

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 134
5564707

BETWEEN BRENT PRIEST
 Applicant

AND PRESTIGE LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Gerard Dewar, Counsel for Applicant
 Libby Brown, Counsel for Respondent

Investigation Meeting: 1-3 March 2016 at Napier

Submissions Received: 22 March 2016 from the Applicant
 26 April 2016 from the Respondent
 11 May 2016 from the Applicant 'In Reply'

Determination: 7 November 2016

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] Mr Brent Priest was summarily dismissed for serious misconduct on 17 December 2014. He alleges his dismissal was substantively unjustified. He says he received an unjustified written warning for refusing to stay overnight at his employer's depot and from this point onwards he was unfairly monitored, bullied, and a performance improvement plan was imposed without good cause.

[2] He seeks from Prestige Ltd (Prestige) reimbursement of lost wages to the date of the Authority's investigation and compensation for distress associated with the unjustifiable dismissal and unjustified actions surrounding the written warning.

[3] Prestige denies Mr Priest was unjustifiably disadvantaged or unjustifiably dismissed. It says it lost trust and confidence following a full and fair investigation where it found Mr Priest had engaged in serious misconduct.

The Authority's investigation

[4] This determination deals with Mr Priest's claims. These were heard alongside those of a colleague, Jim McDermott. Events common to their claims exist. I considered it would be expedient to investigate their respective applications at the same time. Their claims were heard over three full days.

[5] In the mid-afternoon on the second day of investigation I was advised that Aaron McIntosh, who had worked for Prestige as its Service Compliance Manager over the course of Mr Priest's employment and had decided Mr Priest's dismissal, was no longer available to be interviewed. That matter was discussed with counsel. I am only able to give limited weight to his written evidence in circumstances where that information was not able to be tested.

[6] It has not been efficient to set out every matter of dispute and event between the parties. As permitted I have expressed findings of fact and law necessary to dispose of Mr Priest's claims. This determination has been issued outside the statutory period of three months after the date on which the last information was received by the Authority. In accordance with s 174C(4) the Chief of the Authority decided that exceptional circumstances exist to allow a written determination of findings later than the latest date specified at s 174C(3).

Background

[7] Prestige provides multi-trade maintenance services to Housing New Zealand (HNZ) properties in the central North Island. Its headquarters are in Hastings. In addition, it leases offices and depots in Gisborne, New Plymouth and Palmerston North.

[8] In May 2014 Prestige wanted to enhance its quality assessment mechanisms. Mr Priest, who at that time worked as a handyman for Prestige in New Plymouth, transferred to Hastings in June 2014 to take up a position as a Quality Assessor (QA) alongside five other newly appointed individuals, including Mr McDermott.

The depots

[9] Some years before the appointment of the QAs Prestige modified the interiors of each of the depots to accommodate staff when working outside the Hawkes Bay area.

[10] The QAs initially utilised motels when working in the regions but in July 2014 their manager, Mr Matthew Taylor, informed them they were to stay at the regional depots if beds were available.

[11] Mr Priest travelled to Whanganui on 20 August 2014. Prior to his trip he had been asked to take a duvet with him and to stay at the Palmerston North Depot. A colleague was also scheduled to stay at the depot but had been given incorrect instructions as to bedding requirements and was subsequently booked into a motel.

[12] On Mr Priest's arrival in Palmerston North he told the local manager he had not brought bedding and sought to be booked into a motel. Mr Priest told Mr Taylor, and later the local area manager, that he would commute rather than stay at the depot. In any event Mr Priest slept on a spare bed in his colleague's motel room that evening.

[13] The following day Mr Priest received an email alleging he had failed to follow a prior reasonable instruction "*to stay at the Palmerston North depot*". Mr Priest attended a meeting scheduled for the next day and was issued with a written warning valid for 12 months.

[14] At a meeting on 25 August 2014 there was a discussion between the QAs and management about the depot accommodation. It was agreed that if there were no bedrooms available at the depots QAs would be booked into motel accommodation. Mr McIntosh told the QAs that the requirement to stay at the depots was unlikely to change and if they were unhappy about that they "*know where the gate is*".

[15] On or about Friday 3 October 2014 the Palmerston North District Council contacted Prestige and informed that it had received an anonymous complaint. Unknown to Prestige, Mr McDermott had, sometime in September, contacted the Palmerston North City Council. Prestige was advised that the depot was situated in an industrial zone which did not allow for dwelling use. Prestige was advised it may seek resource consent but the building would need to meet a range of standards.

