

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 282  
5372128

BETWEEN                      SIMON HIGSON  
   Applicant  
  
A N D                              DOWNER NEW ZEALAND  
   LIMITED TRADING AS  
   DOWNER  
   Respondent

Member of Authority:       Rachel Larmer  
  
Representatives:             Ray Bianchi, Advocate for Applicant  
   Anthony Russell, Counsel for Respondent  
  
Investigation Meeting:      27 July 2012 at Tauranga  
  
Date of Determination:      20 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**(A) Mr Simon Higson's dismissal for serious misconduct was justified.**

**Employment relationship problem**

[1] The Statement of Problem named the respondent as Downer Infrastructure Limited. Mr Russell advises that during the course of these proceedings the respondent changed its name to Downer New Zealand Limited, so that is now the correct name of the respondent.

[2] Mr Higson was employed by Downer New Zealand Limited (Downer) as a Traffic Controller, so he had responsibility for ensuring the safety of workers and motorists going on or through a Downer worksite. Mr Higson was dismissed on 20 February 2012 for assaulting Mr Francois de Bruin. That assault occurred outside of work hours. Mr Higson was charged with assault, plead guilty, and got diversion.

[3] Downer considered Mr Higson's assault on Mr de Bruin to be a work related concern notwithstanding it occurred outside work hours because the victim was an employee of Grass Cutting Services Limited (GCS) which was both a client of, and subcontractor to, Downer.

[4] Mr Steve de Bruin owns GCS and Francois de Bruin is his son. Both de Bruins work for GCS. Downer has an ongoing relationship with GCS which it subcontracts to perform grass cutting services on its work sites. GCS is also a client because it engages Downer to provide traffic management services to GCS when it undertakes grass cutting on state highways.

[5] Mr Higson and the de Bruins only know each other through their respective relationships with Downer. They do not have an outside work relationship or connection. Prior to the assault on Francois de Bruin there had been some history of ill feeling between Mr Higson and the de Bruins.

[6] In May 2010 Mr Higson's supervisor, Lance Carter, received a complaint from Steve de Bruin about Mr Higson allegedly failing to provide appropriate traffic control services to GCS when he had been allocated to do so.

[7] Mr Carter was concerned about animosity between Mr Higson and the de Bruins and he wanted to preserve Downer's relationship with GCS so as a response to this complaint he told Mr Higson in late 2010 to stay away from the de Bruins. Mr Carter also arranged work allocation so Mr Higson would not be allocated to work with the de Bruins in future.

[8] On or around 31 October 2011 the de Bruins were mowing along State Highway 29, Maungatapu where Mr Higson was in the process of providing traffic management services for Downer. Mr Higson laid a complaint with Mr Carter about the de Bruins being in an area which they were not supposed to be in. He also filled out an incident report which stated the de Bruins had come too close to Mr Higson's worksite. When Downer investigated the incident Steve de Bruin claimed GCS had not been instructed to stay out of Downer's worksite.

[9] Although Steve de Bruin did not raise an issue about that incident at the time it occurred, he did so after Francois was assaulted. Steve de Bruin emailed Jim Nicoll,

the ITS and OSM Central North Manager for Downer, on 08 January 2012 explaining why he believed the assault on his son was work related.

[10] In his email Steve de Bruin referred to the 31 October incident and alleged that Mr Higson had sworn at his son and started a verbal altercation between the two of them during which Mr Higson threatened his son by telling him to *get off his tractor so he could sort him out and I will get you and fuck you up*. Steve de Bruin also said that witnesses reported hearing Mr Higson tell his son at the time of the assault *I told you I was going to get you*.

[11] Francois also alleged in an email (sent to Downer via his father) that when he was assaulted Mr Higson had yelled at him and kept on saying *I told you I am going to get you*.

[12] The day of the assault Mr Higson had received a disciplinary letter from Downer which related to complaints made against him by Steve de Bruin about incidents that allegedly occurred on 14 and 20 December 2011. The disciplinary meeting was to occur at a time to be arranged in the New Year. Mr Higson said he was angry about the disciplinary letter because it was going to hang over him during his Christmas break.

