Determination Number: AA 144/06
File Number: AEA 821/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Brian McGeown (Applicant)
AND	Manchester Property Care Limited (Respondent)
REPRESENTATIVES	Clive Bennett, Advocate for Applicant Mike Mulholland, Advocate for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	31 January 2006 16 February 2006
SUBMISSIONS RECEIVED	28 February 2006 from Applicant 1 March 2006 from Respondent
DATE OF DETERMINATION	28 April 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Manchester Property Care Limited ("Manchester") contracts to provide commercial cleaning and security; food services; washroom hygiene; car valet and airport services, to its clients.

[2] Mr Lance Pearson is the Auckland Branch Manager and Mr Henk Kwakernaat is one of three operations managers reporting to him.

[3] Mr McGoewn commenced employment with Manchester on 9 August 2004. He was employed as a Cleaner/Custodian and worked on a specified client site. Mr McGoewn's hours of work were 7.00am – 1.30pm each day. These hours were altered by agreement on 7 September 2004 when Mr McGoewn's finish time was extended to 2.00pm. Mr McGoewn reported to Mr Kwakernaat. Mr McGoewn worked without supervision in his role although Mr Kwakernaat had occasion to visit the site and discuss issues with Mr McGoewn.

[4] On 13 September 2004 Manchester received a complaint from its client that Mr McGoewn had failed to clean the boundary fence, which had needed attention for some time, and that Mr

McGoewn had complained to an employee of the client that the contract between the two companies did not allow enough time to undertake all his duties. Mr Pearson contacted Mr McGoewn and told him he [Mr Pearson] did not want Mr McGoewn going to the client to discuss contractual matters. The following day, Mr McGoewn approached the CEO of the client directly and discussed contract issues with him.

[5] Mr Brian McGeown was dismissed from his employment for disobeying a lawful and reasonable instruction in that he deliberately and wilfully discussed contract matters with the client of Manchester after being told specifically not to. Mr McGoewn says that dismissal was unjustified.

[6] The respondent denies the dismissal was unjustified.

[7] The issues for determination are:

- Did the employer carry out a full and fair investigation into the misconduct?
- Was the decision to dismiss one that was open to a fair and reasonable employer?

Did the employer carry out a full and fair investigation into the misconduct?

[8] Fairness and reasonableness requires that an employee is given an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct (*NZ (with exceptions) Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

[9] It was common ground that after two days of employment Mr McGoewn had been late for work on both mornings. Mr McGowen accepted at the investigation meeting that Mr Kwakernaat raised the issues of lateness with him and discussed the importance of punctuality. Mr Kwakernaat says Mr McGoewn seemed unconcerned about his behaviour.

[10] On 26 August 2004 Mr Kwakernaat received a call from Mr Iain Butler, maintenance supervisor of the client Mr McGoewn was providing cleaning services to. Mr Butler complained that the canteen was a mess with dirty cups left unwashed. Mr Kwakernaat was concerned that the mess in the canteen would adversely affect staff employed by the client and who were due to commence work at 3.00pm that day. Mr Kwakernaat immediately attended the client's site and

mopped the canteen floor and did the dishes. On 27 August 2005 Mr McGeown was reprimanded for his failure to ensure the canteen was left clean and tidy.

[11] As a result of further complaints about the cleaning undertaken by Mr McGoewn, a meeting was arranged for 7 September 2005 to discuss the duties required to be carried out by him and another Manchester employee Ms Aroha Paulo. Mr Kwakernaat, Mr McGeown, Ms Paulo and Mr Butler, were present at the meeting. During the meeting all the cleaning requirements for the client were discussed and a schedule of duties including indicative times for the duties to be undertaken were agreed by all parties including Mr McGeown.

[12] According to the schedule Mr McGeown was to complete the cleaning of the boundary fence between 12.00 and 1.30pm. Mr Butler approached Mr McGeown at about 1.30pm on Monday, 13 September 2005 and asked Mr McGeown to clean the rubbish from around the boundary fence. Mr McGoewn told Mr Butler it wouldn't be done as he had to leave at 2.00pm for an appointment.

[13] Mr Butler then rang Mr Pearson and complained that the boundary fence had not been cleared for some time and that the rubbish was building up along the fence to the motorway. Mr Butler told Mr Pearson that he had asked Mr McGeown to clean the rubbish up, but Mr McGeown had refused as it was only ½ an hour until his finish time.

[14] Mr Pearson immediately contacted Mr McGeown and instructed him to stay at work and complete the task. Mr McGeown explained to Mr Pearson that he could not stay as he had to attend an appointment. Mr McGeown was asked to keep his cell phone on in order that Mr Pearson could make contact with him.

