

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Nathan Ross Kingsford (Applicant)
AND Bodyworks Panel & Paint Limited (Respondent)
REPRESENTATIVES G Dewar for Applicant
P Mitchell for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Wellington
MEETING 24 and 29 January 2007
FINAL SUBMISSIONS By 31 January 2007
DATE OF 14 February 2007
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Nathan Kingsford claims that he was regularly abused both physically and verbally at the workplace of his employer, Bodywork Panel & Paint Limited (“Bodyworks”). He further claims that he was given two unfair warnings and was later unjustifiably dismissed. Bodyworks denies that Mr Kingsford was ever the subject of abuse known to it, although it accepts that the workplace was a robust one. It considers the warnings to be justified and that Mr Kingsford resigned. If the circumstances were such as to be held a dismissal, Bodyworks claims that the dismissal was justified because of Mr Kingsford’s abuse of his boss.

The Facts

2. Bodyworks, as its legal title implies, is a paint and panel shop operating in the Hutt Valley, employing approximately 8 staff. Its owner/operator, Mr Garry Smith, has

worked in the industry for 25 years and owned his own business for the majority of that time. Most of the staff work on the floor, while he and an administrator operate from the offices adjacent.

3. Mr Kingsford was introduced to Bodyworks in October 2005 by his mother, who was assisting him in obtaining new employment. Mrs Kingsford was helping her son, who had recently left school, because he suffers from both dyslexia and Asperger's syndrome. Asperger's syndrome, which is associated with autism, can often result in sufferers having poorly developed social and communication skills. As Mr Kingsford was interested in cars, it was considered that a job in a panel and paint shop specialising in cars would be a good step for him.
4. Mrs Kingsford told Mr Smith of her son's learning difficulties and he replied that he had other staff with learning difficulties such as ADHD and therefore that was of not too great a concern to him. Mrs Kingsford then explained that her son would, in particular, require clear instructions and to not be interrupted while doing tasks.
5. As there was a vacancy in Bodyworks at the time Mr Smith agreed to take Mr Kingsford on and indeed he started the next day. Mr Kingsford was employed under a three month probationary period and due to his disability his wages were subsidised by Workbridge by 25%.
6. Before Mr Kingsford started Mr Smith told all the staff that Mr Kingsford suffered from a disability, that he could be slow to take up points and that he was easily distracted.
7. The paint and panel shop operated with a workplace culture that could best be described as 'blokey' and robust. Thus there was a lot of banter and put-downs between the staff, usually expressed in very colourful language. In fact apart from the administrator, the sole female employee at Bodyworks, I find that the language used in the work place was personified by the constant use of swear words, which are not repeated in full in this determination.

8. Mr Kingsford soon became part of that workplace language culture, but as a result of his disability it is likely that he did not understand the boundaries between swearing and abuse as well as the other staff.
9. Mr Kingsford had difficulties with one of his work mates in particular. He claims that this co-worker seriously assaulted him on one occasion. If indeed that was the case Mr Kingsford never raised that with any of his superiors at Bodyworks. Furthermore, Mr Kingsford's supervisor noticed that the two were not getting on and tried to ensure that the two worked together as little as possible.
10. Mr Kingsford started off performing very well in his job, assisting with the preparation of cars for panel beating and painting. Unfortunately, after about a month his performance started to deteriorate significantly. Mr Kingsford was counselled about the way he spoke to staff and his deteriorating performance.
11. An example of Bodyworks' concerns was one day when Mr Smith noticed that Mr Kingsford had not masked a car properly. While I accept that Mr Smith told Mr Kingsford that his work was not "*f...ing not good enough*", I do not accept that he was abusive towards Mr Kingsford. That was the language used on the floor and was not personalised toward Mr Kingsford. I also do not accept that this demonstrated that the workplace was violent and/or abusive. In fact the weight of evidence was that it was not.
12. Mr Smith then showed Mr Kingsford how to do the job properly by doing one side of the car while Mr Kingsford did the other. Mr Kingsford complained that that was not the way he had been taught.
13. As a result of Bodyworks' concerns over Mr Kingsford's deteriorating performance it decided to meet with him about them in a disciplinary setting.
14. Accordingly it sent him a letter on 20 January 2006 stating the following:

"We are writing to inform you of a disciplinary meeting to be held on the 24 January 2006 at 11.00am in the office at Bodyworks Panel & Paint.

