IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2011] NZERA Wellington 185
5343235

	BETWEEN	DEAN RENATA HARRISON Applicant
	AND	GRIMES & BROWNING JOINERY (2000) LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Johanne Greally for the Applicant Larissa Simpson for the Respondent
Investigation Meeting:	2 November 2011 at Wellington
Submissions Received:	2 November 2011
Determination:	21 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Dean Harrison, claims that he was unjustifiably dismissed by the respondent, Grimes & Browning, for swearing at a co-worker. He also claims that he had been promised a $3 per hour wage increase after he had worked there for 90 days, but this was never paid.

[2] By contrast, Grimes & Browning claim that Mr Harrison was justifiably dismissed for abusing and threatening a co-worker with violence and that although it had promised to review his pay after 90 days, it had never promised him an increase.

[3] The issues for determination are:

- Was Mr Harrison promised a $3 per hour pay rise;

- Was Mr Harrison unjustifiably dismissed; and

- If so, what remedies is he entitled to?

Factual discussion

[4] Mr Harrison commenced employment with Grimes & Browning as a joiner on 12 July 2010. He was paid $22 per hour for a 44 hour standard week, namely $968 gross per week. He was told that after 90 days his pay would be reviewed. No doubt he expected that if, as did eventuate; his work proved up to standard, he would be given a pay rise. However no such assurance was ever given by Grimes & Browning, and in particular the figure of $25 per hour was never promised to him.

[5] What Grimes & Browning failed to tell Mr Harrison until after much later, when he asked about a pay rise, was that it was in a very poor financial situation, directly due to the defaults of a previous director. That meant that when Mr Harrison asked about a pay rise he was told that it was not possible and that there would be no pay rises for up to two years, and that that stood for anyone in its employ.

[6] Evidence was given by the financial controller for Grimes & Browning, Ms Melissa Simpson, which I accept, that its financial position was such that it would struggle to afford to pay Mr Harrison the sums of over $25,000 that he is seeking, given the pressing needs of other creditors.

[7] By January 2011 at least, Mr Harrison was becoming concerned enough about his future employment with Grimes & Browning, because he had heard that an ex-employee wanted to return, that he had taken to taking file notes of incidents that occurred at work.

[8] The workplace is a joinery factory. As might be expected in such a workplace, profanity and bad language is rife. The "f" word is used as an epithet regularly, without it really meaning anything on most occasions. In such circumstances, it was not surprising that on 19 January 2010, the joinery manager, seeing Mr Harrison apparently doing no work, yelled at him *to stop his … talking and get back to work.* While Mr Harrison claims to have been extremely embarrassed at such behaviour by his manager, I do not accept that, given the workplace environment.

[9] A few days later, one of Mr Harrison's co-workers made similar comments. Given that that person was not a manager, Mr Harrison replied in kind. This incident went further but as this is the key to this case, I will defer making determinations on what occurred until later. From Mr Harrison's perspective, that was the end of the matter.

[10] The only witnesses to the event who was not directly involved in the incident reported the matter to Ms Simpson and the joinery manager the next day. They called in the co-worker who was the subject of the alleged threats of physical violence, who stated that he had been threatened with violence; including what he felt was effectively a threat to kill, i.e. asking him if Mr Harrison wanted to shut his mouth for him and *if I hit you I'd kill you*.

[11] The two managers sought advice from the owner of Grimes & Browning, who told them that whatever decision they made was for them to make, but that they might like to use the services of one of the managers of another company that he owned. Ms Simpson then rang the Department of Labour for advice. I accept her evidence that she spoke to three different people in the Department, who told her (on the basis of what she had told them, namely that one worker had twice threatened physical violence on a co-worker) that this was grounds for serious misconduct and summary dismissal. Incredibly, Ms Simpson was not advised by any of these officials that before moving to dismissal, Grimes & Browning ought first to speak to Mr Harrison and get his side of the story - as inevitably, in such cases, there is almost always more than one side to such a story.

