**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2016] NZERA Auckland 254
5585154

| | | |
|---|---|---|
| | BETWEEN | BILLEY JAHVOR PAGE-SMITH<br>Applicant |
| | A N D | DRILLFORCE NEW ZEALAND LIMITED<br>Respondent |

| | |
|---|---|
| Member of Authority: | T G Tetitaha |
| Representatives: | K Fayen, Advocate for the Applicant<br>M Kamphorst, Advocate for the Respondent |
| Investigation Meeting: | 22 July 2016 at Auckland |
| Submissions Received: | 22 July 2016 from both parties |
| Date of Oral Determination: | 22 July 2016 |
| Date of Written Determination: | 26 July 2016 |

---

**ORAL DETERMINATION OF THE AUTHORITY**

---

**A.** **Billey Page-Smith was unjustifiably dismissed by Drillforce New Zealand Limited.**

**B.** **Drillforce New Zealand Limited is ordered to pay compensation of $2,500 to Billey Page-Smith pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.**

**C.** **Drillforce New Zealand Limited is ordered to pay Billey Page-Smith the sum of $1,750 as a contribution towards his costs.**

**Employment Relationship Dispute**

[1] This case is about a dismissal that occurred in June 2015 as a result of allegations of verbal abuse by Billey Page-Smith towards a bar patron in the Warkworth area.

**Relevant Facts**

[2] Mr Page-Smith was employed by Drillforce NZ Limited (Drillforce) as a driller on or about 18 October 2010.

[3] In February 2015, Drillforce was awarded the New Zealand Transport Agency Puhoi to Warkworth contract as the main drilling contractor. The work being undertaken was mainly in the forest area between Puhoi and Warkworth.

[4] Due to the long hours on site and bad traffic around Auckland, Drillforce decided to put its crew up in a motel at Snells Beach and employees were paid a daily meal allowance while working away from home.

[5] On 23 April 2015, Mr Page-Smith had been drinking with other Drillforce employees after work at the Salty Dog bar in Snells Beach. He returned to the motel and engaged in some play fighting with other employees. This resulted in a hole in the motel unit wall.

[6] On 25 April 2015, a meeting was called at Drillforce's yard in Takanini Auckland. All staff were issued with a verbal warning.

[7] Unfortunately, Mr Page-Smith turned up late and missed that meeting. Zane Brown, the shareholder and Managing Director of Drillforce, and Ryan Tidswell, Project Manager, met with Mr Page-Smith separately. He was given verbal warning for the 23 April incident, told the worksite was a 'dry camp', meaning no drinking alcohol at all while away for work. He was then sent back to Puhoi.

[8] On 21 May 2015 while away for work Mr Page-Smith and other Drillforce employees went to a local bar. He struck up a conversation with an older patron. He admits calling the bar patron a "bum" and making inappropriate comments to his wife. A complaint was raised by Drillforce's head contractor the following day.

[9] Mr Tidswell investigated the complaint. Mr Page-Smith and the other Drillforce employees involved were requested to attend a meeting at the Takanini yard the following day.

[10] On 25 May 2015, the Drillforce employees attended a meeting with Bruce McCallum, Drillforce Director, and Mr Tidswell. During the meeting, Mr Page-Smith admitted drinking in contravention of the directive not to 2-3 times and that he called a bar patron a "bum".

[11] During this period, another employee, Chris, was interviewed. He gave a statement Mr Page-Smith was the main instigator and was rude and offensive. Another employee, Steve, stated Mr Page-Smith deliberately kicked the hole in the wall following an altercation where he punched another employee in the face. Neither of these statements were put to Mr Page-Smith to comment upon.

[12] On 29 May 2015, Mr Page-Smith was sent a letter outlining four concerns Drillforce had with his behaviour during April and May 2015.

[13] On 3 June 2015, Mr Page-Smith was called to a meeting. The meeting was adjourned for further concerns to be particularised in writing and for him to provide a response to those concerns. The concerns were emailed to Mr Page-Smith on 4 June. The concerns included excessive consumption of alcohol; disorderly behaviour including drinking, yelling and being a nuisance in the early hours; violent behaviour towards a colleague whom he was alleged to have hit in the face; property damage by kicking a hole in the wall with an attached photo; and verbal abuse of a member of the public and his wife.

[14] Mr Page-Smith wrote up a response to each of those concerns. He requested another meeting which occurred on 5 June 2015. He read out his written responses. His response to the allegation of verbal abuse was that it was *"cheeky banter taken the wrong way"*. He also noted that the property damage was unintentional.

[15] A third meeting was arranged for 9 June 2015. After hearing further responses and an adjournment, Bruce McCallum indicated a preliminary decision to dismiss based upon the verbal abuse allegation only. Mr Page-Smith's support person requested further time to provide information and a further meeting.

[16] On 11 June 2015, Mr Page-Smith's support person emailed the respondent alleging there had been a flawed process and there was inadequate information provided to Mr Page-Smith. The fourth meeting went ahead that day and the decision to dismiss was confirmed.

[17] On 31 July 2015, Mr Page-Smith raised a personal grievance of unjustified dismissal and unjustified disadvantage.

**The issues**

The issues for hearing have been reduced. Mr Page-Smith had raised a personal grievance of unjustified disadvantage relating to the verbal warning on 23 April. As noted out to counsel, this was not raised within 90 days.[1] Counsel did not seek leave to raise this grievance outside of the statutory time. Therefore the personal grievance relating to the verbal warning is dismissed.