[16] At the following Monday morning meeting (6 October 2014) the QAs were told that the use of the Palmerston North depot for accommodation had ceased. Mr McIntosh questioned who amongst the QAs had contacted the Palmerston North Council. He advised “*things would not be pretty*” if he found it was one of them.

[17] Mr McIntosh’s two statements form part of Mr Priest’s claim that he was bullied.

The performance improvement plan

[18] In between those events, in early September 2014 Mr Taylor discovered Mr Priest had issued almost 4 times the number of corrective action reports (CA reports) as his colleagues over the previous week.

[19] The role of the QA is to inspect and sign off work once tradespeople have completed assigned jobs. If the QA considers additional work is required s/he issues a CA report which activates a work order request to HNZ.

[20] Mr Taylor says those numbers raised a red flag for him: Mr Priest was either doing something exceptional and the rest of the team was underperforming; or something was not quite right. He asked Mr McDermott to check Mr Priest’s CA reports over the material timeframe. The review led Mr Taylor to question whether Mr Priest properly understood his role: in particular, which matters should be reported to HNZ and which to Prestige. An aspect of concern for Prestige was the possibility that HNZ would view Mr Priest’s approach as generating work for Prestige. Mr Priest was given some guidance as to these matters.

[21] On 30 September 2014 Mr Priest met with Mr McIntosh (whilst Mr Taylor was on leave) and the HR Manager, Ms Nicola Bickers. It was proposed that Mr Priest be placed on a performance improvement plan (PIP) for the month of October, to which Mr Priest agreed. The content of the PIP focussed on: following instructions, use of a testing device, his approach to CA reports and processes, and travelling equipment.

[22] Mr Priest says he forgot to attend the first performance review meeting scheduled for 3 October 2014. The meeting was rescheduled for 6 October 2014 and Mr Priest attended.

Events leading up to the dismissal

The reporting of a broken window

[23] Mr Taylor sought to clarify with Mr Priest his approach to reporting ongoing work and/or defective work. By way of example Mr Priest advised he had discovered a broken window in a property the previous week and reported it to HNZ. When asked if he had notified Prestige's Palmerston North Area Manager of the matter Mr Priest said he had. He confirmed again that he had spoken to the Area Manger when questioned further. An hour or so after the meeting concluded Mr Taylor contacted the Area Manager to have Mr Priest's actions corroborated. The Area Manager advised Mr Priest had only just called him (within the hour) about the window.

[24] Mr Taylor updated the PIP document and sent a copy of it by email to Mr Priest on 8 October 2014. The PIP recorded Mr Taylor's concern about the process and that Mr Priest had not been honest with him about the matter.

[25] Mr Priest stayed overnight at the Gisborne depot on 9 October 2014. He was distressed by the noise emanating from a local band practice, the kitchen facilities, and likely also due to the content of Mr Taylor's update in the PIP.¹

[26] He returned to Hastings and obtained a medical certificate stating he was unfit for work. On the same day he advised Prestige by email that he would not be attending any meetings, including the performance review meeting scheduled that afternoon, without his advocate.

Claims of bullying

[27] I have not referred to all the correspondence between 10October and 20 November 2014 whilst Mr Priest was on leave. The relevant facts are that the parties met on 4 November 2014 and Mr Priest asked to have the PIP discontinued. He alleged that he had been bullied by Mr Taylor and Ms Nicola Bickers. Prestige refused to halt the PIP but undertook to investigate the bullying concerns and asked for particulars.

[28] On 13 November 2014 a personal grievance was raised on Mr Priest's behalf concerning the circumstances of the written warning, and included an allegation that he had been bullied by Mr McIntosh also.

¹ Mr Priest's notes of 18 October 2014 refer to the event.

[29] On 18 November 2014 Mr Priest set out in writing the details of the alleged bullying. Included in that document Mr Priest agreed he had not advised the Area Manager of the broken window but said he was not thinking clearly because of the work pressure he was under and had thought the information would be passed to the Area Manager via the Palmerston North office receptionist.