The reasons for this meeting are outlined below:

1. *We have had a number of complaints from other staff members about your attitude towards work and them.*

2. *When you are asked to perform certain jobs you can become argumentative and even lose your cool.*
3. *You are sometimes insubordinate to your Supervisors.*

The Company House Rules state that a warning maybe issued for aggressive or argumentative behaviour.

We have spoken about your attitude before.

You may bring a support person to this meeting.”

15. At the disciplinary meeting, which Mr Kingsford’s mother attended, the issues raised were discussed thoroughly. Mr Kingsford’s concerns about being given conflicting instructions and then being diverted were taken on board, but Mr Smith concluded that a written warning was appropriate because of his poor performance and attitude.
16. Mr Smith then also spoke to staff about their behaviour towards Mr Kingsford and the need for him to be given only one task to do at a time, as confirmed in the warning letter of 25 January. In addition, Mr Smith arranged to employ a new staff member so that Mr Kingsford could be released to work on non-urgent projects and thus be able to work on his own. As a result Bodyworks approached Workbridge and were successful in increasing its subsidy for Mr Kingsford’s wages to 50%.
17. Unfortunately, Mr Kingsford continued to have difficulties in the workplace. In particular, he was now having difficulty interacting with an apprentice panel beater, who he occasionally had to share tools with. On 20 February there was an ongoing dispute over the use of an airline. After a while Mr Kingsford told another worker “*that faggot took my f...ing air line*”. As a result the apprentice went over and assaulted Mr Kingsford by punching him in the head. The apprentice then went immediately to see the administrator to own up to what he had done to Mr Kingsford. Mr Kingsford was obviously upset. He went to arm himself with a broken broom handle and went looking for the apprentice. He then asked a co-worker, Mr David Kapa, where the apprentice was. When Mr Kapa told him that he was in the office Mr Kingsford then smashed the broom handle over a piece of machinery and then left the workshop. This was around a half an hour before the end of the day.
18. The administrator tried to contact Mr Kingsford but he had turned his cell phone off. Mr Kingsford was very upset and suffered bruising and accordingly he did not attend

work the next day. His mother rang in before the start of work to tell Mr Kingsford's supervisor that he would not be attending work.

19. Mr Smith was not informed of this and accordingly rang Mr Kingsford at home looking for him and left a message. Mr Kingsford's mother rang back to state that Mr Kingsford would be coming in that day to discuss his concerns.
20. When Mr Kingsford arrived Mr Smith called him and the apprentice to his office to tell them that their behaviour was both unacceptable - Mr Kingsford for provoking the apprentice and the apprentice for assaulting Mr Kingsford. Mr Kingsford was also told that he had no right to leave work early. The apprentice was dealt with leniently in that he was only given a warning. Mr Kingsford was also issued with a warning, for leaving work without permission and not giving notice of absence the next day. This final warning was said to remain in place for 12 months.
21. Following this incident Mr Smith met with all the staff and told them that workplace violence and abuse would not be tolerated.
22. Mr Kingsford remained concerned about the workplace environment and took a week's leave in March due to stress. When he returned the situation had not changed for the better from his perspective. He still felt that people at work were picking on him. He did not, however, raise any general or specific instances of concern with Bodywork's management.
23. On 26 May Mr Smith was working on the floor to change the fuse in a car, which he believed Mr Kingsford had broken. Mr Kingsford believed that he could have done the job better than Mr Smith and suggested that he do the job for him. Mr Smith told him to leave him alone and go back to his own work.
24. Mr Kingsford then unwisely decided to return to Mr Smith some time later, having noticed that the fuse was still not fixed. He told Mr Smith that if he had listened to him the job would have been done now. Mr Smith replied to the effect that he knew what he was doing.
25. Mr Kingsford responded by saying that "*you are just f...ing around, don't listen to me f...ing wan...r*".

