

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 1  
5355419

BETWEEN           ASHISH MAHARAJ  
Applicant

AND                 RECON PROFESSIONAL  
SERVICES LIMITED  
Respondent

Member of Authority:     G J Wood

Representatives:         G Bennett for Applicant  
                                  J Evans for Respondent

Investigation Meeting:    18 November 2014 at Wellington

Submissions Received:    18 November 2014

Determination:            8 January 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The sole claim to be determined is whether or not Mr Maharaj was justifiably dismissed for serious misconduct. Mr Maharaj claims that he did not use abusive threatening or offensive behaviour or language towards two of his superiors on 27 May 2011. He also considers that his dismissal was also procedurally unjustified, in particular because he was not provided with documentation that the employer (Recon) relied on, explanations relating to Mr Maharaj's conduct were not considered, Recon's investigation was insufficient, similar comments had been put down in the past to "banter" between staff, and because of bias and predetermination by Recon's decision makers. Recon denies all of the claims against it.

[2] The issues for determination are

- whether there was substantive reason for Mr Maharaj's dismissal;
- whether Recon sufficiently investigated the allegations against Mr Maharaj before dismissing him;
- whether Recon raised all the concerns that it had with Mr Maharaj before dismissing him;
- whether Mr Maharaj had a reasonable opportunity to respond to Recon's concerns before dismissal;
- whether Recon genuinely considered Mr Maharaj's explanations before dismissing him;
- whether any defects in the process followed by Recon were minor and did not result in Mr Maharaj being treated unfairly; and
- what remedies, if any, should be available to Mr Maharaj if his dismissal is found to be unjustified.

### **Factual discussion**

[3] One aspect of Mr Maharaj's employment relationship problem, namely whether or not his grievance was filed within 90 days, has already been determined by the Employment Court. In that judgment other matters relevant to this investigation were traversed and I adopt, especially given that there was no challenge to them at the Authority's investigation meeting, the findings of the Court in *Maharaj v. Recon Professional Services Ltd* [2014] NZEmpC 114, from para.[3] as follows:

*[3] ... Mr Maharaj commenced employment with Recon as a Mobile Security Officer on 23 November 2010. Recon is a security firm with its head office in Wellington. It has approximately 100 employees.*

*[4] Mr Maharaj's employment with Recon was not uneventful. On 21 February 2011 he received a written warning signed by the Managing Director, Mr Blair Malcolm, for "failing to follow procedures". The warning letter confirmed that there had been concern about his threatening behaviour towards another employee on 27 January 2011. As Mr Evans, counsel for the defendant, noted in his closing submissions, no personal grievance was raised within 90 days in relation to that written warning.*

[5] On 27 May 2011, Mr Maharaj received another letter from Recon, this time signed by the Operations Manager, Mr Scott Murray. The letter is important because it led to Mr Maharaj's dismissal on 3 June 2011. It read:

Mr Ashish Maharaj

...

27 May 2011

**NOTICE OF PERFORMANCE MANAGEMENT MEETING FOR  
SERIOUS MISCONDUCT**

Dear Ash,

This is a formal request to meet with you to discuss issues regarding your general performance, specifically:

*Threatening and offensive language used to other Recon staff members while conducting the Bravo patrol on Thursday 26th May 2011 because you were unhappy about the amended patrol run. Including words similar to "the changing of the run is all Nick's fault and that Nick is a fucking asshole that needs to be smacked over". Telling the Duty Supervisor to "fuck off" before hanging up the phone to him. While on the phone to the Duty Supervisor saying that Blair can stick his job and you would be more than happy to tell him what you think of his fucking company.*

*I have arranged for a meeting to be held at Recon Head office on Tuesday 31st May 2011 at 1330 hrs. It is recommended that you bring representation with you.*

*A possible outcome of the meeting could be that no further action is taken or you may receive a Written Warning. Depending on your report it is also possible you may have your employment terminated for Serious Misconduct.*

Yours faithfully,  
Scott Murray  
Operations Manager

***The disciplinary meeting***

[6] The disciplinary meeting scheduled for 31 May 2011 was adjourned until 2 June 2011 in order to enable Mr Maharaj to have representation. Mr Maharaj had Mr Phil Dixon as his support person. Recon was represented by Mr Malcolm and Mr Murray. Some brief handwritten notes made by Mr Murray show that the meeting commenced at 1.00pm and finished at 1.40pm.

