

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 101
5316235

BETWEEN BEVAN JOHNSTON
Applicant

AND ADECCO PERSONNEL
LIMITED
Respondent

Member of Authority: G J Wood

Representatives: Jills Angus Burney for the Applicant
Jo Douglas for the Respondent

Investigation Meeting: 3 and 4 May 2011 at Wanganui

Submissions Received: By 25 May 2011

Determination: 13 June 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Bevan Johnston, claims that he was unjustifiably given a final warning, and subsequently unjustifiably dismissed. The respondent, Adecco, claims that Mr Johnston was justifiably warned for failure to comply with its minimum compliance standards, and subsequently justifiably dismissed for breaching a lawful and reasonable instruction to not discuss non-work related matters or make negative comment about Adecco, thus bringing it into disrepute.

Factual discussion

[2] After a serious head injury several years ago Mr Johnston made a near-miraculous recovery, based on hard work and determination, which allowed him to return to work following the best part of a decade off. His previous career had given

him a strong background in sales and in late 2007 Mr Johnston was able to re-skill himself to the level of being able to work in that field again, this time for Adecco. Adecco is a large multi-national human resources consultancy company.

[3] In May 2008 Mr Johnston was promoted to a *permanent* role with Adecco as a consultant. Mr Johnston's commitment to work and his outputs were such that he received bonuses in 2008 and 2009 and one of Adecco's prestigious *Certificates for Achievement* in 2009.

[4] Mr Johnston's prime client was the Mars Pet Factory in Wanganui, which had a significant demand for casual labour. In fact Mars was Adecco Wanganui's biggest client by far.

[5] Unfortunately, at the commencement of Mr Johnston's employment the management of the Wanganui branch was not requiring its staff to follow Adecco's procedures for the recruitment of what it calls associates, but are otherwise more widely known as temps. This meant that while Mr Johnston may or may not have later been properly trained on recruitment processes, these procedures were never implemented by him, nor required to be implemented by his manager at the time.

[6] During 2009 the Wanganui branch manager went on parental leave, leaving the Palmerston North manager to manage both branches. The General Manager, People and Performance (who was also based in Palmerston North) then discovered that proper procedures were not being followed in Wanganui and accordingly put in place processes to ensure that Adecco's policies were followed. Such policies involved the entry on Fast-track (Adecco's computer system) of all important recruitment actions. Such actions as required by Adecco's policies also included:

- Two work related references being required before an associate is given an assignment;
- Only managers have any authority to engage potential associates with criminal convictions;
- Ministry of Justice clearances being sought for all potential associates (with them only being able to be placed in advance of such checks if the client so agrees in writing); and

- Drug and alcohol testing to be done when the client required it.

[7] I am satisfied, on the basis of the standard policy documents relating to minimum compliance signed by Mr Johnston; the focus by Adecco on compliance with its minimum standards in its employment agreements, job descriptions and internal communications; and the evidence of its management, that Mr Johnston was aware at least from the time that new management took over the running of the Wanganui branch, that these standards had to be complied with.

[8] Towards the end of 2009 I accept that Mr Johnston's performance fell off. Whether this was a result of significant personal pressures or as the result of a falling out with his co-worker at the Wanganui office is not apparent, but it is clear that local management raised issues with the People and Performance General Manager around this time, who provided Mr Johnston with counselling to assist him with his personal difficulties. Concerns were also raised by Mars about Mr Johnston raising personal issues unrelated to work with them.

[9] In May 2010 Mr Johnston took a holiday in the United States. As cover his co-worker took over responsibility for the Mars account. During this period of seven or eight weeks (which included a significant handover period) a number of concerns about Adecco's recruitment standards came to light. This was primarily because an associate placed by Adecco allegedly threatened other workers at Mars. As a result Adecco management conducted a review of all placements at Mars (and later by Mr Johnston's other clients), in order to determine whether he had been following Adecco's policies.