26. By this point Mr Smith was very angry and advanced towards Mr Kingsford, swearing and saying words to the effect he had better watch his mouth or one day someone would shut it for him. Mr Kingsford wisely retreated until Mr Kapa was between him and Mr Smith.
27. Mr Smith then thought better of matters and went up to the office. Mr Kingsford then mumbled under his breath that Mr Smith was “*a f..wit*” as he was on his way back to the office. Mr Smith did not hear this statement, which was not directed personally at him in the sense that Mr Kingsford expected him to hear it.
28. Mr Kingsford then threw the keys of the car he was working on into an engine bay and left, stating that he quit. He went to the smoko room where the administrator tried to calm him down. Mr Kingsford contacted his mother who said that he should go home to calm down, which the administrator agreed with.
29. The administrator meant that Mr Kingsford should leave for a little while to cool down, but Mr Kingsford and his mother took it that he could have the rest of the day off. Mr Kingsford’s mother also informed the administrator that Mr Kingsford couldn’t quit his job because as he had not put his notice in writing as was required by the employment agreement he could not have resigned.
30. Mr Smith was concerned that there might be some repercussions from the incident and therefore got two of the staff to write out written statements about what they had heard and seen that day, which have proved useful to the Authority in determining what did actually occur, given that the Authority’s subsequent investigation occurred some eight months later.
31. Mr Kingsford’s mother soon changed her mind about Mr Kingsford not leaving once she saw how agitated her son was. She decided immediately, in her own mind, that he could never go back to work at Bodyworks.
32. Later that day she rang Mr Smith to tell him that nobody should have to take the kind of abuse that her son had, but could only leave a message to that effect. Mr Smith rang back and left a message. It stated:

“Hey Garry Smith from Bodyworks. Hey um, I am not really impressed about Nathan coming back on Monday as, as he walked out the door he said he quit. So that is the end of the story as far as I am concerned. I agree that nobody should put up with abuse, that’s why he is not coming back, because he abused me and the end of story really. Thanks a lot, see you.”

33. Mr Smith wanted to make it absolutely clear that Mr Kingsford would not be returning to work at Bodyworks. From his perspective, Mr Kingsford was guilty of serious misconduct warranting summary dismissal. Bodyworks’ house rules, which Mr Kingsford was given, make it clear that employees must follow the rules so that *“a safe and effective work environment is enjoyed by all staff”*. In the house rules the use of aggressive or abusive language while at work, which may offend, is said to be behaviour that may result in dismissal. Breach of such a provision is said to result in instant dismissal. I also note that the employment agreement, in the disciplinary procedure clause, states the following:

“In all events where a warning may potentially be issued the allegations will be put to the employee concerned at a disciplinary investigation meeting and the employee will be given the opportunity to provide an explanation. An employee may elect to have a support person present at any disciplinary investigation meeting.”

34. Mr Smith sent Mr Kingsford a dismissal letter, dated 29 May, as follows (verbatim), because he considered Mr Kingsford had abused him:

“As you already know you currently have 2 written warnings in place dated 25 January and 21 February.

You will note in the first letter it reads

When asked to perform certain jobs by his supervisors, he is not to become argumentative with them as he is the junior Labourer.

On Friday 26th May you were asked to leave me along and continue grooming a car.

I am quite capably of doing the job I was doing.

I have 25 years experience in the trade and owned my own business for the last 20 years.

To your credit you left, Unfortunately you returned and proceeded where you left off.

You were asked to go away again which didn’t seem to register and then it turned into a slanging match with myself.

Calling your employer a (Fuckwit) is not acceptable behaviour for an employee of Bodyworks Panel & Paint.

I refer you to Clause No.22.1(iv)

For conduct amount to serious misconduct, the employee will be instantly dismissed.

As you can see you have left me with no option but to dismiss you.

This will be effective from Monday 29th May at 4.30pm”

35. Mr Kingsford subsequently raised an employment relationship problem. The parties attended mediation but failed to resolve the problem. A determination from the Authority is therefore required.

Credibility

36. In coming to my determination on the facts set out above, I have been required to make many findings on disputed areas of facts. There can be no certainty about what occurred many months ago. The Authority is required, however, to determine what it believes occurred in each area of dispute. It does so on the balance of probabilities, i.e. what is more likely to have occurred than not. In this case, because of a lack of documentary material created at the time, which is not surprising given the nature of the workplace, I have been required to determine the facts on the basis of my assessment of the credibility of the witnesses. While there were difficulties with parts of the evidence of many of the witnesses, the weight of the evidence, given that there were six witnesses from Bodyworks about what happened at the workplace, favoured Bodyworks.
37. In any event I have been particularly assisted by the evidence of Mr David Kapa, who was still an employee of Bodyworks but who has also maintained a friendship with Mr Kingsford. He was therefore the closest to an independent witness in this case. I find that while he was slow to criticise either Mr Kingsford or Mr Smith, his evidence was given with sincerity and not the subject of the sort of exaggeration that could be said of other witnesses. His evidence on the key incident was also supported by the statement he prepared at the time. Therefore I have first recourse to his evidence in determining the facts. Where his evidence was equivocal or he was not present at events I have in general preferred the evidence of Bodyworks' witnesses to that of Mr Kingsford. While it is true that simply having more witnesses does not make those witnesses' versions of events more believable I have significant concerns about Mr Kingsford's evidence in that it differed starkly from Mr Kapa, his friend, on many occasions.

