

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 454/09
5282688

BETWEEN PETER LEWIS
 Applicant

AND CITY CARE LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Lou Yukich for Applicant
 Raewyn Gibson for Respondent

Investigation Meeting: 25 November 2009

Submissions received: 30 November 2009 from Applicant
 4 December 2009 from Respondent

Determination: 16 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Lewis, a maintenance fitter, was employed by the respondent (City Care) for four years. He had an unblemished work record up until an incident on 17 September 2009 during which he was alleged to have verbally abused his manager, Ken Buckley. Mr Buckley suspended him immediately and City Care commenced an inquiry into the allegation of verbal abuse as well as two other allegations.

[2] The investigation included two meetings with Mr Lewis, on 24 September and 2 October (the first having been delayed because Mr Lewis was unwell.) The first meeting, at which Mr Lewis's account of events was sought, was conducted by Operations Manager Chris Harris, assisted by Parks Contract Manager Phil Everett. The second (which culminated in the decision to dismiss) was conducted by Tauranga Branch Manager Kees Swannink and Mr Harris. Mr Harris also interviewed Mr

Buckley and an administrative worker, Ms Cunningham, who at the relevant time was seated just outside the room where the incident took place. At the conclusion of the inquiry the decision maker, Mr Swannink, was satisfied that there was no misconduct associated with two of the allegations but concluded that on 17 September there had been verbal abuse amounting to serious misconduct. Mr Lewis was therefore dismissed on 2 October 2009.

[3] Mr Lewis says that the dismissal was procedurally unfair and substantively unjustified.

Issues

[4] In his application to the Authority Mr Lewis sought interim and substantive reinstatement however both parties agreed that instead of dealing with the interim application in the usual way the Authority should instead proceed directly to an early substantive investigation. During that investigation process the parties further agreed that the Authority should determine the substantive matters but defer evidence and determination of remedies until it was known whether the applicant's grievance had been made out. This determination therefore addresses whether the dismissal was unjustified and if so, whether Mr Lewis contributed to the situation which gave rise to the grievance.

[5] Mr Lewis accepts that he raised his voice and swore during the incident on 17 September but denies that the incident justified dismissal. The principal grounds on which Mr Lewis challenges the justification for his dismissal are (he says):

- i. The respondent did not provide Mr Lewis with details of the alleged verbal abuse or with the statements it took from Mr Buckley and Ms Cunningham;
- ii. Mr Swannink failed to give sufficient weight to Mr Lewis's explanation of his conduct. This included the assertion that the incident did not arise in the performance of his duties, but out of a discussion about Mr Lewis's sick leave entitlements; that Mr Buckley provoked him, and that Mr Lewis was unwell at

the time of the incident and (being affected by his illness) acted out of character;

- iii. Mr Lewis says Mr Buckley knew he was unwell on the morning of the incident and (consistent with relevant health and safety obligations) should have turned his mind to whether Mr Lewis was fit to work (including whether his presence at work might constitute a danger to himself or others);
- iv. Although Mr Lewis had a support person with him during the disciplinary meetings he was not able to have with him his chosen representative;
- v. Mr Swannink determined the outcome of the disciplinary process after having had very little involvement in the inquiry itself, and
- vi. There was a disparity of treatment between Mr Lewis and other employees involved in similar incidents, who were not dismissed. Further to that, Mr Lewis is an active union delegate and is concerned that this disparity of treatment may amount to discrimination on the basis of his union activities.

[6] The respondent refutes these allegations, asserting in submissions:

- a. *“That it had significant evidence (which is largely undisputed) before it to reach a conclusion that the employee’s conduct amounted to serious misconduct clearly justifying dismissal;*
- b. *That it had carried out a full and fair investigation during which the applicant was given every opportunity to advance an explanation/mitigation for his conduct; all of which was given due consideration by the respondent.”*

...In these circumstances it is submitted that it is clear that the actions of the respondent are completely consistent with what a fair and reasonable employer would have done in the very clear circumstances surrounding the applicant's completely unacceptable conduct towards his manager, which was so extreme his manager feared for his safety."

[7] During the Authority's investigation, on Mr Lewis's behalf, Mr Yukich also asserted that Mr Lewis was disadvantaged by the suspension which he says was unjustified because he was not consulted. The respondent noted (correctly) that this claim was not set out in the statement of problem, but responded saying that immediate suspension was justified given the circumstances: Mr Buckley sent Mr Lewis home to cool off. I address this issue in this determination because despite it not having been properly pleaded both parties were satisfied that I had before me all relevant evidence on that point.