[30] Mr Priest returned to work on 20 November 2014 and reported to Mr McDermott while the bullying claims were investigated by the Health, Safety and Environmental Manager. That investigation was concluded on 26 November 2014. No evidence of bullying was identified however the report commented on Mr McIntosh's statements to the QAs noting that management needed to be mindful of how it engages with staff.

The blocked toilet

[31] On 26 November 2014 Hastings Area Service Manager, Ewan Adams, sent an email to Mr McIntosh raising concerns about whether Mr Priest had properly assessed a purportedly blocked toilet at a HNZ property and the accuracy of a CA report generated as a result. He advised he had questioned Mr McDermott about the matter who told him he had not attended the house but that Mr Priest had. Mr Adams says he asked Mr Priest whether he had "*actually checked the toilet and confirmed it was still blocked*" both of which Mr Priest confirmed.

[32] Mr Adam's email reported he had since spoken with the tenant who told him Mr Priest had not entered the house but remained on the door step and only asked her if the work had been done. He asked Mr McIntosh to have these matters addressed with Mr Priest.

The investigation and disciplinary process

[33] On 4 December 2014, Mr McIntosh sent Mr Priest a letter and advised there were allegations that on "*two occasions that you have not been honest when answering direct questions from management*". The letter set out the events which led Prestige to consider Mr Priest had not reported the broken window as represented to Mr Taylor, and described the event and concerns set out in Mr Adam's email. The relevant CA report, email and work order was attached. A meeting date was proposed for 8 December 2014 to hear Mr Priest's response. Mr Priest was advised that if one or both of the allegations were substantiated then dismissal may result.

[34] Mr Priest's then representative advised he was not available before Christmas. Mr McIntosh suggested meeting outside business hours or a teleconference. The representative reiterated his unavailability and stated if the meeting went ahead he would deal with any outcome when the time came.

[35] On 9 December 2014 Mr McIntosh advised that Prestige was unwilling to defer the matter until the New Year and scheduled a meeting for 15 December 2014. He noted that conclusions would be drawn from the facts as they stood if he [the representative] or Mr Priest did not provide input.

[36] Neither Mr Priest nor his representative attended the meeting.

[37] On 16 December 2014 Mr McIntosh wrote to Mr Priest. The letter advised "*Without feedback to the contrary we can only conclude that in both instances you deliberately deceived management*" and the allegations had been substantiated. The letter noted that "*the trust and confidence we had in you to undertake your role...has significantly and irreparably diminished*" and Prestige was considering summary dismissal. The letter invited Mr Priest to respond.

[38] Mr Priest replied in writing the same day. He advised he had been unaware of the disciplinary investigation meeting until after its conclusion. As regards the broken window matter he repeated the explanation he had put forward in the letter on 18 November. He denied he had lied to Mr Taylor and said it was a "*simple name mix up*". In respect of the blocked toilet he said he had inspected it and found it wasn't functioning properly. Mr Priest said he had no further comment to make.

[39] Prestige wrote to Mr Priest on 17 December 2014. It did not accept either explanation, and noted Mr Priest did not challenge the tenant's perspective. He was notified of his dismissal effective immediately.

Issues

[40] The Authority is required to determine the following:

- (a) whether the written warning of 22 August was justified;
- (b) whether Prestige engineered Mr Priest's dismissal, in particular:

- (i) was his work unfairly monitored including placement on a performance improvement plan,
 - (ii) was he bullied,
 - (iii) were the allegations that led to the dismissal trivial in nature or was Mr Priest's summary dismissal justifiable;
- (c) if the warning and/or if a dismissal was not justified, is Mr Priest entitled to remedies;

The law

[41] Section 103(A) of the Employment Relations Act sets out the test against which Prestige must satisfy the Authority that the written warning given to Mr Priest and his dismissal were justified.

[42] Whether either of these actions were justified is determined by the Authority inquiring into whether there were reasonable grounds for the action and whether the process taken to reach that decision was fair. The Authority is required to objectively assess whether those actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal.²

Was the written warning justified?

[43] Prestige agrees that the depots could not be regarded as 5-star' accommodation but says it sought to emulate motel style facilities. It says prior to the QAs commencing work there had been no complaints about the facilities and all employees, including management, stayed at the depots. Prestige has cleaners who regularly attend the depots and professional laundry services are used.

[44] In contrast, Mr McDermott and Mr Priest say that the depots were often overcrowded and makeshift. In one depot the toilet and shower is located in another building which could only be accessed by crossing the yard.