[15] Mr McGeown then approached Mr Butler and told him the tasks on the new schedule could not be completed in the timeframe required, and that the new schedule did not have enough hours in it.

[16] Mr Butler then relayed this conversation to Mr Pearson complaining that Mr McGoewn had discussed contractual matters with him. Mr Pearson contacted Mr McGeown at about 8.00pm that evening after several failed attempts. Mr Peason told Mr McGeown that he would have to attend a disciplinary meeting on the 15 September 2005 to discuss ongoing performance problems.

Mr McGoewn was advised that the meeting may result in disciplinary action being taken and that he was entitled to representation. Mr Pearson also told Mr McGeown:

> I would appreciate it if you didn't go and discuss the issues between Manchester and yourself with Moore Gallagher. I don't think it's doing the relationship any favours and it's a very important contract for us. I don't want you going to the client and discussing contract matters. Do you agree with this?

[17] Mr McGeown's response, somewhat surprisingly, was "No, I don't agree". In response to questions at the investigation meeting Mr McGoewn acknowledged that it was clear from this conversation that Mr Pearson did not want him talking directly to the client about contractual matters.

[18] The following morning, on 14 September 2004, Mr McGeown approached both Mr Peter Graham and Mr Sam McCann, of the CEO and Operations Manager of Manchester's client. He expressed his view that there were insufficient hours within the cleaning contract to complete all the tasks required. In answer to questions at the investigation meeting about why Mr McGoewn took this action when he had been told not to discuss matters with the client, Mr McGoewn told the Authority that …I took it upon myself. I am experienced at talking to clients."

[19] The disciplinary meeting to discuss performance issues went ahead on 15 September as planned. During the meeting the issue of Mr McGoewn approaching the client's CEO was raised and Mr McGoewn's explanation sought. Minutes of the meeting, which were confirmed by Mr McGoewn at the investigation meeting recorded Mr McGoewn's response to the company at that time as being:

> … he felt [Mr Pearson] was wrong and he felt no guilt about having taken the action. He said he would only apologise half-heartedly. [Mr McGoewn] went on to say that he has had the same sort of arguments with the managers of other cleaning companies and that if he was directed not to discuss contract matters with the client in future he would probably comply, reluctantly.

[20] Mr McGoewn was advised that the nature of the disciplinary meeting had changed and the company wished now to escalate the matter to one of serious misconduct for Mr McGoewn's deliberate disobeying of an instruction from his manager. Mr McGoewn was provided an opportunity then to adjourn the meeting to enable him to reconsider whether he wished to have representation at the meeting.

[21] Mr McGoewn expressed his desire to continue with the meeting to resolve the issues. Following further discussion the meeting was adjourned briefly. On reconvening the meeting Mr

McGoewn was advised that the company were treating his approach to the client's CEO as serious misconduct and that dismissal was a possibility. Mr McGoewn was advised that Manchester would consider a final written warning if Mr McGoewn could provide an assurance that he would work as directed in the future. Mr McGoewn responded that he was completely without contrition and felt no guilt about what he had done. The meeting ended with a further meeting being arranged for 17 September 2004.

[22] The serious misconduct issue traversed at the meeting on 15 September 2004 was confirmed in writing to Mr McGoewn in a letter of the same date. The meeting for 17 September was also confirmed and Mr McGoewn was suspended on pay pending the resolution of the matter.

[23] At the investigation meeting Mr Pearson confirmed that the fact of suspension was never put to Mr McGoewn for his response before the decision was made to suspend him.

[24] The minutes recorded from the 17 September 2004 meeting show that Mr McGoewn was given a full opportunity to provide an explanation as to why he approached the client and discussed contractual issues directly after being informed he was not to do so. He was aware prior to the meeting that the company regarded the matter seriously and the consequences included possible dismissal. Mr McGoewn was provided with opportunities to seek representation. He chose not to do so.

I am satisfied that the investigation carried out by Manchester was a full and fair investigation.

Was the decision to dismiss one that was open to a fair and reasonable employer?

[25] Mr McGoewn was dismissed for failing to comply with a lawful and reasonable instruction.

[26] For an instruction to be lawful it must not be illegal, be within the scope of the agreement, and must not demand the performance of any impossible or dangerous task (*Wellington etc Clerical etc Workers IUOW v College Group Limited* [1984] ACJ 315).