[8] Also during the Authority's investigation Mr Lewis and Mr Yukich raised concerns that Mr Lewis had been discriminated against as a result of being a union delegate. These concerns appear to have been triggered in part by respondent evidence that showed that two other union delegates have been dismissed in the last couple of years in very similar circumstances.

[9] I cannot determine this issue because (unlike the suspension issue) it has not been fully covered in evidence. Should the applicant wish to pursue that matter further he should advise accordingly.

[10] In the determination which follows I deal with the suspension issue followed by the concerns about the dismissal, grouped under five headings: the incident, the explanation, representation, the decision, and disparity of treatment.

(i) Suspension

[11] Mr Buckley suspended Mr Lewis, on the spot, after Mr Lewis had been swearing and raising his voice. Mr Lewis told the disciplinary inquiry (and confirmed to the Authority) that he called Mr Buckley a "cock" and it was upon hearing this that Mr Buckley suspended him. Mr Buckley's version of events is more extreme. He told

the Authority, as he had the inquiry, that Mr Lewis called him a “*fucken dick*” after becoming so angry that Mr Buckley feared for his safety, later having several sessions with EAP to address the effects this had on him. Maureen Cunningham, an administrative worker who was seated just outside Mr Buckley’s office, confirmed (again to the respondent and the Authority) the heated nature of Mr Lewis’s conduct although not the final insult which she did not hear.

[12] Even as set out in Mr Lewis’s account the circumstances were such that it was entirely appropriate to send Mr Lewis home to cool off. I accept also that this was self-evident. The only issue, then, is whether the respondent was justified in continuing the suspension as it did during the investigation process. The reason for the suspension was given to Mr Lewis (upon his request) on Monday 21 September (that is, the third day of the suspension.) He was told that it was “*as a direct result of your behaviour earlier that day [17 September]*” and that it would continue “*until further notice.*”

[13] It is fair for Mr Lewis to assert that this does not give a very full explanation and it is also fair for him to say he should not have needed to ask for information about his suspension. City Care should have consulted Mr Lewis about its continuation. However, its failure to do so does not render the suspension unjustified given the circumstances. Mr Buckley and Mr Lewis worked closely together in a small team and I accept that it would have been difficult for both of them to do so while an inquiry was underway into the allegations against Mr Lewis. I accept that the suspension was substantively justified.

(ii) Incident

[14] Although it was put to Mr Lewis that he had verbally abused Mr Buckley, he was not given full details of what he was alleged to have said and was not shown statements Mr Buckley and Ms Cunningham made during the inquiry. Mr Harris told me:

“I did not consider it was necessary to provide Peter Lewis with the statements I had received from Ken Buckley and Maureen Cunningham because I put to Peter Lewis the most significant parts of their statements.”

[15] Mr Harris said Mr Lewis did not appear to dispute what he put to him, responding with an assertion that he was unwell at the time and his behaviour was out of character.

[16] The meeting notes record that Mr Harris put it to Mr Lewis that:

“it was beyond an angry conversation and was more like a rage and Ken was concerned for his safety and Maureen agreed...”

in general, Pete’s statement is in line with Ken’s and statement is what happened.”

[17] It is correct that there was a substantial degree of overlap in the content of all the statements: Mr Lewis admitted swearing and raising his voice. However it was not put to him that he called Mr Lewis a “*fucken dick*” and the tone of the encounter was (by his account) less heated than what Mr Buckley and Ms Cunningham recalled.

[18] Mr Lewis understood (reasonably, given what Mr Harris recorded in his notes) that his own account of events was accepted and that this was what he was being held accountable for. It was not. In coming to the decision to dismiss, City Care relied on the other witnesses’ accounts, and was holding Mr Lewis responsible for a more serious level of conduct than he understood to be at issue.

[19] City Care’s failure to put all the information to Mr Lewis for comment materially undermined the inquiry.

(iii) The explanation

[20] From Mr Lewis’s point of view, the background to the incident on 17 September started approximately mid August when he asked Mr Buckley for a statement showing how much sick leave he had used. Mr Buckley did not pass this request on to the pay office until 3 September 2009. On 8 September Mr Lewis followed up with Mr Buckley. Mr Buckley was not yet able to provide the information sought but did show Mr Lewis the limited records he had access to.

[21] On 10 September in the course of his duties Mr Lewis came into contact with waste water. He did not fill out an incident report but the next day he fell ill and remained unwell over the weekend of 12 and 13 September. On the Monday he felt a little better and went in to work for a short period before deciding to see his doctor who gave him a two day medical certificate. Mr Lewis told Mr Buckley this and Mr Buckley expected Mr Lewis would be back at work on 16 September. However Mr Lewis had construed the doctor's certificate to mean that he had been put off work until 17 September.