[10] Schedule 2 to Mr Johnston's employment agreement provides that, amongst other things, in regard to misconduct and serious misconduct:

The following are examples of ... serious misconduct...which may ... give rise to dismissal...without notice:

...iii) refusal to perform the Duties or to carry out any proper and lawful instruction given by the Employee's manager or any other person acting with the authority of the Employer;

...

The following are examples of acts or omissions which may, after appropriate warnings from the Employer, lead to dismissal:

...vii) any act which is likely to diminish the reputation of the Employer in the business or wider community;

...xii) Failure to complete standard recruitment procedures outlined by the company will result in instant dismissal eg verbal reference

checks, skills evaluation, police checks when required and appropriate interviewing.

The employee acknowledges that the examples of misconduct ... are by way of example only and that other acts or omissions on the part of the employee may lead to termination of this agreement without notice and without warning if they are considered sufficiently serious by the employer or subject to appropriate warning or notice if they are considered less serious.

[11] Upon investigation, the Branch Manager and the General Manager People and Performance had concerns with the placement of nine people at Mars, and whether some people placed with another client had been drug tested as required. Mr Johnston was thus called to a disciplinary meeting on 1 June to *discuss a number of matters related to placement of associates with clients and failure to follow the required processes and practices*. This meeting was attended by the Managing Director of Adecco, Mr Mike Davies, who was very concerned that Mr Johnston's actions could not only lose a significant client for the Wanganui branch but for Adecco internationally, because of a major international connection with Mars, another large multi-national company.

[12] Most of the complaints related to either engaging associates with criminal convictions without approval from the branch manager and subsequently from the client (whether following Ministry of Justice checks or not); not *performance managing* associates who had health and safety or performance problems on site; and not doing drug tests (or at least not providing evidence in Fast-track of having completed any or all of the above actions).

[13] However none of the details later referred to in the meeting were provided to Mr Johnston in advance. No doubt taken by surprise, Mr Johnston was unable to give a detailed response to many of the issues when raised at the meeting, particularly as he could not remember some of them. Certainly he accepted that he had not documented a number of matters in Fast-track, but noted also that he did not have enough time to do everything required, and that he had not been trained to log all the required information into Fast-track. I accept that the matters raised with Mr Johnston related to placements for which he had responsibility - both because he was the consultant for Mars at the relevant time, and because there were no new placements into Mars while Mr Johnston was on leave.

[14] Furthermore, Mr Johnston also accepted that he had made some errors, that he did give some people with convictions a chance, and that he preferred to performance manage people informally as issues arose, rather than utilising a formal process he said he had not been trained in.

[15] During the meeting Mr Johnston was also told that clients were aware of Mr Johnston's personal challenges and were concerned about them, and that he had to stop mentioning them when working. The General Manager People and Performance had previously had a discussion with Mr Johnston about raising his personal issues with co-workers and clients and advised him to raise them only with her. Mr Johnston responded that he had not initiated such contacts with clients and only talked about such things if people asked him about them.

[16] The meeting concluded with the General Manager People and Performance noting that the purpose of the meeting was to provide Mr Johnston with Adecco's concerns and gain feedback, that they were going to visit Mars that day, and that decisions would then be made *with all parties' feedback*. No doubt the meeting was most unpleasant for Mr Johnston, particularly as he was taken by surprise by its focus.

[17] Following the meeting at Mars Mr Johnston was sent an email (along with his co-worker and others) telling him of the key points of the meeting and that Adecco would be undertaking a full review of its management of the Mars account, which it was at grave risk of losing. The General Manager People and Performance stated:

I do not wish for there to be any debate about the points Mars have raised. Yesterday there was discussion about the validity of Mars's comments. I wish to further reiterate I will no longer listen to your personal opinions or thoughts about the validity of Mars concerns. They are the client and are very unhappy with our service delivery – to me that is all that matters.

