have been dismissal earlier.

[20] Turning to the reasons for dismissal, there were serious failings of supervision, as Mr Gartner himself admitted. The consequences involved a serious injury, including burns and a period of unconsciousness. Mr Gartner accepted that a fatality could possibly have occurred.

[21] There was no doubt that Mr Gartner did nothing wrong deliberately. He did, however, make some serious misjudgements, which related fundamentally to his decision to have the apprentice work on live wires to save time, which, as Mr Gartner himself accepted, should not have been an issue.

[22] Mr Langford questioned whether it was appropriate for Spotless to take into account the consequences of Mr Gartner's failings (rather than just the failings themselves) using, as an example, mistakes made by bank employees when crediting

too much money into clients' accounts. I hold that the seriousness of the outcome of an incident is a matter that can be taken into account by a fair and reasonable employer. For example in *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 (CA) at 459 it was held:

This was a case of negligence. There was never any evidence of wilful misconduct but a single incident of carelessness, when sufficiently serious, can impair trust and confidence ...

[23] In *Click Clack International Ltd v. James* [1994] 1 ERNZ 15, it was implicit that it was the cost to the employer of the damaged product as a result of negligence that was an important factor in the Court concluding that a single act of negligence constituted serious misconduct warranting dismissal. Similarly, it was also implicit in *Oram* that the mistake by Mr Oram, which led to serious financial and reputational consequences for his employer, was a major factor in the justification for his dismissal.

[24] It would be artificial to require employers to stand aside from the consequences of negligent acts by their employees and not take those consequences into account when determining whether or not it had continued trust and confidence in such employees. I therefore conclude that a fair and reasonable employer would take into account the consequences of the negligent acts here.

[25] Similarly, Mr Langford criticised Spotless because of issues raised by the investigator about its general practices. Clearly this report provided an impetus for Spotless to take serious stock of its provision of support for its electrical workers, to help ensure that their safety and health would not be endangered in the future. I certainly hope that Spotless has taken account of the generic training and process issues raised, which it should have adopted as a result of the report. Although many of the matters were outside Mr Gartner's control this did not, however, minimise Mr Gartner's role and is therefore not determinative of the decision before the Authority, particularly given Mr Gartner's free acknowledgment of his own errors.

[26] Mr Langford also relied on the fact that the Registration Board had not revoked Mr Gartner's registration and dealt with the matter only with a small fine. No reasons were given by the Board in support of its decision. However, there is little doubt that the Registration Board would have taken into consideration that Mr Gartner had already lost his job over this incident, as that was a submission put forward on his

behalf at the time. Furthermore, Spotless did not have the benefit of the Registration Board's decision but instead, as was entirely proper, conducted its own investigation and drew its own conclusions.

[27] In addition, Mr Langford submitted that the *punishment did not fit the crime* and that a final warning, coupled with the loss of supervisory duties was a fairer alternative. No doubt that was an alternative, and it was one considered by Spotless. However Spotless was under no obligation to change the position of a supervisory electrician, which it had a continuing need for, to fit the needs of Mr Gartner. While the accident investigator did state that further training and counselling could be provided to Mr Gartner, he also stated that a disciplinary process should be instituted and that a minimum sanction would be a formal warning. It was clearly therefore open to Spotless to conclude that dismissal was not something that the investigator had ruled out as a result of the incident. Furthermore, I am satisfied that it was not practical to employ Mr Gartner on a part time basis, safety concerns aside. Indeed, Spotless filled Mr Gartner's supervisory role within a couple of months.

[28] Mr Langford also submitted that Mr Gartner's good employment record should have been taken into account. I accept Mr Davidson's evidence that it was.

[29] No doubt an employer with a slightly different approach to safety, i.e. without the zero tolerance approach of Spotless, might have considered that Mr Gartner could have been trusted to carry on working for it solely as an electrician, without any supervisory decisions and subject to a final warning. However while a more forbearing employer might have come to a different conclusion, I accept that it was open to a fair and reasonable employer to conclude that it could no longer have trust and confidence in Mr Gartner in his role as an electrical supervisor following serious failings in his role as a supervisory electrician. Those failings were almost all clearly acknowledged by Mr Gartner, indeed Mr Gartner's defence was very much a plea in mitigation. Those issues have been dealt with above. I therefore dismiss Mr Gartner's claim for a personal grievance.

Costs

[30] Costs are reserved.

G J Wood
Member of the Employment Relations Authority