[27] Mr McGoewn was told twice (once on 7 September and again on 13 September 2004) by his employer not to talk directly to client's about matters to do with the contract between the company and its client. Mr McGoewn was employed by Manchester not the client. The

instruction to Mr McGoewn not to discuss contractual matters with clients was not illegal and was within the scope of the employment agreement. The instruction was not impossible nor was it in any way dangerous. It was therefore a lawful and reasonable instruction. I now turn to consider whether the decision to dismiss was one open to Manchester to make.

[28] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

> … an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[29] When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct but whether the employer had reasonable grounds for believing that there was misconduct.

[30] In *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal at paragraphs [31] and [32] said that

> The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of "could" rather than "would" used in the formulation used in the second *BP Oil case* [1992] ERNZ 483 (CA) at 487.
>
> The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

[31] In *Oram* the Court of Appeal held that if a fair and reasonable employer is able to view the conduct disclosed by its investigation as deeply impairing of the basic trust and confidence essential to the employment relationship, it is hardly necessary for the employer to consider whether in all the circumstances the employee ought to be dismissed, since dismissal will be within a range of disciplinary measures available to the employer for it to choose from.

[32] Mr McGoewn received a copy of the Manchester Staff Information booklet which included the Manchester's code of conduct. According to the code of conduct, refusal to obey a lawful and reasonable instruction is deemed by the company to constitute serious misconduct. During the meeting on 15 September 2004 Mr McGoewn told Mr Pearson that he hadn't read it because he had a good idea of what the terms and conditions for cleaners were and did not need to read it.

[33] During his explanations on 17 September 2004 Mr McGoewn relayed his understanding that employers in the cleaning industry take seriously the issue of staff talking to clients about contractual matters. He referred to a similar situation he had encountered when employed by Sail City Cleaners. He told Mr Pearson that Sail City Cleaners had regarded his unauthorised communications to its clients very seriously.

[34] I consider that Mr McGoewn's employment experience was such that he was well aware that refusing to obey and instruction from his employer not to talk to clients about contractual matters was considered to be serious misconduct.

[35] During the disciplinary meeting on 17 September 2004, Mr McGoewn told Mr Pearson that when he said on 13 September 2004, that he did not agree not to discuss contractual matters with clients directly, he meant that he disagreed in principal that cleaners should not communicate employment related matters to the client but felt at liberty to express his frustrations at the constraints posed by the contract.

[36] Manchester told the Authority that Mr McGoewn's actions were of great concern to the client. In an email dated 14 September 2004, Mr Butler told Mr Pearson:

> The CEO felt that it was not his problem and summoned the Operations Manager. He also believed the issue was between [Mr McGoewn] and Manchester. Neither was he particularly impressed with being drawn into the issue. If senior management did not know before that there were issues with the cleaning contract they do now.
>
> Brian also bailed me up in my office yesterday afternoon after you had spoken to him regarding the parimeter cleaning. Lance, enough is enough.

[37] Mr Pearson provided Mr McGoewn with an opportunity to suffer lesser penalty than dismissal on the priviso that he would undertake not to discuss contractual matters with the client in the future. Mr McGoewn was unable to give Manchester an emphatic undertaking and in fact, during the disciplinary process and at the investigation meeting he consistently expressed his view that he had a right to express himself to the client as he saw fit.

[38] For these reasons Manchester determined it could no longer have confidence in Mr McGoewn not to repeat his conduct, and that Mr McGoewn's continued employment could put its relationship with it's client at risk.

[39] I consider in the circumstances of the instant case, the decision made by the employer was substantially fair and reasonable according to the standards of a fair-minded but not over-indulgent person, I conclude that it was fair and reasonable.

[40] It follows that I must find that the dismissal of Mr McGoewn was justified and that Mr McGoewn does not have a personal grievance and hence the remedies that he seeks are declined

Disadvantage Grievance

[41] Mr Bennett submitted that Mr McGoewn be compensated for a separate personal grievance for unjustified disadvantage suffered as a result of the employer's failure to consult over the suspension.

[42] Section 122 of the Employment Relations Act 2000 allows the Authority to find a grievance is of a kind other than alleged. Section 122 can apply when the factual matrix advanced in support of an alleged grievance such as a dismissal, does not support the existence of a dismissal although it may support the existence of another kind of grievance, such as a disadvantage (see *New Zealand Van Lines Limited v Gray* [1999] 1 ERNZ 85 (CA)).

[43] However, section 122 is not intended to allow parties to ignore the provisions regarding the raising of personal grievances within 90 days, as contained in ss 114 and 115. If I were to accept it, which I do not, the submission would have that effect. Mr McGoewn never complained about the suspension at the time of raising his grievance for unjustified dismissal. The possibility of a disadvantage grievance only arose during the course of the investigation meeting which was well outside the 90 day time period.

Costs

[1] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority