

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 90
5546829

BETWEEN JORDAN ROY
 Applicant

AND BIKE RETAIL GROUP LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Applicant in person
 Rita Nabney, Counsel for Respondent

Investigation Meeting: 8 March 2016 at Wellington

Submissions Received: At the investigation meeting

Determination: 28 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Jordan Roy, claims he was unjustifiably dismissed by the respondent, Bike Retail Group Limited (BRG), on 28 October 2014.

[2] BRG accepts it dismissed Mr Roy but says the decision was justified.

Conduct of the Investigation

[3] This is a matter with a long history being originally scheduled for an investigation in October 2015. Unfortunately the date had to be vacated due to the ineptitude of Mr Roy's then advocate. Indeed that ineptitude was such the advocate did not even appear to know what a witness brief was and my dissatisfaction was such Mr Roy was copied into administrative e-mails to his representative.

[4] The investigation was then rescheduled for 8 and 9 March 2016 during a telephone conference in which both Mr Roy and his advocate participated. It is not known what then transpired between the two but a couple of days before Mr Roy's briefs were due he advised the Authority he no longer had confidence in his advocate and would be representing himself. Mr Roy then sought a further week to prepare and that was granted.

[5] When Mr Roy's briefs were forwarded they were challenged by Ms Nabney on the grounds they were inadequate. I had to agree which led to another telephone conference.

[6] During the call Mr Roy indicated he was inclined to abandon this date as well. After discussing this it was agreed the meeting would occur as scheduled on the understanding Mr Roy had established a prima facie case given BRG's admission it dismissed him. Given that and the requirements of ss 103(1)(a) and 103A the meeting would proceed with BRG being tasked with trying to justify its decision.

Background

[7] Mr Roy was initially employed by BRG as a sales assistant in June 2011. He was subsequently promoted to store manager in Wellington and later again assumed responsibility for a store in Lyall Bay. Mr Roy's manager was Mr Ellis, though the evidence suggests their relationship was less than perfect, at least from Mr Roy's perspective.

[8] The event that triggered the chain leading to dismissal occurred on 25 August 2014 when Karla Feary, BRG's National Training Manager, sent Mr Roy an email requesting he reviews his laybys. This arose as some in the stores he managed dated back to 2011. The message went on to ask Mr Roy follow up with customers and cancel the layby if there were no payments. He was also asked to do a stock check. Mr Roy responded advising he would spend the first part of the week working on it.

[9] Nothing further was heard and on 3 September 2014 Ms Feary sent a follow up email asking *how are you coming along with the laybys, can you please give me an update?*

[10] On 7 September 2014 Mr Roy put a cash refund through BRG's accounting system. The following day this was noted by its accountant who considered the transaction inappropriate and advised Mr Ellis. Some \$1,360 was involved.

[11] On 9 September 2014 Mr Ellis spoke to the Wellington Assistant Manager and asked about the money. Two days later he again spoke to the accountant who said the money must be banked and advised he had told Mr Roy.

[12] On 16 September 2014 Mr Ellis was in Wellington for another purpose but decided to check on the money's status. He was accompanied by Ms Feary and the two discovered the money was still in the store when Mr Roy showed it to them. According to them it was in what Mr Roy described as a *hiding place*. Mr Ellis told Mr Roy the money was to be banked immediately. He then asked Mr Roy email him when this had been done.

[13] Mr Roy's response was he intended using the money for other purposes around the store. Mr Ellis' said *no*, that is not acceptable and the money is to be banked immediately. Mr Roy accepts he received this instruction and was clearly told to bank the money.

[14] By 1 October 2014 Mr Ellis became aware the money was yet to be banked. He wrote advising Mr Roy he now considered the matter disciplinary and sought a meeting at 10am on 3 October 2014. The letter asked Mr Roy confirm receipt and told him to advise BRG should either he or any support he may wish to bring be unable to attend.

[15] Mr Roy responded advising he had received the letter and would attend.

[16] Mr Ellis travelled to Wellington for the meeting on 3 October 2014. Mr Roy did not attend.

[17] While in the Wellington store Mr Ellis, in the company of another staff member, decided to look for the cash. This included looking in the *hiding place* Mr Roy had shown him on 16 September 2014. The cash could not be found.

[18] On 5 October 2014 Mr Roy put three labour charges through the accounting system amounting to the total in question. The records show the money was banked the same day.

[19] Mr Ellis found out the money had been banked on 8 October but in the intervening period the failure to bank the money had led to his commencing a further disciplinary process. The letter, dated 7 October, asked Mr Roy attend a meeting on Friday 10 October and advised BRG wished to discuss the following allegations:

1. *That you disobeyed a lawful instruction to bank cash to the value of \$1,360;*
2. *That you agreed to attend an investigation meeting with myself and a support person of your choosing and failed to advise me that you would not attend the meeting, thus causing me to waste both time and money to fly from Auckland to Wellington;*
3. *That you took leave without permission*
4. *That you have failed to account for \$1,360;*
5. *That you have failed to follow the policy of dealing with lay-bys.*

[20] The letter advises:

These allegations constitute serious misconduct and should they be proven then the consequences may result in your being given a written warning or dismissal.

[21] No response was received which led to a follow up email from Mr Ellis to Mr Roy on 9 October 2014 asking whether the latter could advise if he was able to meet the following day. Mr Roy responded by advising *Fridays are my rostered day off. I am unavailable.*

[22] Mr Ellis replied by asking if Monday would suit but received no reply.

[23] On 13 October 2014, Mr Ellis sent Kim Gordon, BRG's HR adviser, an email advising he had made four or five attempts to schedule an investigation meeting and when he had called the Wellington store that day he had been told Mr Roy was on a week's annual leave. Mr Ellis stated he did not know of the leave and had not approved it.

[24] On 20 October 2014, Mr Ellis sent another email to Mr Roy advising he had no reply to his request for a meeting and asked Mr Roy when they could meet that week. Again there was no response and Mr Ellis sent a further email some four hours later suggesting 10.30am on Thursday.

[25] Within a minute Mr Roy forwarded the email to Ms Gordon advising he wished to speak to her about a time and place for the meeting. The two spoke by telephone the next morning and Mr Roy requested the meeting be held in Auckland.

[26] Mr Ellis was copied in to subsequent correspondence and said *no* to the request the meeting be in Auckland. He proposed it remain in Wellington at his suggested time on Thursday. Mr Roy then advised his support person was in Auckland and further correspondence ensued. It was eventually agreed the meeting be held on Tuesday, 28 October 2014 at BRG's board room in Auckland.

[27] The meeting occurred as scheduled. The five concerns were canvassed and Mr Roy given an opportunity to respond to each. The meeting went for some time and there was an adjournment while some points were confirmed with the accountant. There are notes of the meeting which record Mr Roy's explanation which, to a large extent, were reiterated in evidence he gave at the Authority's investigation.

[28] Having listened to Mr Roy's explanations, BRG concluded its concerns were legitimate and the allegations made out. It decided to dismiss.

[29] In the resulting letter which confirmed the decision BRG notes:

- (a) The Company considers the allegations are true.*
- (b) Specifically that you failed to follow the lawful instruction by your General Manager to bank \$1,360 on 16th September 2014. The money was still not banked by you when Andrew Ellis visited your store on 3rd October 2014. It was only banked after that visit when Andrew Ellis invited you to an investigation meeting to discuss where the money was.*
- (c) The Company does not accept your explanation for your failure to bank the money.*
- (d) The Company does not accept your explanation that you specifically hid the money in your store's office to avoid Andrew Ellis finding the money.*
- (e) The Company finds that you did fail to follow the Lay-by policy and you ultimately banked the money in a manner that was specifically designed to advantage yourself in meeting your budget for the month, thus breaching the lay-by policy and the instruction from Andrew Ellis.*

[30] The letter goes on to advise BRG considers Mr Roy's conduct, specifically that regarding the money, to be serious misconduct. Adding the other indiscretions such as failing to follow a reasonable instruction and putting the company to lost time and money had led BRG to conclude it no longer had confidence or trust in Mr Roy's ability to continue as store manager in Wellington.

[31] In his evidence Mr Roy also canvassed a series of events which he says constitute disadvantages and support a claim he was the victim of a campaign of

harassment and bullying by Mr Ellis. In doing so he claims the following were *The most relevant difficult situations but not an exhaustive list*.