[13] Steve de Bruin emailed a complaint to Downer on 20 December which consisted of allegations that:

- a. On 20 December whilst he was standing on the kerb with his back to the traffic at a Welcome Bay site a colleague pulled him back when an ITS truck drove past missing him by a few inches. He claimed Mr Higson was the driver;
- b. On 14 December whilst working close to Lakes RAB Mr Higson passed in a Downer truck and was shouting and gave him the finger as he went past. Mr de Bruin said he decided to ignore it at the time but the 20 December incident was the catalyst for him raising it now.

[14] The assault occurred around 6.15pm at a house in Mt Maunganui. When Mr Higson turned into his property he saw Francois de Bruin standing outside a neighbouring house which lead to verbal abuse being exchanged. Mr Higson then ran

up to Francois and punched him in the head, grabbed him by the hair, and kneed him twice in the head.

[15] Mr Higson was arrested that evening, charged with common assault, and had to appear in Court the next day. At approximately 8pm that evening Mr Higson rang his boss Mr Carter to advise of the assault and his arrest by the police.

[16] A disciplinary meeting was held on 18 January 2012 to discuss the alleged incidents on 14 and 20 December 2011. Downer then conducted further investigations and advised Mr Higson of its preliminary conclusions by letter dated 24 January 2012.

[17] Downer's preliminary conclusion was that the 14 December incident was unlikely to have occurred and that on 21 December he had driven very close to Mr de Bruin. Downer indicated it did not believe Mr Higson had driven with malice or reckless disregard for safety but it was concerned his actions demonstrated Mr Higson had not followed appropriate work practices, which it believed had caused the truck to be in the position that it was. Downer proposed to issue Mr Higson with a written warning for not following correct work procedures and it invited him to a meeting to discuss that.

[18] As it turned out a written warning was never imposed because it was superseded by the assault disciplinary outcome.

[19] Downer sent Mr Higson a disciplinary letter dated 27 January 2012 which identified their concerns about the assault and which quoted from Francois de Bruin's email about the assault. Downer set out the sections of its Code of Conduct which it considered relevant to the incident and identified that a potential outcome could be dismissal. A disciplinary meeting was held on 20 February 2012 after which Mr Higson was summarily dismissed.

[20] Mr Higson claims his dismissal was unjustified. He says the assault had nothing to do with his employment and that the outcome of the disciplinary process was predetermined.

## Issues

[21] The following issues require determination.

- a. Was Downer entitled to commence a disciplinary process against Mr Higson for an assault which occurred outside of work hours?
- b. If so, did Downer conduct a fair and reasonable investigation?
- c. Did Downer's investigation reveal conduct that a fair and reasonable employer could view as serious misconduct?
- d. If so, was summary dismissal justified?
- e. If not, what if any remedies should be awarded?

### **Was Downer entitled to commence a disciplinary process against Mr Higson for an assault which occurred outside work?**

[22] An employee's outside of work actions may be dealt with as an employment related matter if there is a clear relationship between the conduct in question and the employment. I find that in this case there was a close nexus between Mr Higson's conduct and his employment.

[23] Mr Higson's actions in assaulting an employee of one of Downer's clients/subcontractors, who was also the son of the owner of the business, had a direct potential impact on Downer's business because at a minimum it affected Downer's reputation with GCS. Mr Higson's conduct was also incompatible with the proper discharge of his duties as an employee. I also find that it impacted upon Downer's obligations to Francois de Bruin as an employee of GCS because he was entitled to expect Downer to provide him with a safe workplace.

[24] In the leading case of *Smith v Christchurch Press Company Limited*<sup>1</sup> the Court of Appeal held that it was not necessary for an employer to demonstrate that there had been an actual adverse affect on the employment situation or working environment if

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<sup>1</sup> [2000] 1 ERNZ 625

such an impact was inevitable. I consider it was inevitable Mr Higson's assault on Francois de Bruin would have an adverse impact on Downer's relationship with GCS.