[12] The three managers assembled in Grimes & Browning's offices and decided to dismiss Mr Harrison for serious misconduct. Mr Harrison was summonsed to the office and was told by the joinery manager that he was going to have to let him go. He was told that the reason was because of the situation between him and his co-worker and that he had threatened him. Mr Harrison responded by questioning why they had preferred the co-worker's word without speaking to him, and stating that he had simply responded to the co-worker's abuse with like language. He was told that his behaviour was unacceptable and that he was going to be dismissed summarily. Mr Harrison asked about notice and after some discussion it was agreed that he would be paid for his work to date and one week's notice, plus holiday pay.

[13] Subsequently, the other manager decided that some of Mr Harrison's work had not been up to standard, so told Ms Simpson not to pay the week that Grimes & Browning had agreed to pay.

[14] Mr Harrison was unemployed for several weeks. He then got a temporary contract for around three months, until that ended. He was then unemployed for another four weeks.

[15] Mr Harrison wrote to Grimes & Browning a couple of weeks after his dismissal raising a personal grievance, and stating that the only reason he had been given was for swearing at his co-worker. This was followed up by a lawyer's letter days later that sought reasons for his dismissal. Ms Simpson wrote back stating that Mr Harrison had been dismissed for gross misconduct. It was not until the statement in reply that Grimes & Browning first indicated that the dismissal was for abuse and threatening a co-worker.

[16] Despite mediation, the parties have been unable to resolve their differences. It therefore falls to the Authority to make a determination.

The law

[17] Section 103A of the Employment Relations Act 2000 provides for the Authority to determine, on an objective basis, whether a dismissal is unjustified. The Authority must do so 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 dismissal occurred.

[18] As was made clear in *X v. Auckland District Health Board* [2007] ERNZ 66 at para 97, two separate considerations are required, namely:

> *…first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes).*

[19] The two types of assessment often overlap, see for example *Madden v NZ Railways Corporation* [1991] 2 ERNZ 690.

[20] The focus on procedural *fairness* (how the employer acted) is explained in *John v. Rees* [1970] Ch 345 at 402:

> *It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. 'When something is obvious', they may say, 'why force everyone to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start'. Those who take this view do not, I think, do themselves justice. As everybody who has had anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow were not; of unanswerable charges which, in the event, are completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.*

[21] The basic requirements of procedural fairness are set out in *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 28. At 46 the Court held that the minimum requirements can be said to be:

> *1. notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
>
> *2. an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to repute the allegation or to explain or mitigate his or her conduct; and*
>
> *3. an unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*
>
> *Failure to observe any one of these requirements will generally render the disciplinary action unjustified.*

[22] Furthermore, the standard of proof required both by an employer (and by the Authority) involving cases of alleged serious misconduct that can also be categorised as criminal conduct must be consistent with the gravity of the allegations, which here are very grave. Thus, given the serious allegations made against Mr Harrison, Grimes & Browning had to be satisfied, on the balance of probabilities but to a high standard, that Mr Harrison was guilty of the claims of threatening another worker. Similarly, in making its findings of fact, the Authority is bound by the same standard of proof and thus it is not likely to find Mr Harrison to have committed serious misconduct such as

a threatened assault without strong evidence in support, given the seriousness of the allegations and the potential consequences on Mr Harrison of such a finding.

Determination

[23] It is clear from the above that, at least on the grounds of how the employer acted, namely the procedure, this dismissal can not be justified. No doubt Grimes & Browning has grounds to be justifiably upset that when it rang the Department of Labour for advice, its managers were not given fundamental information on how to act in a disciplinary investigation situation such as here. That does not change the fact that it has failed to meet any of the procedural requirements to justify Mr Harrison's dismissal.

[24] Furthermore, given the obvious overlap between what the employer did and how it acted, it is difficult to see how it can justify the dismissal on substantive grounds either. In particular, in this case, given that Mr Harrison was never interviewed by Grimes & Browning before he was dismissed, it is impossible to see how Grimes & Browning could have come to a fair and reasonable conclusion that Mr Harrison was guilty of threatening to assault a co-worker. This was a particularly serious allegation and therefore, as noted above, the proof of it must have been as convincing as the charge was grave. Without hearing from Mr Harrison, as was his lawful right, it was impossible for Grimes & Browning to conclude that his dismissal was justified.