[22] Mr Lewis understood from his doctor that his illness was work related (being caused by the contact with the waste water) and in reliance on this, when he went in to work, he filled out an incident form and recorded his absence as caused by it. However, he did not provide the paperwork necessary to lodge an ACC claim or a claim number, because his doctor had not yet supplied him with this material.

[23] On seeing what Mr Lewis had submitted, Mr Buckley called him in to his office and told him that the illness could not be treated as work related without medical confirmation. Mr Buckley was right on this point. (Eventually the doctor did confirm his diagnosis that contact with the waste water had caused the illness.)

[24] Mr Buckley also said that Mr Lewis did not have enough leave to cover the Wednesday. On this issue he was wrong. Under the collective employment agreement that governed Mr Lewis's terms and conditions of employment, staff are entitled to "*reasonable paid time off work in each year in the event of personal sickness or accident.*" Managers are tasked with managing sick leave and Mr Buckley did so by requiring a medical certificate for leave exceeding five days per year (this was in itself a change in approach from the previous manager.) Mr Buckley thought that Mr Lewis had already exceeded this level and that the Wednesday was not covered by his medical certificate. In fact, when a full sick leave statement was finally obtained, it showed that he had not, and although it was not clear from the first certificate, the doctor later clarified that the Wednesday absence was covered.

[25] Mr Buckley told Mr Lewis that the Wednesday would be treated as leave without pay. Saying "*I shouldn't even be here*" Mr Lewis lost his patience and the incident took place as described already. After he was suspended he went back to the

doctor, who subsequently provided a further certificate covering the whole period from the Wednesday to Tuesday 22 September inclusive. The doctor noted on the certificate:

“Peter returned to work Thursday 17th but has remained unwell and this will have impacted significantly on any interaction he has had at work that day.”

[26] Mr Lewis told me he considered Mr Buckley’s mistake about his sick leave to be particularly unfair given that he had previously asked Mr Buckley to source accurate information about his leave entitlements. He also says that his illness caused him to act out of character and that when he said *“I shouldn’t even be here”* this should have alerted Mr Buckley to the fact that he was unwell. (Mr Buckley did not recall this comment but Ms Cunningham did.)

[27] The respondent’s position is that it took into consideration Mr Buckley’s conduct (including the fact that he was wrong about the level of leave remaining) and concluded that this did not excuse Mr Lewis’s behaviour. As for Mr Lewis being unwell Mr Swannink told me that he did not see how a gastric upset (which was what Mr Lewis had) would cause someone to become abusive. He therefore did not see the illness as mitigating Mr Lewis’s conduct.

[28] I am satisfied that Mr Lewis’s explanations should have been given considerable weight, especially given Mr Lewis’s good work record and the fact that this conduct appeared to be out of character.

(iv) Representation

[29] Mr Lewis is himself a union delegate and was accompanied to the meetings by another experienced delegate, Roy Hopkins. However he says he never saw Mr Hopkins as more than a support person or witness and wanted Mr Yukich to represent him from the outset.

[30] Mr Lewis wrote to Mr Harris on 20 September enclosing a further medical certificate and explaining that due to his ill health he could not attend the first meeting (which had been scheduled for 21 September.) The letter went on:

“If... a meeting is still required I ask that you contact my representative and arrange a suitable time with him.”

[31] He then gave Mr Yukich’s details. His expectation was that the respondent would communicate directly with Mr Yukich about the next meeting. There was nothing unusual about this; for an employee to ask their employer to communicate through a representative during disciplinary proceedings is common practice. However, on 21 September Mr Lewis received a letter from Mr Hall about a meeting proposed for 24 September. The letter included the following:

“You are entitled to bring a representative with you to this meeting. However it is not our responsibility or obligation to arrange the meeting at the convenience of your Union representative.”

[32] It seems that the respondent left things at that and made no contact with Mr Yukich. However, at no stage did Mr Lewis request the disciplinary meetings to be deferred while he contacted Mr Yukich, signal that he was not happy to proceed without him, or even, it seems, try to arrange for Mr Yukich to be there. This is particularly odd given that he was a union delegate himself, and could be expected to have some knowledge of his rights in a disciplinary process.

[33] While City Care’s behaviour was certainly not appropriate (it does have to accommodate representatives, at least to a reasonable extent) the fact that Mr Lewis did not raise any issue with it means that I cannot hold Mr Hall responsible for the fact that Mr Lewis did not have his representative of choice present.

(v) Decision

[34] Mr Swannink determined the outcome of the disciplinary process after having been involved in only one meeting with Mr Lewis. Mr Yukich argues on Mr Lewis’s behalf that this is unfair.

