

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 449
5404069

BETWEEN MARKO OTIS
 Applicant

A N D BUNNINGS LIMITED
 Respondent

Member of Authority: K J Anderson

Representatives: Tina Alach, Advocate for Applicant
 David France, Counsel for Respondent

Investigation Meeting: 11 June 2013 at Auckland

Submissions Received: 18 June 2013 from Applicant

Date of Determination: 1 October 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Marko Otis, claims that he was unjustifiably dismissed on 31 October 2012. Mr Otis asks the Authority to find that he has a personal grievance and award him various remedies. Conversely, the respondent, Bunnings Limited (Bunnings), says that the dismissal of Mr Otis was justifiable due to serious misconduct involving a breach of health and safety obligations.

[2] The Authority heard evidence from Mr Otis, Ms Tina Alach and Mr Laurie Stowers. For Bunnings, there is evidence from: Mr Ryan Sylvester, Mr Trip Willie Upoko, Mr Des Bickerton, Mr Dion Orbell, Mr Matthew Cardey, Mr Greg Dalley, Mr Mark Haddon, Mr Avi Chandra and Mr Stephen Hawkins.

[3] The Authority has also received a number of relevant documents and CCTV/ video footage pertaining to the circumstances leading to the dismissal of Mr Otis. All of the material evidence has been closely considered albeit it may not be specifically referred to in this determination.

Background

[4] From 12 May 2008 until 31 October 2012, Mr Otis was employed as an Account Manager by Bunnings. At the material times, Mr Otis was employed at the Bunnings East Tamaki Trade Centre (the Trade Centre).

The incident on 19 October 2012

[5] Mr Greg Dalley is also an Account Manager employed by Bunnings at the Trade Centre. He was on leave on 19 October 2012 but came into the Trade Centre to sort out some paperwork. Mr Dalley arrived on his 1300cc motorcycle (the bike) and parked it inside the Trade Centre just off the access thoroughfare.

[6] Mr Otis showed some interest in the bike and asked Mr Dalley if he could take it for a ride. Mr Dalley agreed. Mr Dalley's safety helmet was available but Mr Otis chose not to wear it. The evidence of Mr Dalley is that Mr Otis handed the helmet back to him before mounting the bike. Also present was Mr Ryan Sylvester, another Bunnings employee, employed in the role of Trade Support. His evidence is that Mr Otis took the helmet to the trade counter before leaving on the bike. Not much rests on what happened to the helmet as it is commonly accepted that Mr Otis chose to ride the bike without wearing a safety helmet. His explanation for this is that because it was a full face helmet with a visor, and he suffers from claustrophobia, he was not able to wear it. However, it appears that he never offered this information during the disciplinary investigation and this explanation came some time later.

[7] Mr Sylvester attests to Mr Otis riding the bike through the Trade Centre aisle and stopping briefly to move a pallet that was blocking his progress. Mr Otis says that he was "straddling/walking" the bike in the aisle between the Trade Centre wall racking and the first row of racking, but Mr Sylvester disputes this. While the CCTV footage shows Mr Otis straddling the bike with both feet on the ground at one point, it is clear from other camera footage that when he exited the Trade Centre, he was

obviously riding the bike, that is, seated with both feet on the footrests and going forward at a reasonable pace.

The investigation

[8] Mr Matthew Cardey is employed by Bunnings in the role of Area Sales Manager – Northern Region. Upon becoming aware that Mr Otis had been riding the bike within and around the Trade Centre on 19 October 2012, he conducted an investigation into the circumstances.

[9] Mr Cardey wrote to Mr Otis on 19 October 2012¹ inviting him to attend a formal meeting on 23 October 2012 to: “...discuss concerns about your use of a motorcycle within the confines of the trade centre at East Tamaki”. Mr Otis was informed that the issue was serious, that disciplinary action may result, and he could bring a support person.

The disciplinary meeting – 23 October 2012

[10] The evidence of Mr Cardey is that he advised Mr Otis of the company’s concerns in regard to riding the bike around the Trade Centre vicinity and through aisles where no vehicles were allowed; then proceeding to ride out into a busy public road without wearing a helmet. Mr Otis was informed that his actions were considered to be “very dangerous”, particularly given that forklifts operate in the areas where he rode the bike and team members are often present carrying heavy items.

[11] When asked to respond, Mr Otis said that he “wheeled” the bike through the Trade Centre aisles rather than riding it. Other than this purported defence, Mr Otis admitted the conduct in question and said that he “had a brain explosion” and “didn’t know what got into him”. Both of these statements are recorded in the *Record of Discussion/Meeting* document produced to the Authority. It is not disputed by Mr Otis that he made these statements. It is also recorded that Mr Otis was “very sorry” for his actions.

[12] The evidence of Mr Cardey is that Mr Otis agreed with him about the dangers associated with the bike ride. Mr Cardey attests that Mr Otis appeared remorseful as the full danger of his actions “sunk in”.

¹ The letter records (x 2) the year “2013” but clearly these are typing errors.