² Section 103A employment Relations Act 2000

[45] At issue is whether Prestige's instruction for Mr Priest *'to stay at the Palmerston North depot'* was reasonable.³

[46] It does not appear to be in dispute that on the night of 20 August 2014 the bedrooms at the depot were assigned to other staff and the only available bedding for Mr Priest was on a pull-out stretcher located in a lounge area commonly used by staff to watch TV and chat.

[47] There may be some industries or events which necessitate communal arrangements for employees who sleep away from home during working periods. Such conditions are likely to have been agreed by the parties when entering into the employment relationship agreement. There is nothing exceptional about Prestige's business which would lead me to conclude that living arrangements when working away from home demands similar compromise. I am not persuaded that Prestige as fair and reasonable employer could require an employee, in the absence of agreement, to stay in its premises without ensuring there was space available to sleep that is free from observation and interruption by others.

[48] I accept that Mr Priest may not have clearly articulated the cause of his reluctance to stay at the depot, but I remain of the view that the instruction was unreasonable in the prevailing circumstances. I find the warning was unjustifiable because the accommodation facilities presented to Mr Priest, at least on 20 August 2014, lacked an adequate degree of personal privacy and were unreasonable.

[49] Even if I am wrong on this point, Prestige's omission to obtain appropriate approvals from the Palmerston North City Council following the renovation brings into question the suitability of the depot for accommodation purposes.

[50] Despite written assertions in Prestige's statement in reply that it had been misled by its landlords about use of the depots for accommodation purposes, Mr Lyndon Hakopa, the managing director of Prestige, candidly conceded during the Authority's investigation that Prestige had not obtained approval from its respective landlords to use the depots to house staff, nor had it obtained consent from the respective local councils to permit that activity.

³ I do not accept the submission advanced on behalf of Prestige that there was no requirement for staff to stay at the depots as they were free to make alternative accommodation arrangements. That proposition is at odds with the cause for which Mr Priest received his warning.

[51] Prestige submits the Authority has no jurisdiction to decide the lawfulness of the depots as it has been not prosecuted by territorial authorities empowered to determine those matters. Those submissions miss the point.

[52] I am not satisfied that a fair and reasonable employer could require employees to reside at its premises without having first ensured its property properly complied with standards considered necessary for safe dwelling. Moreover, an instruction to require an employee to reside in premises where that activity is excluded by the territorial district plan must be unlawful. Prestige's submission that it was unaware of the Council's requirements when it issued the warning does not excuse its obligations. Prestige's instruction to stay at the depot on 20 August 2014 was unlawful and unreasonable.

Did Prestige engineer Mr Priest's dismissal?

The monitoring of work

[53] Mr Priest refutes that there was any good reason for Prestige to question his work although he does not deny he issued significantly more CA reports as compared to his colleagues in the first week of September 2014. I have no reason to doubt that the disparity in reporting numbers prompted Prestige to have another QA examine Mr Priest's assessments and reports or to conclude that it was unreasonable of it to do so.

The PIP

[54] There is a suggestion on Mr Priest's behalf that Prestige's decision to place him on a PIP was improperly motivated by a suspicion that he had contacted the Palmerston North Council. The evidence does not support that finding. The proposal to begin a PIP was advanced prior to the notification from the Palmerston North City Council.

[55] I agree that it was inappropriate to place within the PIP a component to monitor Mr Priest's compliance to stay at its regional depots. In the absence of any evidence that Mr Priest repeated the behaviour over the period of 6 weeks between the warning and the PIP commencing I consider the matter had been dealt with and it was unfair for Prestige to revisit it.

[56] There was an additional performance measure which sought to address an incident where Mr Priest had not travelled with a necessary piece of equipment which also appears to have been addressed before the PIP was instituted.

[57] These findings do not however render the whole of the PIP unjustifiable. The PIP identified concerns with Mr Priest's approach to reporting processes, and on several occasions he had taken up tenants' personal concerns with HNZ. I am satisfied these matters gave rise to genuine concerns about Mr Priest's performance. Prestige was entitled to seek improvement about those matters. I am not persuaded that the PIP was imposed for ulterior motives or unjustifiable.