[25] The following factors satisfy me that there was a close connection between the assault and the work environment:

- a. Mr Higson only knew Francois de Bruin through his employment with Downer and because of Francois' employment with GCS.
- b. Up until the assault any interaction between Mr Higson and Francois de Bruin had been limited to the work environment only;
- c. There had been previous incidences between Mr Higson and the de Bruins which had all occurred at work;
- d. GCS had an ongoing relationship with Downer, both as a client when it engaged Downer to provide traffic management services for it, and as a subcontractor when it was engaged by Downer to provide grass cutting services;
- e. Downer had limited ability to keep Mr Higson and the de Bruins apart on a permanent basis, as evidenced by the issues which arose in October and December 2011 despite having previously arranged for him not to work with GCS;
- f. The assault escalated the previous animosity between the parties and was such that it could create issues in terms of ongoing health and safety for employees and contractors. Downer had an obligation not only to its employees, but also to its subcontractors and clients to ensure it could provide them with a safe place of work;
- g. When asked by police why he had assaulted Mr de Bruin, Mr Higson said:

*I just lost the plot and saw red. I have received a letter from my bosses that will be hanging over me all Christmas because of them.*
- h. Mr Higson had previously been told to stay away from the de Bruins;

- i. The assault occurred whilst Mr Higson was already engaged in an employment disciplinary process involving the victim's father Steve de Bruin;
- j. The genesis of the assault arose from the animosity that existed in the working relationship and in particular from the 20 December complaint Steve de Bruin had made which had given rise to a disciplinary process.

### **Did Downer conduct a fair and reasonable investigation?**

[26] Section 103A(3) of the Employment Relations Act 2000 (the Act) identifies four tests which relate to procedural fairness and natural justice considerations which must be met by an employer. Failure to meet any one of these tests will render a dismissal unjustified.<sup>2</sup>

[27] Mr Higson accepted that Downer had raised its concerns with him before he was dismissed<sup>3</sup> and that he had been given a reasonable opportunity to respond to those concerns before he was dismissed.<sup>4</sup> Section 103A(3)(b)&(c) have therefore been complied with.

[28] Mr Higson disputed Downer had complied with the tests in s.103A(3)(a)&(d) of the Act. Mr Higson alleged that Downer failed to *sufficiently investigate* the allegations against him because it did not interview two witnesses<sup>5</sup> to the assault. Mr Higson had provided Downer with written statements from these two witnesses but said Downer should have spoken to them personally.

[29] I find that there was no need for Downer to have personally spoken to those two witnesses because Downer accepted their statements. The fact that Mr Higson had assaulted Francois de Bruin was never in dispute so it was unnecessary for Downer to interview these two witnesses about the assault.

[30] I find Downer complied with s.103A(3)(a) of the Act because, having regard to the resources available, Downer sufficiently investigated the allegations against Mr Higson before he was dismissed.<sup>6</sup>

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<sup>2</sup> *Angus and McKean v Ports of Auckland* [2011] NZEmpC 160

<sup>3</sup> Section 103A(3)(b) of the Act.

<sup>4</sup> Section 103A(3)(c) of the Act.

<sup>5</sup> Mr Higson's partner and a neighbour.

<sup>6</sup> Section 103A(3)(a) of the Act.

[31] Mr Higson claims his explanation was not *genuinely considered* contrary to s.103A(3)(d) of the Act because Downer had predetermined the outcome of the disciplinary process.

[32] Mr Higson says Mr Carter told him that Downer was going to make an example of him. Mr Carter denies that. Mr Brian Rimmer, Area Organiser for Amalgamated Workers Union New Zealand, alleges that on 4 February 2012 Bill Pepperell, Human Resources Adviser for the Hamilton Branch of Downer, told him Downer were looking to dismiss Mr Higson from his employment. Mr Pepperell denies he said that.

[33] I am not satisfied on the balance of probabilities that Mr Carter told Mr Higson Downer was going to make an example of him. I prefer Mr Carter's evidence that he told Mr Higson the situation was serious and he could lose his job. I do not consider that establishes predetermination. Mr Carter was also not a decision maker in the disciplinary process relating to the assault.

[34] I also consider it unlikely that Mr Pepperell made the comments Mr Rimmer attributed to him. I accept Mr Pepperell's evidence that he approached Mr Rimmer to ask him to get involved with the disciplinary process because of the potential seriousness of the allegations against Mr Higson. I consider it likely Mr Pepperell merely emphasised how seriously Downer viewed the concerns because he was trying to encourage Mr Rimmer to become personally involved with the case. It was inconsistent for him to have been giving that encouragement if the outcome had already been predetermined.