[13] The evidence of Mr Cardey is that the meeting lasted about 15 minutes, albeit Mr Otis says it was brief: six to eight minutes. But in any event, there is no dispute about what was discussed and the outcome. Mr Cardey says that he adjourned the meeting to allow Mr Otis an opportunity to arrange a support person and/or seek advice if he wished to do so². Mr Cardey attests that at the conclusion of the meeting he informed Mr Otis that the CCTV video footage was going to be viewed and that Mr Otis could come and see it also. Mr Cardey says that Mr Otis turned down the opportunity to view the footage saying that he did not need to see it; saying: *“I know what I’ve done”*.

The disciplinary meeting – 31 October 2012

[14] A further disciplinary meeting with Mr Otis took place on 31 October 2012. The evidence of Mr Cardey is that following the meeting on 23 October, he interviewed a number of employees who were present on the day that Mr Otis rode the bike. The purpose of the meeting was to provide Mr Otis with an opportunity to respond to the allegation against him, before a decision was made in regard to appropriate disciplinary action. Mr Otis was accompanied by a support person, another Account Manager employed by Bunnings, Mr Laurie Stowers.

[15] Following some discussion about the incident that occurred on 19 October 2012, including some input from Mr Otis and Mr Stowers, the outcome of the meeting was that Mr Otis was dismissed.

[16] A comprehensive letter dated 1 November 2012, confirming the dismissal, summarises the circumstances that existed; hence it is reproduced below:

Dear Marko,

As you know, an allegation of misconduct has been made against you, and has now been carefully investigated. Specifically, the allegation was that, on 19 October 2012 at the East Tamaki Trade Centre, you:

- You got on a motorcycle that was not yours while you were at work for Bunnings Limited without using a helmet that was available.
- You then proceeded to ride this motorcycle through the trade centre ignoring the directional flow of arrows for vehicles and riding through aisles where there is no vehicle access as it is where forklifts operate.

² While Mr Otis had been informed he could have a support person at the meeting, he chose not to do so.

- During your several laps through and around the trade centre you also thought it fit to go out onto the busy Cryers Road East Tamaki without a helmet on.
- During this 5 minutes of dangerous behaviour your speed during the majority of this period was unacceptable. Dangerously and narrowly missing a team member as you came around a corner again against traffic flow where Forklifts operate at speed.
- 3 weeks previous to this on the 26th of September we had a meeting, which involved a presentation of our safety obligations and the example you set as a leader in our business when it comes to safe behaviour. You actively took part in this meeting and put forward a suggestion during this presentation.
- Also you have received safety briefings at each regional team meeting, trade centre team meetings including safety messages presented at Bunnings conferences.
- Finally during this entire incident many team members witnessed this behaviour and there was no remorse or thought of wrongdoing on your behalf until I questioned you about it over the phone later that day and discussed how dangerous this action had been.

The allegation was put to you and discussed at a meeting with you on 23/10/2012. You were given an opportunity to respond to the allegation again on 31/11/2012 and your response was carefully considered as part of the investigation carried out by Des Bickerton, Dion Orbell and myself. In summary your response to the allegation was:

- You had a brain explosion and extremely sorry for your action.
- Didn't know what had got into you.
- You told us that you had not ridden the motorcycle up the aisles where traffic is not allowed but pushed it.
- Your support person Laurie Stowers' comment was "you can't excuse the inexcusable".

The results of the investigation are summarised here:

- Viewed all security footage.
- Statement of wheeling the motorcycle through the aisles is incorrect.
- Helmet was available but was deliberately taken back to the owner of the bike before you mounted it and rode it.
- Customers were using the trade centre, forklifts were operating. Team members were performing their duties.
- For a period of five minutes you continued with this reckless behaviour at speed.

These findings were presented to you and discussed at a meeting on 31/10/2012, at which you were accompanied by Laurie Stowers.

After considering the findings of the investigation and your response, we have concluded that the allegation of misconduct is justified. Furthermore, your actions and behaviour were completely unacceptable to this organisation, and the misconduct is serious enough to warrant immediate termination of employment.

[17] Mr Otis says that the dismissal was unjustified because Bunnings failed to enter into “a robust and genuine” investigation process before determining if he should be dismissed. It is also argued that the process by which the dismissal was implemented was “careless”. Criticism is also levelled at Bunnings in that it is alleged that the company failed to apply its core company values to the circumstances pertaining to the dismissal of Mr Otis. Reference is made to certain values such as integrity and accountability.

[18] The submissions for Mr Otis refer to him being a top performer and a team player in the company and that it was therefore unfair that he should be dismissed over a “one-off” incident.

[19] Mr Otis also referred to several examples of other incidents involving alleged misconduct by other employees where the outcome was not as serious as dismissal. Apart from Mr Cardey giving what appeared to be reasonable explanations in regard to the other “incidents”, there is no tangible or corroborative evidence available to establish that there is any disparity between the circumstances of Mr Otis and the examples that he has referred to.