Mr McIntosh's statements

[58] The issue as to whether Mr Priest was bullied was not vigorously pursued in submissions but for completeness I agree that Mr McIntosh's statements to the QAs were inappropriate but I do not find they were repetitive in the sense that the behaviour was persistent over time and do not consider the behaviour can be objectively considered bullying within the currently accepted definition of that concept.⁴

Was the allegation in respect to the reporting of the broken window trivial?

[59] There is a suggestion that the allegation concerning the inaccurate reporting of the broken window to Mr Taylor was not raised until almost two months after the event and cannot have been of a concern. I do not accept that submission. The evidence is that Mr Taylor updated and documented the matter in the PIP as an issue he wanted to discuss at the next review meeting in 2 days' time. That the meeting did not occur due to Mr Priest's ill health was out of Prestige's control.

Could Prestige, as a fair and reasonable employer, reasonably conclude that Mr Priest's actions amounted to serious misconduct?

[60] In *Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand*,⁵ the Court of Appeal held;

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or

⁴ Work Safe New Zealand, Best Practice Guidelines, 2014

⁵ (1990) ERNZ Sel Cas 985

have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

[61] There is no real dispute that Mr Priest inaccurately represented to Mr Taylor that he had reported the broken window matter to the relevant Area Manager.

[62] Turning to whether Mr Priest misrepresented the toilet inspection I must assess whether Prestige carried out a sufficient inquiry into the concern to an extent where it was reasonable of it to conclude he did not.

[63] I am satisfied that Prestige, by way of Mr Adams, made inquiries with Mr McDermott, Mr Priest and the tenant as to whether Mr Priest checked the toilet. I also conclude that Mr McIntosh provided Mr Priest all relevant information such as the CA report, Mr Adam's email and the initial work order.

[64] Despite his assertion to Prestige that he was not informed in a timely manner of the disciplinary meeting, I am satisfied Mr Priest was aware the scheduled meeting some time before it commenced.⁶ I am also satisfied Mr Priest was advised if he did not participate in the meeting that a decision would be made on the information available to the employer at that time. His decision not to attend the meeting in these circumstances meant he deprived himself of an opportunity to provide a full response to the allegations against him, answer questions and mitigate any possible conclusions. In any event Mr Priest did provide a brief written response the following day which I am satisfied that Prestige did consider.

[65] On balance I am satisfied Prestige conducted a fair investigation to the extent it was able to do so in circumstances where Mr Priest's engagement was limited. I consider Prestige was entitled to draw reasonable inferences and conclusions from the surrounding facts and circumstances known to it at the time including its preference for the tenant's account of Mr Priest's visit and the information available to it. I note the CA report simply stated "*Tenant says trade had not attended to fix blocked toilet*" which tends to suggest Mr Priest relied on what was told to him by the tenant and did not conduct a visual assessment. At the Authority's investigation Mr Priest said the CA report was incorrect. It emerged in evidence that Mr McDermott may have authored the report. Unfortunately Mr Priest did not did raise that matter with

⁶ confirmed by his then representative

Prestige at the time of its investigation and therefore was not a factor it was able to consider or make further inquiry about.

[66] The Authority cannot substitute its own view of what it would have done in the circumstances. On balance I find Prestige was fairly able to reasonable belief that that Mr Priest had misrepresented his actions both in respect to reporting the broken window and his assessment of the toilet. An essential requirement of the QA role is to work without supervision and to accurately conduct and report assessments to management. Prestige was entitled to expect Mr Priest perform these activities fully and honestly. I consider it was open to Prestige to regard Mr Priest's omissions as serious misconduct given the nature of his position, and his dismissal was within the range of options that a fair and reasonable employer could have taken in all the circumstances. Mr Priest was not unjustifiably dismissed.

Remedies

[67] I have not found that Mr Priest was unjustifiably dismissed but have concluded he was unjustifiably disadvantaged by the instruction to stay at the Palmerston North depot and the written warning he received for failing to follow that instruction.

[68] The impact of the instruction to stay at the depot and the ensuing written warning was abundantly clear at the investigation meeting. Mr Priest presented as a sensitive and private person and I have no doubt he was distressed (and continues to be so) by Prestige's instruction and subsequent action. I consider an order of \$5,000 in compensation pursuant to s 123(1)(c)(i) of the Act is appropriate. He did not contribute to the situation that led to his personal grievance and his remedy is not impacted by s.124 considerations.

Costs

[69] Costs are reserved.