[25] On all counts, therefore, the dismissal by Grimes & Browning of Mr Harrison was unjustified in the circumstances.

[26] By contrast, it is also clear on the facts that Mr Harrison was never offered a pay rise and certainly not to $25 per hour. That claim must therefore be dismissed.

Remedies

[27] Mr Harrison gave evidence, supported by his partner, that he was humiliated by his summary dismissal without an opportunity to put his side of the story, and by the financial consequences thereof. In particular, the dismissal negatively affected his ability to sleep and his ability to meet his and his family's needs. It also affected his sociability and eating patterns.

[28] In these circumstances I would normally award compensation in the sum of around $8,000, but reduce that to $4,000 because it appears that Grimes & Browning would be unable to pay any more significant sums, given the issue of lost wages, even over a reasonable timeframe.

[29] I accept that Mr Harrison has lost remuneration as a result of his personal grievance. In particular, I accept that he should have been paid the week's pay he was promised. It was not for Grimes & Browning to decide to not pay because his work was allegedly not up to scratch. If it so believed, it had alternative remedies that were not self help ones. Mr Harrison lost an additional $2904 gross, being the balance of the four weeks he was out of work, plus $3,042 gross, being the difference between his pay at his new job and at Grimes & Browning over the next nine weeks, totalling $6,914 gross.

[30] I decline to extend the period beyond three months because Mr Harrison had obtained new employment within that time, which lasted for some months, and because of the financial state of Grimes & Browning.

[31] I am also required to take account, in deciding both the nature and the extent of the remedies to be provided in respect of the personal grievance, the extent to which the actions of Mr Harrison contributed towards the situation that gave rise to the personal grievance: s.124. I am not satisfied, given the seriousness of the allegations against Mr Harrison, that they were proven, even during the course of the investigation meeting. There were three witnesses to the incident that led to Mr Harrison's dismissal, but evidence was only given by two of those witnesses. While providing a written statement for the witness who may have been seen to be more independent than the two protagonists, Grimes & Browning elected not to summons that witness, who no longer works for them. That witness was available to attend were Grimes & Browning prepared to meet his pay for the day, but it chose, for its own reasons, not to do so, or summons him. In any event, that potential witness' written statement did not specify details of the actual behaviours complained of, except to mention two threats of *physical violence*. That is not the same thing as a threat to kill, as was alleged by Mr Harrison's co-worker. That co-worker maintained that evidence before the Authority. In contrast, Mr Harrison claims that all he did was swear at him.

[32] I am not prepared to conclude that there were threats to kill or threats of serious physical violence on the basis of that evidence, given the seriousness of the allegations. What is clear, however, is that there was a nasty altercation between Mr Harrison and his co-worker, which neither needed to have taken further. Furthermore, Mr Harrison has the build of a professional rugby prop. By contrast, the co-worker with whom he was involved in the altercation was much, much older; much, much smaller, and appeared reasonably frail.

[33] In these circumstances, I accept that the co-worker would never have posed a threat to Mr Harrison and that to have upset his two co-workers so much, Mr Harrison must have retaliated in a fashion that (although he did not necessarily intend or understand it as such) must have been extremely threatening to the co-worker. I simply do not accept that this was some form of convoluted plot by the co-workers to have Mr Harrison replaced by a previous worker that they got on much better with.

[34] The above clearly constitutes blameworthy behaviour. I set the level of contribution, on the $4000 compensation and $5946 of lost remuneration, taking into account the fact that Mr Harrison unnecessarily added to and continued a workplace spat, at 25%. That does not extend to the one week's pay that Grimes & Browning had agreed to pay in lieu of notice, because it should have been paid regardless.

[35] I therefore order the respondent, Grimes & Browning Joinery (2000) Limited to pay to the applicant, Dean Renata Harrison, $3,000 compensation under s.123 (1)(c)(i) and $5427.50 gross under s.123(1)(b).

Costs

[36] Costs are reserved.

G J Wood
Member of the Employment Relations Authority