[20] Finally, Mr Otis alludes to Mr Chandra, the Trade Centre manager, not being concerned about Mr Otis riding the bike in and around the Trade Centre. Reference is made to Mr Chandra making a comment: “vroom vroom” to Mr Otis; an apparent reference to the bike ride. But the evidence of Mr Chandra is that he did not give Mr Otis permission (express or implied) to take the bike for a ride as occurred. Mr Chandra attests that he did not know that Mr Otis was going to act as he did. In regard to the “vroom vroom” comment, Mr Chandra told the Authority that he just wanted to “cheer people up”. This explanation was not particularly convincing and I conclude that there may be some merit in the view espoused by Mr Otis that Mr Chandra was not particularly concerned about the incident. On the other hand, Mr Chandra does not have any line management responsibility for Mr Otis and the disciplinary process was conducted by a more senior manager, Mr Cardey, who clearly was concerned about the actions of Mr Otis.

Analysis and conclusions

[21] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test:

... whether the employer's actions and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.³

[22] And then in applying the test, the Authority 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

[23] It is submitted for Mr Otis that Bunnings failed in its obligation to carry out a thorough and genuine investigation before determining if he should be dismissed. It is said that Bunnings failed in its obligation to undertake a fair process. But having perused all of the evidence closely, I am satisfied that the process used by Bunnings was appropriate and that each of the essential criteria (above) was met.

[24] In regard to the substantive reason given for the dismissal, while Mr Otis acknowledges the importance of upholding health and safety standards, it is argued that because he had not attended a "Site Safe" course, this should have been taken into account as a mitigating factor and Bunnings should have seriously considered an alternative to dismissal.

[25] As I understand it, the Site Safety course is additional training that Mr Otis could have participated in if he had made a request to do so. When it was put to him what difference attending the Site Safety course would have made, Mr Otis responded that he would not have behaved as he did in regard to riding the bike.

[26] However, I am satisfied that apart from the Site Safety course, Bunnings has consistently emphasised the importance of all employees engaging in appropriate

³ Section 103A(2) Employment Relations Act 2000

⁴ Section 103A(3) Employment Relations Act 2000

health and safety practices in the workplace. This was confirmed by witnesses for the respondent. I also note that safety in the workplace has been an important part of the company's national business conference in July 2012 and the Accounts Managers' national conference in May 2011. And as recently as 26 September 2012, three weeks before the incident, Mr Otis attended an Account Managers' regional meeting where attendees were advised of the importance of safe behaviour in the workplace.

[27] Additionally, there are a number of specific provisions within the employment agreement of Mr Otis whereby he is required to:

... take all reasonable steps to ensure your own safety and to ensure that your action or inaction, while at work does not cause harm to any other person.

[28] It is also provided that: "serious breaches of safety policy may result in dismissal"⁵.

[29] In summary, I am satisfied that Mr Otis was well aware of the importance that Bunnings places on health and safety in the workplace, as evidenced from the material that is available, his induction process, and the response of Mr Otis in regard to the relevant questions put to him by Mr France during cross-examination.

[30] Mr Otis has also alluded to Mr Chandra giving his consent to ride the bike in the manner that Mr Otis did. But I conclude that Mr Chandra did not give any consent, express or implied, for Mr Otis to act as he did.

Determination

[31] It is most regretful that the career of Mr Otis with Bunnings ended in the manner that it did, particularly as it appears that he was highly regarded by his colleagues and managers. But as the submissions for Bunnings succinctly portray, Mr Otis:

- (a) Was not authorised to drive or operate any vehicles in the trade centre (except insofar as he may have driven a car through the vehicle bay to pick up goods for delivery to a customer);

⁵ Clause 9 of the individual employment agreement

- (b) Drove a motorcycle down an aisle where vehicles are not permitted and where team members operate forklifts and frequently physically carry items of timber;
- (c) Drove the wrong way against the directional flow of arrows in areas where forklifts operate;
- (d) Drove through yard areas which are forklift only areas;
- (e) Failed to wear a helmet whilst riding around the trade centre and also he proceeded out onto the busy Cryers Road, East Tamaki without a helmet on;
- (f) Rode the motorcycle at dangerous speeds in areas where forklifts operate, team members are carrying out their duties and trade customers walk around; and
- (g) Engaged in this behaviour for several laps of the trade centre for approximately five minutes.

[32] The circumstances pertaining to the dismissal of Mr Otis are most unfortunate, but on the weight of the evidence available, I am left to conclude that, following a fairly conducted investigation, Bunnings was entitled to treat the action of Mr Otis as a serious breach of its health and safety requirements and hence serious misconduct had occurred.

[33] The Court of Appeal in *W&H Newspapers Ltd v. Oram*⁶ confirmed that there may be more than one correct response open to a fair and reasonable employer. And while for some, the dismissal of Mr Otis may seem to be a harsh sanction, the issue for the Authority to determine is whether it was open to Bunnings, acting fairly and reasonably, to have concluded that dismissal was the appropriate response to the conduct of Mr Otis.

[34] I find that having conducted a proper investigation and having met the other essential criteria set out in s.103A(3) of the Employment Relations Act 2000, the dismissal of Mr Otis was what a fair and reasonable employer could have done in all the circumstances; hence the dismissal was justifiable.

⁶ [2000] 2 ERNZ 448

Costs

[35] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file a memorandum with the Authority. The applicant has a further 14 days to file a memorandum in response.

K J Anderson
Member of the Employment Relations Authority