[7] It was common ground that at the disciplinary meeting, Mr Murray had with him documentation relating to the complaints against Mr Maharaj which he was not prepared to disclose to Mr Maharaj or his representative. Mr Maharaj explained the situation in his examination-in-chief in these terms:

*... I then lost it and told him that this meeting isn't going anywhere and you can go fuck yourselves as he wasn't letting*

*me see or have copies of the documents that he had but was quoting from them. ...*

[8] *In his examination-in-chief, Mr Murray confirmed that Mr Maharaj had asked to see the documents he held in his hand. He told the Court that they comprised the original of the letter set out at [5] above plus two emails – one from Recon’s Duty Supervisor, Mr Peter Aldridge, (containing approximately 480 words) and the other from Mr Greg Darragh, Mobile Senior officer (containing approximately 230 words). They were both dated 27 May 2011 and timed at 12.44am and 4.09am respectively. They formed the basis of the complaint against Mr Maharaj. Mr Murray was then asked by Mr Evans what he did when Mr Maharaj asked to see the documents. The exchange is recorded in the transcript as follows:*

*Q. And what did you do?*

*A. I said I wasn’t going to hand the other documents over to him because everything in them was included in the paragraph 1 of the letter that he had received.*

*Q. And what happened after that?*

*A. Mr Maharaj kept arguing that point for a while but then he would no answer any – sorry the questions he did answer about the contents of paragraph 1 he just simply wanted to deny. He then accused myself and Mr Malcolm of being racist towards him.*

*Q. Why were you not prepared to give copies of those emails to Mr Maharaj?*

*A. At the time the contents of the letters, of the emails as you can see, were about his behaviour and his threatening manner. I felt that by handing over that information and letting him see who had written these emails directly, even though he knew who they were, would’ve inflamed the situation more and I did have a responsibility towards the staff who provided me the information and keeping them safe.*

[9] *In cross-examination Mr Murray was asked by Mr Bennett about other documentation which was before the Court that had not been provided to Mr Maharaj. One of the documents was a one and a half page set of notes made by Recon’s Operations Supervisor, Mr Heemi Mareikura, detailing a text message and telephone conversations he had with Mr Maharaj on 27 and 28 May 2011. Mr Murray confirmed that that document had not been given to Mr Maharaj but he said that it “was just a note to me to say that conversation had taken place” and it “wasn’t even considered in the dismissal process”. Another document was a one and a half page report from Mr Darragh relating to Mr Maharaj’s conduct giving rise to the investigation which was dated 28 May 2011 at 7.47pm. That document was headed “Statement about Ash”. Mr Murray described the document as “an internal email” and he confirmed that it had not been shown to Mr Maharaj.*

[10] *Mr Murray denied that at the end of the disciplinary meeting Mr Maharaj had said that he was going to the Employment Court. Mr*

*Murray's version of events was that as he tried to speak to Mr Maharaj he became "more enraged". Mr Murray continued:*

*I assured him that we would get further information from the people who had complained about him to compare it with his view of events. At this point he stood up and told Mr Malcolm and I to "go and fuck ourselves". He said he was "going on a hunger strike" and was "going to the press". The Plaintiff then stormed out of the office leaving Mr Malcolm and I with his representative.*

*[11] Mr Murray said that after the disciplinary meeting he obtained a written statement from Mr Aldridge and further details from Mr Darragh about the events giving rise to the complaint against Mr Maharaj. Both statements were reasonably detailed and were approximately one and a half pages in length. The evidence was that neither statement was shown to Mr Maharaj. The statement from Mr Aldridge was dated 2 June 2011 at 3.45pm. The statement from Mr Darragh was dated 3 June 2011 at 2.48am. In cross-examination Mr Murray was asked by Mr Bennett about the statement had had obtained from Mr Aldridge after the disciplinary meeting:*

*Q. Why didn't you show him that document?*

*A. Because there was nothing different in there as to what was spoken about on the same day, in the meeting. The facts of what we wanted to speak to him about, the serious misconduct parts of that were exactly the same. That statement is just reaffirming what I'd already what I'd already been told by the person.*