[18] The remaining issues for hearing are:

(a) Was there evidence of conduct before the respondent employer for which the applicant could have been dismissed? and

(b) Were the respondent employer's actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

**Was there evidence of conduct before the respondent employer for which the applicant could have been dismissed?**

[19] There was no letter setting out the reasons for dismissal. The conduct which gives rise to the dismissal is set out in paragraph 2.30 of the statement in reply namely the verbal abuse that brought the company into disrepute.

[20] Serious misconduct *"... will generally involve deliberate action inimical to the employer's interests*.[2] It is conduct which *"deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."*[3]

[21] It is well established that conduct that occurs outside the workplace can give

---

1 See s.114 Employment Relations Act 200 (Act) requires employees to raise personal grievances within 90 days.

2 *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319.

3 *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483.

rise to disciplinary action.[4]

[22] It is not necessary that the conduct itself be directly linked to the employment, but rather that it has the potential to impact negatively upon it.[5] There must be a clear relationship between the conduct and the employment.[6]

[23] At the time this conduct occurred, it could not have been seen as having the potential to cause problems for the respondent's business. The alleged abuse occurred at a pub where all patrons were drinking. There was evidence of 'pub banter' - patrons being cheeky towards each other including the bar patron to Mr Page-Smith. Although Mr McKeown noted this was a sensitive community with divided feelings about the project, this was not known to Mr Page-Smith. It would have been difficult to foresee the head contractor's reaction to this after hours conduct.

[24] Mr Page-Smith's evidence was he participated in 'cheeky banter' with the patron. There was no complaint from the patron. It came from the head contractor whose geologists were present and allegedly witnessed the incident at the pub. There is no evidence he swore or used aggressive language or conduct other than calling the patron a 'bum'. There is little to evidence why the head contractor believed this was abusive as opposed to normal expected pub behaviour.

[25] The required nexus between the dismissal conduct and the impact upon this employer's business was not evidenced. In my view there was insufficient evidence for this employer to conclude that the verbal abuse was serious misconduct.

**Were the respondent employer's actions leading to dismissal what a fair and reasonable employer could have done in all the circumstances?**

[26] The fact Mr Page-Smith's employment was terminated is accepted. The onus falls upon Drillforce to justify whether its actions were what a fair and reasonable employer could have done at the time the dismissal or action occurred.[7]

[27] In applying this test, I must consider the matters that are set out in s.103A(3) of the Act. Those matters include whether, having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the

---

4 *Hallwright v Forsyth Barr* [2013] NZEmpC 202 at [48]
5 See above n4 at [49].
6 *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [25].
7 Section 103A(2) of the Act.

employee, gave the employee a reasonable opportunity to respond and genuinely considered the employee's explanation prior to dismissal.

[28] As indicated to the parties, from the evidence the respondent did not properly raise its concerns. In reality the respondent was concerned about the impact of Mr Page-Smith's general behaviour on its reputation to its head contractor and within this community. It was also concerned about its ability to trust Mr Page-Smith to work independently and without supervision.

[29] Zane Brown, respondent director believed numerous chances had been given to Mr Page-Smith and that continuing to act in this way would create concerns for the employer in terms of his continued employment. Irrespective he was not fired for the ongoing performance concerns or even the prior disciplinary action including the verbal warning for the 23 April 2015 incident. If all of Mr Page-Smith's behaviour was being taken into account in the decision to dismiss then those concerns should have been raised. They were not.

[30] Not all of the relevant information that Mr McCallum had before him when he made his decision was provided in any event. This information included the statements that were taken from the two employees, Chris and Steve, and the information it had been receiving from its client and members of the local community about the impact of Mr Page-Smith's behaviour.

[31] Unfortunately, for the respondent employer because the concerns were not properly raised, and material information not given to Mr Page-Smith, he cannot have had an opportunity to respond and there could not have been genuine consideration of his responses.

[32] Therefore, Billey Page-Smith was unjustifiably dismissed by Drillforce (NZ) Limited.

**Remedies**

[33] Mr Page-Smith does not seek any lost remuneration because he found a job relatively quickly. I am satisfied from his evidence at hearing that he would have suffered some hurt and humiliation and loss of dignity. In the circumstances, he would be entitled to compensation pursuant to s.123(1)(c)(i) of the Act in the sum of $5,000 subject to contribution.

[34] An employee's conduct may be relevant to remedies. I am required to consider the extent to which the actions of the employee contributed towards the personal grievance and if required reduce any remedies.[8]

[35] In order for contributing behaviour to be taken into account in the reduction of remedies, the actions of the employee must be both causative of the outcome and blameworthy.[9] The serious misconduct leading to dismissal was caused by Mr Page-Smith's behaviour, including in particular his breach of a directive not to drink alcohol. The breach of a reasonable directive would have justified dismissal. In my view this was causative and blameworthy behaviour and a 50% reduction in remedies is justified.

[36] In the circumstances, Drillforce New Zealand Limited is ordered to pay compensation of $2,500 to Billey Page-Smith pursuant to ss.123(1)(c)(i) and 124 of the Employment Relations Act 2000.

**Costs**

[37] After hearing from both parties regarding costs Drillforce New Zealand is ordered to pay Billey Page-Smith the sum of $1,750 as a contribution towards his costs. This is a very rare half day hearing and costs are usually set at the Authority's daily notional tariff of $3,500 per day.

**T G Tetitaha**
**Member of the Employment Relations Authority**

---

8 Section 124 of the Act.
9 *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.