[35] Mr Pepperell was also not the decision maker in the disciplinary process. The decision maker, Mr Nicoll, impressed me as a truthful and considered witness. I accept his evidence that he approached the matter with an open mind and did not make the decision to dismiss Mr Higson until after the disciplinary meeting on 20 February 2012.

[36] The allegation of predetermination is not made out. I am satisfied Downer complied with s.103A(3)(d) of the Act because it genuinely considered Mr Downer's explanation before dismissing him.

[37] I find that Downer complied with all four of the tests in s.103A(3) of the Act.

**Did Downer's investigation reveal conduct that a fair and reasonable employer could view as serious misconduct?**

[38] Mr Higson said he punched Francois de Bruin in the head, and grabbed him by the hair while kneeling him twice in the face. I find that a fair and reasonable employer could conclude that those actions towards an employee one of its clients/subcontractors amounted to work related serious misconduct.

**Was summary dismissal justified?**

[39] Justification is to be determined in light of the s.103A justification test in the Act as it applies from 1 April 2011. Section 103A requires the Authority to objectively determine whether Downer's actions, and how Downer acted, were what a fair and reasonable employer could have done in all the circumstances at the time Mr Higson was dismissed.

[40] I find that Downer carried out a fair and reasonable process before concluding that Mr Higson had engaged in serious misconduct so the issue is whether summary dismissal was a response which was available to a fair and reasonable employer in all of the circumstances.

[41] Mr Higson had been told to stay away from the de Bruins and his timetable had been adjusted so that he would not work with them. Notwithstanding those arrangements, issues arose on 31 October and 14 and 20 December 2011. Mr Nicoll told me in light of that he was not satisfied Downer would be able to permanently keep Mr Higson and the de Bruins apart. Mr Nicoll believed that this created potential health and safety risks in the workplace, which he said Downer had to manage.

[42] An aggravating feature was that the assault occurred the same day Downer commenced the disciplinary process which had arisen from Steve de Bruin's complaint. He had also been told by his manager to stay away from the de Bruins.

[43] Mr Nicoll said when assessing the appropriate sanction he was concerned because Mr Higson had not accepted responsibility for doing anything wrong. He had not provided an apology either to the de Bruins or to Downer. Mr Higson had not

provided any undertaking that he would act appropriately in the future or any assurances about his future conduct.

[44] Mr Nicoll said that Mr Higson's consistent position throughout the disciplinary process was that it was none of Downer's business and had nothing to do with them. Mr Nicoll was concerned this demonstrated a lack of understanding and appreciation of the sensitivities between the relationships Downer had with GCS and the de Bruins.

[45] Mr Nicoll said Mr Higson had not shown any remorse for the assault and appeared to maintain that Francois de Bruin was responsible for the incident because of comments he allegedly made. Mr Nicoll had understandable doubts about the reliability of Mr Higson's allegation of provocation because it had not been raised with the police at the time of the incident or with his solicitor at the time Mr Higson pleaded guilty to the assault.

[46] Mr Nicoll concluded that physical violence towards an employee of Downer's client/subcontractor was unacceptable and had a significant negative impact on Downer's reputation. He considered that the incident was so sufficiently connected with work as to bring Downer into disrepute. His view was that even if name calling had occurred, that did not justify the physical assault. For all of these reasons Mr Nicoll concluded dismissal was the only appropriate sanction.

[47] I consider that finding was open to a fair and reasonable employer in all of the circumstances.

### **Outcome**

[48] I find that Downer's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Mr Higson. Downer's summary dismissal of Mr Higson for serious misconduct was therefore justified.

### **Costs**

[49] Downer as the successful party is entitled to a contribution towards its costs. The parties are encouraged to resolve costs by agreement. If that is not possible,

Downer has 14 days within which to apply to file a costs memorandum, Mr Higson has 14 days within which to respond, and Downer a further 7 days to file any reply. This timetable will be strictly enforced.

[50] To assist the parties with their costs negotiations, I can indicate that the Authority will adopt its usual daily tariff based approach to costs, with the notional starting tariff being \$3,500 per day. That will then be adjusted to reflect the particular circumstances of this case.

**Rachel Larmer**  
**Member of the Employment Relations Authority**