*Q. Wouldn't it have been fair to give Mr Maharaj that document?*

*A. I chose not to.*

### ***The dismissal***

*[12] Mr Maharaj told the Court that at about 9.18am on 3 June 2011 he received a telephone call from Mr Murray who advised him that he had Mr Malcolm with him. He said that Mr Murray told him that he was terminating his employment for serious misconduct. Mr Murray confirmed making the telephone call to Mr Maharaj on his cell phone. He said that after he advised Mr Maharaj that the company had decided to terminate his employment for serious misconduct "being the language used, and threats made to staff and management", Mr Maharaj hung up. The telephone conversation lasted for less than a minute. Mr Murray and Mr Malcolm were asked if Mr Maharaj had made any comment during the phone call. The only comment the two men could recall Mr Maharaj making was "something about his dog".*

*[13] On the same day Recon sent a letter to Mr Maharaj signed by both Mr Murray and Mr Malcolm confirming his dismissal for serious misconduct. The letter repeated the allegations contained in the first paragraph of the letter of 27 May 2011 (see [5] above) and went on to state: "with the evidence we have obtained and the information you have provided we are required to terminate your employment immediately for serious conduct." The evidence was that*

*Mr Maharaj would have received the letter on either 6 or 7 June 2011.*

[4] A lot of additional evidence was heard by the Authority, particularly about Mr Maharaj's behaviour during phone calls with his managers about changes to Recon's Hutt Valley runs that occurred on 26 March 2011. There is a dispute about what happened during those calls and one of the two supervisors involved was not called to give evidence. Mr Maharaj was questioned by me about that supervisor's report. Another supervisor involved, Mr Darragh, did, however, give evidence.

[5] I accept Mr Darragh's evidence that on Thursday 26 May 2011 he spoke to Mr Maharaj about run changes, the detail and finality of which Mr Maharaj was unaware of until that day, although there had been discussion and notification that changes would be forthcoming due to changes in clients' requirements. Mr Maharaj had been keen in prior discussions that he should keep the Wainuiomata pool as part of his run, (and in the middle of his shift) so that he could stop off at home to look after his dog during a break.

[6] Very soon after the call started Mr Maharaj started yelling at Mr Darragh and swearing at him about the changes and that they could not occur without consulting him. Mr Maharaj did not listen to Mr Darragh's explanation that information had previously been provided to him on this matter.

[7] Mr Maharaj was abusive and swearing and concerned in particular about how his night had been ruined, that things could not change without warning and that the company was *f...d*. He then told Mr Darragh that he was so annoyed (using swear words) that he was going to park the car up, leave it and walk home.

[8] At that point Mr Darragh decided that the only option was to hang up on Mr Maharaj because of his abusive language. Although Mr Darragh did not feel threatened himself, he was concerned as to what might happen if Mr Maharaj were to return to the office. Mr Darragh escalated the matter to his supervisor.

[9] I do not accept that Mr Darragh lied to Mr Maharaj or misled him about the changes to the run, but rather that Mr Maharaj had not been properly informed when the changes were to occur until the day they commenced in operation. Thus he was not informed when they were going to occur, although he was aware of changes being in the pipeline.

[10] Whatever the other supervisor's written account of his calls with Mr Maharaj state, it does not follow that simply because I have preferred Mr Darragh's evidence to Mr Maharaj's evidence wherever there was conflict (because Mr Darragh was prepared to make concessions and was conciliatory in his evidence) that I accept the emailed statement of the supervisor, who did not give evidence. There was simply no evidence to refute Mr Maharaj's evidence on any such disputed matters and I have therefore accepted it.

[11] In essence, therefore, while the bulk of the supervisor's email can be accepted, Mr Maharaj denied, and I accept, that he did not refer to a colleague as an *f...ing a...hole* that needed to be smacked over, that Recon could get *f.....d* or that Mr Maharaj told the supervisor to *f off* and hung up on him. I also do not accept that in the second call Mr Maharaj laid into the supervisor with abuse and foul language, but instead that he swore back at the supervisor. Furthermore, I conclude that Mr Maharaj did not say that the supervisor could *stick his job* and that he would be more than happy to tell Mr Malcolm what he thought of his *f...ing company* or that they were all a bunch of *fwits* who did not know what they were doing and could get *f...d*. However Mr Maharaj did accept swearing at the supervisor, that he should have been consulted over the changes and that he was angry and would be returning to base, while on his first call. He also accepted swearing and getting angry on the second call. On the other hand I accept that swearing was part of the workplace culture at Recon. The real issue is whether any person's behaviour (and not exclusively Mr Maharaj) was abusive. Here I accept Mr Maharaj's evidence that he was wound up by his supervisor and merely gave as good as he got.