The Law

38. The difference between a resignation and a dismissal must be assessed on the facts of each case. In *Boobyer v. Good Health Wanganui Ltd*, unreported, Goddard CJ, 24

February 1994, WEC3/94 the Employment Court held that there are many cases in which an employee is treated as having resigned yet did not want to do so and a dismissal rather than a resignation may in law have occurred. This may be so, as noted at page 3, where:

“...words of resignation form part of an emotional reaction or amount to an outburst of frustration and are not meant to be taken literally, and either it is obvious that this is so or it would have become obvious upon inquiry made soberly once “the heat of the moment” had past and taken with it any “influence of anger or other passion commonly having the effect of impairing reasoning faculties”.

39. This was held to include actions by employees who even used emphatic language and expressive conduct extending to actually walking out or using words of resignation, only to return later.
40. In assessing the claims for disadvantage and dismissal the Authority must determine this on an objective basis, by considering whether the employee’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 or action occurred (s.103A).

Determination

41. It follows from my findings of fact that Mr Kingsford was not subject to any ongoing physical and verbal abuse, which would clearly be in breach of the Health and Safety in Employment Act’s requirements for employers to provide safe workplaces. Bodyworks can not be responsible for behaviour between employees which is not brought to its attention. Furthermore, on the one clear occasion when Mr Kingsford was subject to an assault by a fellow worker during work time that worker was warned and Mr Smith made it very clear to all staff that that sort of behaviour would not be tolerated.
42. While I accept that Mr Smith was lenient in only warning the apprentice, that does not mean that he left Mr Kingsford unsafe at work, as demonstrated by the fact that there were no further incidents between him and the worker who had assaulted him.
43. Mr Kingsford did not challenge the warnings that he received, at least within the 90 day period. They are relevant though, I find, to all the circumstances of his later

dismissal (even although it was a summary dismissal for serious misconduct), so must be analysed.

44. I find that the first warning was quite justified in any event. It resulted from a clear documented process that was fair to both parties. The warning was only issued after Mr Kingsford had been given a full opportunity to state his position. Furthermore Mr Smith took further steps to assist Mr Kingsford thereafter.
45. The second warning, by contrast, followed a very brief investigation and was not fair because Mr Kingsford should not be criticised for leaving work a little early after being assaulted and his mother in fact did ring in the next day on his behalf.
46. I turn now to the claim for unjustified dismissal. This case is clearly one where Mr Kingsford walked out, stating that he quit, following an altercation with Bodywork's owner Mr Smith. No doubt these actions were taken by Mr Kingsford as a way of covering his embarrassment at the situation, as well as in anger. Bodyworks was told within minutes that the apparent resignation should not be relied upon and indeed it was clear from Bodyworks' subsequent actions, including Mr Smith's phone call and his dismissal letter, that Bodyworks knew that Mr Kingsford did not really intend to resign and therefore dismissed him.
47. This dismissal was unjustifiable because it did not follow any of the basic requirements of natural justice, such as a proper investigation into the incident, as had occurred over the concerns raised on 20 January, and is expected of any fair and reasonable employer. It was also in breach of the employment agreement's own disciplinary procedures, which required a disciplinary meeting.
48. Even although Mr Smith was directly involved in the incident that led to the dismissal, this is not a case where Mr Kingsford's behaviour was so clear on the face of it that Mr Smith could safely conclude without any investigation that Mr Kingsford had committed serious misconduct warranting summary dismissal.
49. What became clear following a full investigation by the Authority over more than a day was that Mr Smith was angry and advanced at Mr Kingsford, no doubt in response to Mr Kingsford's wholly inappropriate approaches, together with his abusive use of

language. Mr Smith relied on Mr Kingsford calling him “*a f...wit*”, but on later investigation it was shown that Mr Kingsford mumbled this under his breath as Mr Smith was departing and he did not hear it. On the other hand Mr Kingsford did call Mr Smith, in effect his employer, a “*f...ing wan..r*” in the middle of their dispute.