I also wish to say once and for all I no longer wish for there to be internal issues impacting on this client. If there are personal issues between you, get over them. I have put this in writing and if you fail to adhere to this request I will personally deal with these situations as they present themselves. This situation is desperate!

[18] In the interim the two Wanganui staff were required work together on the Mars account.

[19] It was not until 15 June that another meeting was held with Mr Johnston, because of the unavailability of different parties. Unlike the first meeting Mr

Johnston was represented. There Mr Johnston acknowledged his failure to adhere to processes but advised that he had not received any proper training. There was then a discussion about whether or not sufficient training had been given. In particular, Mr Johnston maintained that he had never had training in performance management, or on who was responsible for approving associates who had criminal convictions for employment. He did not accept that he had not done drug testing, but did accept that the evidence for that was not readily available on Fast-track.

[20] The meeting ended with advice from Adecco that a further meeting would be held the next day, when a decision would be communicated. That decision was that although Adecco felt that Mr Johnston could have been dismissed for serious misconduct, he was instead to be issued with a written warning and be given a strict retraining programme. As a result he was to lose his involvement with the Mars account, but keep his other major client. Mr Johnston's response was that he felt that the final written warning was unjustified, but that he would go through the retraining process, although he expected to be treated honestly and fairly.

[21] Mr Johnston was also told that his dealings on the other major account were to continue purely on a business level, because it had already told management that he had talked about personal issues outside of the business, and thus the relationship had to be kept *strictly business*. A structured retaining programme was subsequently put into place. Mr Johnston then took the rest of the week off on sick leave, and returned the next week to commence his training.

[22] The final warning was confirmed in writing on 18 June for:

- Acceptance of criminal convictions deemed unacceptable;
- Failure to undertake performance management of associates; and
- Failure to perform standard recruitment processes.

[23] The warning was to remain in force for 12 months, and Mr Johnston was informed that further instances of *misconduct or serious misconduct for poor performance may lead to your dismissal*.

[24] This was followed up by an email from Mr Davies with his expectations of Mr Johnston. In particular he was told that the other major account was to:

...remain at this stage your client to service. However I must stress that when working with this client all conversations are to be kept to work/company related business.

...

In regards to [client name suppressed] I want you to understand that with this very important client your involvement will be monitored closely to ensure you are following our procedural requirements.

[25] Mr Johnston considered this direction as unnecessary and counter-productive to good account management, as clients respond best in his experience to discussions that do not only relate to business matters. In the ordinary course of events I accept that he is probably correct, and hence the existence of large marketing and promotions departments in many companies. However in this case Adecco was responding to direct client feedback, and whether or not Mr Johnston's views were correct in theory, this did not mean that he could override his employer's instructions to the contrary. In any event I accept that Mr Johnston did attempt to comply with the direction, although, most likely because of his previous accident, this would prove to be very difficult.

[26] The training commenced over the next few weeks, but unfortunately Adecco became aware of concerns, raised by an associate working at the other major client, about Mr Johnston's behaviour on 8 July. These concerns were first raised with Mr Johnston's co-worker, who referred it to the Branch Manager, who referred it on to the General Manager People and Performance. She then spoke to the associate concerned, who told her that Mr Johnston's attitude towards both his co-worker and Adecco was of concern to her. It was then left to the Branch Manager to deal with the complainant, who met with her on 12 July to go over her complaint, which by then had been committed to writing.

[27] The complaint centred on Mr Johnston allegedly inappropriately raising private matters about his own and his family's life with her and a Police Officer, which distracted them from their work. She further claimed that Mr Johnston *seems to have a problem controlling when it is appropriate to speak of personal matters and a more professional approach is needed.* She also stated that she found it very awkward when he was talking very negatively about Adecco and [his co-worker] in

particular ... He stated that [his co-worker] had 'set him up' manipulating [name withheld] another administrator here to make him lose his clients ... It seems odd to be working for a company and then running them down so publicly.