[12] I turn now to the disciplinary meeting. Together with the letter outlining the reasons for the disciplinary interview, Mr Murray had an email from the supervisor and an email from Mr Darragh with him. I note that the focus of the letter was on comments allegedly made to the supervisor, but it refers to other Recon staff members, which presumably included Mr Darragh, although it is not clear from the letter who else might be involved. Therefore there was little in the letter about Mr Maharaj's comments to Mr Darragh. Further details were in fact set out in the two emails from Mr Darragh and two from the supervisor to which Mr Maharaj never got to have access. In fact two of these documents were not in existence and/or not in Recon's possession at the time of the disciplinary meeting.

[13] I accept that the letter does, however, cover the bulk of the supervisor's concerns, but even then there is more detail about his claims, as set out above, that Mr Maharaj would have been able to better respond to if he had been given a copy of the email, which could easily have been done. In particular, there are contextual matters about what Mr Maharaj is alleged to have done before the relevant phone calls. I do not accept there were any valid safety concerns that would have resulted if Recon had released the documents, as Mr Maharaj already knew who had complained about him and many of the serious allegations they had made, albeit without the full context. In addition, Mr Maharaj was never provided with copies of the company rules that he was being judged against. This was also relevant information to the disciplinary meeting.

[14] As noted above the meeting effectively went nowhere as Mr Maharaj simply denied the allegations and declined, as was reasonably open to him in the circumstances, to respond further without access to the source documents. The meeting was, however, also effectively derailed by Mr Maharaj storming out of the meeting and using abusive language.

[15] I note that while Recon could legitimately have pursued Mr Maharaj's behaviour at the meeting as an instance of further alleged misconduct it did not do so and did not rely on that behaviour as any part of its decision to dismiss. It is therefore not relevant to the assessment of whether his dismissal was justified.

[16] Instead, Recon dismissed Mr Maharaj during the course of a very short telephone discussion the next day. Its reason for dismissal was that it believed Mr Maharaj had used threatening and offensive language towards Recon managers on the night of 26 May 2011.

### **The law**

[17] The Employment Court also provided useful guidance to the Authority at paras.[33] and [34] as follows:

*[33] In failing to provide Mr Maharaj with a copy of the various reports it had obtained relating to the serious misconduct charge against him, Recon acted in breach of its statutory good faith obligations. Section 4(1A)(c) of the Act provides:*

**4 Parties to employment relationship to deal with each other in good faith**

...  
 (1A) *The duty of good faith in subsection (1) –*

- ...  
 (c) *without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –*
- (i) access to information, relevant to the continuation of the employees' employment, about the decision; and*
  - (ii) an opportunity to comment on the information to their employer before the decision is made.*

[34] *Whether Recon's failure to make the relevant documentation available to Mr Maharaj was sufficient to determine Mr Maharaj's dismissal unjustified is an issue which can only be determined at a substantive investigation or hearing. A further issue may arise as to whether Recon complied with the test of justification criteria outlined in s 103A of the Act. Suffice it to say, however, that the rules of natural justice and the good faith procedural requirements in the Act are intended to prevent the type of showdown that occurred at the disciplinary meeting in the present case when Mr Maharaj, feeling an undoubted deep sense of injustice, reacted in the way that he did by storming out of the meeting with a volley of threats and expletives.*

[18] Section 103A sets out the requirements in determining whether a dismissal is justified as follows:

*103A Test of justification*

- (1) For the purposes of section 102(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- (2) The test is whether the employer's action, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
- (3) In applying the test in subsection (2), the Authority or the Court must consider-*
  - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
  - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

- (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
  - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition the factors described in subsection (3), the Authority or the Court may consider any other factors it thinks appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-*
- (a) *minor; and*
  - (b) *did not result in the employee being treated unfairly.*

[19] The Court of Appeal has recently re-emphasised, in *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541, the importance of the requirements of good faith under s.4, described as the “overarching duty of good faith”.

### **Determination**

[20] As alluded to by the Employment Court, this is clearly a dismissal that is unjustified, at least in the way (i.e. how) Recon acted. A fair and reasonable employer could not have conducted a sufficient investigation, or have provided Mr Maharaj with a reasonable opportunity to respond to its concerns for dismissal, without providing him with full information. This is clear from s.4(1A)(c)(i), which requires the access to information relevant to the continuation of an employee's employment about the decision and an opportunity to comment on the information to their employer before the decision is made.