[35] I am satisfied that the piecemeal approach to the investigation was unsatisfactory and calls into question Mr Swannink’s ability to evaluate all the

available information. I also note that unfortunately, neither Mr Swannink nor Mr Harris knew Mr Lewis very well at all and were unable to assess whether the conduct in question was out of character or not.

(vi) Disparity

[36] Witnesses for both parties gave evidence of another incident (not long before the one for which Mr Lewis was dismissed) which involved two members of Mr Buckley's team but resulted only in warnings to the two men involved. In certain respects this incident was more serious than the one which led to Mr Lewis's dismissal (it included physical shoving and pushing and more serious verbal abuse) in others, less so: the protagonists were on the same level of the organisation and both appeared to participate in it.

[37] In deciding to issue only warnings, the respondent also took into consideration the fact that neither of the men in that incident wanted the matter pursued. Unfortunately, however, the conflict between them continued to be an issue and to disrupt the working of the team (six fitters.) Mr Buckley had not been able to tackle the problem, possibly because he was younger and less experienced than any of the men in the team including the two who were feuding. Day to day responsibility for keeping relationships functioning fell largely to Mr Lewis, who played something of a mediator role between his workmates, possibly because of his position as union delegate. By 17 September, Mr Lewis was frustrated and tired of trying to manage a tense and awkward work environment which he felt it was Mr Buckley's job to fix. He told me the unfounded accusation about his sick leave use was even more annoying given the extra effort he felt he was putting into keeping the team on an even keel.

[38] I remained unclear just how much Mr Swannink knew about this background, but Mr Harris was aware of it as he was present, with Mr Buckley, when the incident occurred. I consider it relevant and consider that if Mr Swannink did not know of it, Mr Harris should have apprised him of the situation.

[39] I also record that the Authority heard evidence from a Mr Mayall who attested to having a conversation with Mr Buckley in which Mr Buckley expressed a wish to

get rid of Mr Buckley because he found him to be negative. This occurred some time before the incident of 17 September and came to Mr Lewis's notice after the disciplinary proceedings because, on hearing about them, Mr Mayall repeated the comment to a mutual acquaintance.

[40] The evidence of this witness is accepted. He was summoned and told the Authority that he had declined to give evidence without a summons because Mr Buckley was a friend. Mr Buckley did not recall making the comment but told the Authority there was no reason to doubt the witness's credibility.

[41] This information was not available to Mr Swannink at the time of his decision. However, because Mr Buckley was a manager within the organisation City Care must be deemed to have been on notice of it.

(vii) Summary and Determination

[42] I conclude as follows:

- i. The respondent failed to conduct a full and fair inquiry in that it did not put all of the information it had gathered to Mr Lewis for his response. It follows that the material which was not put to Mr Lewis must be excluded from the assessment of whether the dismissal was justified at the time. The dismissal falls to be justified on the basis of the agreed factual background: that is that Mr Lewis swore, raised his voice and called Mr Buckley a "*cock*;"
- ii. The explanation Mr Lewis gave weighs more heavily in the balance when set against the lower level of conduct established (that is, the level conceded by Mr Lewis.)
- iii. The dysfunction within Mr Buckley's team, including Mr Buckley's attitude to Mr Lewis, impacted on the relationship between Mr Lewis and Mr Buckley and the level of stress Mr

Lewis was experiencing at work. As relevant factual background it should have been taken into consideration;

- iv. The piecemeal nature of the investigation and the switching of decision makers compounded these failings, and
- v. There was a disparity of treatment between Mr Lewis and the other two men. Although worse in that it was his manager on the receiving end of Mr Lewis's swearing and shouting, the incident between Mr Lewis and Mr Buckley was not (by Mr Lewis's account) marred by the kind of seriously unpleasant abuse that characterised the other incident.

[43] Taking all these factors into consideration, I cannot conclude that this employer's actions, and how it acted, were what a fair and reasonable employer would have done in all the circumstances.

[44] The dismissal was unjustified.

(viii) Contributory conduct

[45] Notwithstanding these findings, I accept that the level of contribution in this case is high. At the Authority investigation meeting the respondent's original assessment of the seriousness of the incident was borne out. Mr Hall told me that for him, Ms Cunningham's evidence tipped the balance. It was much the same for the Authority. Ms Cunningham's evidence was credible in that she seemed to be disinterested, level headed, and genuinely concerned at the level of the outburst she overheard.

[46] I accept that the incident was as described by Ms Cunningham and that it was sufficiently serious to cause the complete breakdown of the relationship between Mr Lewis and Mr Buckley. I do not consider it practicable to require them to work together closely again.

[47] As agreed with the parties, I do not proceed to consider remedies, or costs at this stage. A follow up conference call will be convened to discuss how those issues are to be addressed.

Yvonne Oldfield

Member of the Employment Relations Authority