[28] It never became clear in evidence what specifically Mr Johnston had said that was very negative about Adecco, other than that he had been taken off the Mars account (which he felt was wrong), that he was wrongfully being put through a disciplinary process and that he had been set up by his co-worker.

[29] Adecco took the complaint seriously and Mr Davies took up the running of another disciplinary process. He telephoned Mr Johnston to tell him that there would be a meeting over allegations that he had discussed his private life and had criticised Adecco and its staff, in breach of the requirement to only speak at about matters of relevance to the client's account.

[30] Mr Johnston was provided with a copy of the complaint and was told that his behaviour could amount to him *publicly bringing Adecco Personnel into disrepute and acting in an unreasonable manner. If proven his behaviour may be considered serious misconduct.* Mr Johnston took the next day off work to prepare for the meeting.

[31] The meeting did not run smoothly. Adecco found it difficult to keep the meeting on track for what it believed its purposes were, because of Mr Johnston's representative's insistence on a full investigation into the operation of the Wanganui branch (and in particular the co-worker's role in any problems), rather than responding to the allegations in the complaint. This may have been the reason for the inexplicable failure of Adecco to provide Mr Johnston with a copy of the email that the Branch Manager had written to Adecco management, which contained additional comments made by the complainant, as well as a copy of her written complaint.

[32] There was also an insistence by Mr Johnston's representative on knowing the identity of who the complainant had first contacted in Adecco. Only after significant time did Adecco agree to inform Mr Johnston that it was indeed his co-worker who had been involved in escalating the complaint to management.

[33] In any event, Mr Johnston did eventually make a response to the complaint. He agreed that he had discussed non-work matters, but not that he initiated them, or was expansive about them. He also accepted that he might have mentioned the co-

worker and the other administrative worker, but *not as represented in the statement*. He also repeated on many occasions that he had never run down Adecco. Adecco was also again asked to look at the bigger picture within the branch.

[34] There was then a half hour adjournment. Mr Davies decided that Mr Johnston had committed serious misconduct while on a final written warning for other serious misconduct, and that summary dismissal was the appropriate option. He arranged with the Chief Financial Officer to make up his final pay during the break.

[35] Mr Davies then returned to the meeting to announce his decision of summary dismissal. This was confirmed in writing the next day. The letter noted the allegation of Mr Johnston speaking negatively of the co-worker and of Adecco, then stated:

I consider that your behaviour on this occasion amounts to conduct which brings Adecco Personnel into disrepute. You have previously been given a final warning and you were advised at that time that you were to act professionally in all your dealings on behalf of Adecco Personnel in the future or your employment may be terminated. I made it very clear to you not to enter into or partake in any non-work related conversations or behave unprofessionally when meeting with Adecco clients. In this regard I believe that you were well aware of the standard of behaviour that is expected of you.

At our meeting yesterday, you denied making the alleged comments, and suggested that the complaint was solicited by [your co-worker] as you have a poor relationship with her. I do not accept that explanation. Regardless of any issues between you and [your co-worker], I do not believe there is any reason to believe that the statement made by [the complainant] would be false.

In this regard, I consider your actions to be very serious and damaging to our business. I have lost trust and confidence in you to carry out your role in a professional way in the future. Your employment has therefore been terminated effective 15 July 2010.

You have been paid your final pay up to the 30th July 2010.

[36] Ms Angus Burney then raised a personal grievance on Mr Johnson's behalf. The matter was not resolved in mediation or subsequently, and it therefore falls to the Authority to determine the claims.

Determination

[37] The sorts of failures highlighted in the first three meetings, such as the failure to complete standard recruitment procedures, are categorised as serious misconduct warranting summary dismissal in the employment agreement, although contained in

the warnings section. Given the specificity of the language, however, and the overall statement focussing on the seriousness of an employee's behaviour, I accept that the parties have agreed on such conduct, if proved, being categorised as serious misconduct warranting summary dismissal.