[21] As I have noted above, there was insufficient information provided to Mr Maharaj in order for him to respond. Similarly, while this could have been remedied by the provision of the information, Recon refused to provide it to Mr Maharaj when he forcefully requested it on several occasions. All that was required from Recon was to photocopy two short documents and provide them to Mr Maharaj with any deletions as might have been necessary, although it was difficult to see that any were required in any event.

[22] Recon, therefore, must bear the major responsibility for its failure to provide this information and its insistence on continuing its investigation, resulting in summary dismissal, without involving Mr Maharaj any further. These errors were further compounded by Recon's reference back to Mr Darragh and the supervisor without informing Mr Maharaj of the outcome of those discussions.

[23] As a result of the above flawed process, Recon also failed to provide Mr Maharaj with an opportunity to comment on its proposed outcome of summary dismissal. It is well established law, see for example *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, that an employer must consider an employee's overall work history before dismissal and thus an employee is entitled to an opportunity to make submissions on why they should not lose their job.

[24] I do not accept, however, that Recon had predetermined the outcome or was biased against Mr Maharaj. While Recon did not properly involve Mr Maharaj in its disciplinary process, he made this more difficult for it through his belligerent behaviour at the investigation meeting.

[25] The above failures in the process were so substantial as to mean that any grounds Recon may have had to dismiss Mr Maharaj for his behaviour on the night could not be established in all the circumstances at the time. The dismissal was therefore unjustified.

[26] Mr Maharaj gave clear evidence about how significantly his dismissal had impacted on his life. On the other hand, this evidence was not corroborated in any way. In these circumstances, I consider that an appropriate award of compensation under s.123(1)(c)(i) would be \$5,000, subject to contribution.

[27] Mr Maharaj also seeks lost remuneration for the period in excess of three years since his dismissal. I conclude that his lost remuneration should not extend beyond three months. Three months remuneration based on a 40 hour week at \$14.50 per hour, as claimed, is \$7,540.

[28] There are two main reasons for limiting lost remuneration to three months. First, Mr Maharaj was unable to provide sufficient material to show that he had mitigated his loss. While Mr Maharaj stated that he had been on a WINZ benefit throughout, there was no independent evidence to support this. Furthermore, his oral evidence indicated that he had applied for few if any job vacancies in over three years.

He referred to inquiring with some public service employers and looking for work through word of mouth. This is quite insufficient mitigation for any claim, let alone a claim of this magnitude. Second, Mr Maharaj had only been employed by Recon for around six months. In that time he had had been in receipt of a number of warnings, including a warning for similar behaviour, namely the abuse of other employees. In these circumstances, I can have no confidence that Mr Maharaj's employment would have lasted more than three months.

[29] The Authority must assess Mr Maharaj's contribution to the situation that gave rise to his dismissal. Such actions must equate to blameworthy conduct. There were a number of blameworthy actions by Mr Maharaj that are relevant. First, there is Mr Maharaj's abusive behaviour towards Mr Darragh, as set out in the facts section. Such actions are blameworthy, cannot be condoned and had to be investigated by Recon, who owe a duty to its other employees to provide a workplace safe from the conduct such as that of Mr Maharaj towards Mr Darragh. However Mr Darragh never felt personally threatened, otherwise there may have been a 100% reduction in the remedies.

[30] Second, while Mr Maharaj was justifiably concerned about Recon's failure to provide him with relevant documentation, his behaviour at the disciplinary meeting was unacceptable. There were no grounds for him to accuse Recon's senior management of racism, or to otherwise be abusive as he was at the disciplinary meeting. Ironically, this made it less likely that Recon was ever going to accede to his request to provide further information that its staff had provided to it, even although that was the correct thing to do in law. Similarly, it cannot be acceptable behaviour at any time, let alone in a disciplinary meeting, to abuse and swear at one's senior managers, particularly where such behaviour was not being mirrored by the employer.

[31] On the other hand, there were, as set out above, serious failures by Recon in the way that it dealt with the investigation into Mr Maharaj's conduct. Balancing all these factors, I consider that an appropriate reduction for contribution is 50%.

[32] I therefore order the respondent, Recon Professional Services Limited, to pay to the applicant, Mr Ashish Maharaj, the sum of \$2,500 in compensation and \$3,770 gross in lost remuneration.

**Costs**

[33] Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**