50. Matters may in fact have been different, especially given Mr Kingsford’s disability (which meant that he was more prone to misunderstanding the boundaries between workers and bosses and therefore stepping over that line to the detriment of their own interests), had Bodyworks allowed for more time for all parties to have cooled off. The relevance of Mr Kingsford’s disability can be seen in the fact that Bodyworks received a subsidy from Workbridge to cover half his pay. A proper investigation, which would have allowed for representation of a worker with Mr Kingsford’s disability would also have been appropriate.
51. A delay in looking into the incident would also have allowed Mr Smith to reconsider his reaction to Mr Kingford’s abuse, as his actions were very threatening. Thus Mr Smith may have come, on reflection, to have accepted that his part in the altercation with Mr Kingsford was not a positive one and therefore Mr Kingsford should not take all the blame
52. It can not therefore be said with certainty that Mr Kingsford would have been dismissed as a result of a fair investigation. Therefore his dismissal is unjustifiable.

Remedies

53. Mr Kingsford went on to a sickness benefit after he left Bodyworks and was unable to find work for many months thereafter. I do not accept that he went on to a sickness benefit as a result of Bodyworks’ actions towards him. Rather it is likely that he went on to that benefit because it was the most money he could obtain as a benefit in his particular circumstances, for example as opposed to him going on to the unemployment benefit.
54. Being on a sickness benefit clearly implies that Mr Kingsford was unable to work. Mr Kingsford certainly made few attempts at finding work. Furthermore, the assistance his mother had previously given him did not seem to continue over this period. In all

the circumstances of this case I therefore decline to consider an award of lost remuneration, as Mr Kingsford has not done enough to mitigate his loss of remuneration.

55. On the other hand, Mr Kingsford clearly suffered from what happened at work on that last day and after being dismissed. He was involved in a nasty confrontation with his boss and dismissed without any opportunity to give his side of the story. Mr Kingsford gave evidence of the effect the dismissal had on him. In particular he suffered from depression and his confidence was low, particularly until he found another job. On the other hand, he has failed to take responsibility for his role in the events that transpired. In addition, compensation can only be awarded in the light of the Authority's findings, not Mr Kingsford's perceptions of events where those have been found to be inaccurate.
56. Subject to contribution an award of \$6,000 is appropriate. I consider that Mr Kingsford's actions contributed greatly towards the situation that gave rise to the personal grievance. In this regard I focus particularly on Mr Kingsford's behaviour on 26 May. While I accept that Mr Kingsford's condition meant that he may not have understood as well as other workers the consequences of hassling the boss, I find his actions that day to be blameworthy behaviour. Mr Kingsford was upset when Mr Smith told him to go away when he was just trying to help. That is no excuse, however, for his subsequent actions in coming back and then abusing Mr Smith in gross terms. In particular in many ways he brought this matter on himself by telling Mr Smith "*you're just f...ing around don't listen to me f...ing wan..r*". He had already been counselled about and formally warned for abusing staff before.
57. Even although Mr Kingsford had been inculcated into a culture of that sort of language he must have known that he had crossed the line when he called his boss such names. In balancing the employer's contribution with that of Mr Kingsford I find that Mr Kingsford was substantially responsible for the termination of his own employment.
58. I therefore reduce the remedies that would otherwise have been awarded to him by two thirds.

Conclusion

59. I dismiss Mr Kingsford's claim against Bodyworks for disadvantage in his employment and in particular his claims that he was continually verbally and physically abused during his employment at Bodyworks. I have, however, found that his dismissal was unjustified because there was no proper investigation into what had happened in the incident between himself and Bodyworks' owner Mr Smith.
60. I have reduced the remedies awarded to Mr Kingsford by two thirds to take into account his contributory behaviour, particularly in relation to the incident with Mr Smith.
61. I therefore order the respondent, Bodyworks Panel & Paint Ltd, to pay to the applicant, Nathan Ross Kingsford, the sum of \$2,000 in compensation.

Costs

62. Costs are reserved.

G J Wood
Member of Employment Relations Authority