[38] My findings of fact show that Mr Johnston was or should have been aware of the requirements to undertake the standard actions required in the placement of all associates. For whatever reason he chose not to in relation to the items raised by Adecco in its first three meetings. Mr Johnston had the opportunity, before a disciplinary decision was made on 16 June, over the course of three meetings, to undertake his own investigations into the placements at issue. He could then have provided a detailed response should he have wished to do so. Therefore Adecco's failure, before the first meeting, to provide the details of its concerns about him not following policies was later remedied.

[39] Adecco decided to give Mr Johnston the benefit of the doubt that his failures may not have been deliberate, but rather occurred as a result of poor training or poor retention of what he had been trained in. Therefore it decided to issue him with a final warning rather than dismiss him for serious misconduct. The failures to follow process have, as admitted, been demonstrated to be widespread and fundamental in terms of recording on Fast-track. Furthermore, Johnston was also shown to have not followed important procedures as to the engagement of associates. Thus in many ways Mr Johnston might consider himself lucky to have been given the benefit of the doubt by Adecco in these circumstances, given there was serious misconduct warranting dismissal pursuant to the employment agreement. In these circumstances there can be no challenge to the issuing of a final written warning.

[40] I turn to the claim for unjustified dismissal. Mr Davies was on solid ground in refusing to enter into an investigation of the whole of the operation of the Wanganui branch before disciplining Mr Johnston over the written complaint. This was a one off complaint and as such Adecco was entitled to treat it as an independent issue.

[41] While Adecco was slow to notify Mr Johnston of his co-worker's role in passing on the complaint, this was eventually remedied. Adecco also should have given Mr Johnston a copy of the Branch Manager's email that attached the written complaint. However I do not consider there has been any resultant harm or unfairness to Mr Johnston as a result. Overall I am satisfied that the substance of the

complainant's issues were dealt with in the written complaint and that even if Mr Johnston had been given the additional information, it would not have assisted him further in addressing the substance of the complainant's concerns. It simply would have provided a bit of a gloss on the complaint.

[42] Of more importance is Adecco's finding that Mr Johnston ran it down and thus brought it into disrepute, in the absence of any specific words allegedly used by Mr Johnston to that effect. I accept that if Adecco justifiably accepted the substance of the complaint then it could also accept that the comments made by Mr Johnston were such that it had the effect of running down Adecco. This is because the flavour of a conversation can be as important as the specific words used.

[43] The complainant clearly felt that the specific words used had the flavour and effect of running Adecco down. I accept that Adecco were entitled to draw the same conclusion as a result of its investigations, because the complaint had no axe to grind with Mr Johnston, and because much of her complaint was accepted by Mr Johnston, although not in terms of its flavour. In particular, Mr Johnston was accused of talking to clients about non-client issues and he admitted doing so, yet he had been clearly warned not to do so. Furthermore, he also accepted that he had said there had been *back stabbing* while he had been away, that that was why things had changed, and that it was the co-worker who was responsible. It was therefore a reasonable inference for Adecco to draw that Mr Johnston spoke negatively about the performance management programme he was under, and about his co-worker. In that context it was also reasonable to conclude that Mr Johnston was in serious breach of his employment agreement in that he was not only breaching a proper and lawful instruction to only talk with clients about clients' business, but that he had also made negative comments about Adecco's business. That is clearly serious misconduct under the parties' employment agreement.

[44] Mr Johnston now claims that the complainant was not a client, but did not do so at the time. In any event, I accept that the complainant was sufficiently related to the client, particularly as Mr Johnston was conversing with her as an Adecco associate placed with the client at the client's premises, and that the conversation took place *when working with the client*. Thus there was a direct breach of Mr Davies' instruction. In all these circumstances I conclude that Mr Johnston's dismissal for serious misconduct was justified.

Costs

[45] Costs are reserved.

G J Wood
Member of the Employment Relations Authority