[32] They include:

- a. an alleged failure to process a promised pay increase;
- b. issues over Mr Roy's ability to use a bike of his choice in various events;
- c. the irregular undertaking of performance reviews and the manner in which these were conducted when they occurred;
- d. that when he managed a change of premises for the Wellington store mid-January / early February 2014 Mr Ellis was *blustering and bullying* and could not be enticed to look at or address resulting issues at the Lyall Bay site;
- e. that soon after the shift he lost responsibility for Lyall Bay and with it the ability to determine what Wellington employees were paid from which shop and when. This meant Lyall Bay would not meet sales targets and that meant he would not meet his bonus targets. Despite that, and having raised the issue, he accepts he agreed to focus on the Wellington store;
- f. that when he returned to Wellington Mr Ellis 'fed him a line' which allowed the stores previous occupier continuing access during which he pilfered equipment, tools and supplies the store could have used and Mr Ellis threatened him when he raised the issue; and
- g. he was subjected to an abusive phone call.

[33] There was also evidence from BRG about what it considers either strange and/or improper acts by Mr Roy post dismissal. Given they are post dismissal and do not affect remedies¹ I need not consider them.

¹ *Salt v Fell* [2008] ERNZ 155 (CA)

Determination

[34] As already said BRG accepts it dismissed Mr Roy. In doing so it accepted it is required to justify the dismissal and that was the basis upon which the investigation proceeded when Mr Roy advised he was considering abandoning the revised hearing date of 8/9 March during the telephone conference referred to in [6] above.

[35] Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] 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.

[36] Traditionally the objective review has been performed by considering the employer's actions from both a substantive and a procedural perspective. Whilst it is clear issues of substance and process overlap and there is no such thing as a firm delineation, separation still provides a useful means of analysis.

[37] Turning first to process. In essence the Act requires I consider, having regard to its resources, whether the employer's enquiry was sufficient. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[38] The evidence clearly shows BRG put its concerns and allowed Mr Roy an opportunity to respond. It also shows the explanations were considered and there is evidence of further investigation such the approaches to the accountant during adjournment in the disciplinary meeting. Having considered the evidence I conclude BRG has complied with the procedural requirements of s 103A.

[39] Turning to the substantive issues. Five concerns were put with Mr Roy admitting the most serious of them; namely he failed, repeatedly, to follow clear instructions he bank the money from both Mr Ellis and the accountant. He also accepts he failed to attend the meeting of 3 October thereby putting BRG to unnecessary expense. He said he was on leave at the time and was never going to attend. He attributed his advice he would do so to an honest mistake.

[40] His explanation in respect to the leave was that he had advised BRG via the rosters he produced. I conclude the explanation could, as occurred, be considered

weak by BRG. Mr Roy acknowledged during the investigation that what he did was not in accordance with BRG policies though I must also note he said he made no great effort to acquaint himself with those policies. There is then evidence which shows Mr Roy failed to produce the rosters in question when due. Indeed the one advising he was on leave for a week was forwarded to Mr Ellis a fortnight late and on the eve of Mr Roy's departure on leave. In other words Mr Ellis had no time to act on it in any event.

[41] The fourth accusation was essentially a repeat of the first and treated accordingly. The fifth related to the lay-by policy and an accusation Mr Roy had failed to follow it. The concerns largely pertain to the use of money taken for lay-bys. The discussion canvassed issues such as the fact Mr Roy attempted, contrary to policy, to use the money for other purposes and recorded the income as a labour charge which would show as a credit attributable toward the earning of sales bonuses. It also canvassed the fact the accountant gave clear instructions as to how the money was to be treated which Mr Roy chose to ignore. Having perused the notes of the disciplinary meeting and consider the evidence at my investigation I am not surprised BRG concluded Mr Roy had failed to follow the applicable policy. It was a conclusion open to the company on the evidence it had.

[42] To the multiple transgressions, some admitted and some established on the evidence, I add further admissions made by Mr Roy during the meeting of 28 October. I conclude these must, as BRG claims, have exacerbated its concerns and confirmed its view it could no longer trust Mr Roy as a manager. Examples include an admission he was deliberately hiding the money from Mr Ellis and that he was, throughout the period he had the money, seeking to record transactions concerning it in a way that would see it reflected in his and his staff's sales records which would, in turn, mean a pecuniary benefit might accrue through the bonus system, despite advice from the accountant not to do so.

[43] Given the evidence I conclude the decision to dismiss was one open to BRG and I must say I am not surprised that is what they chose to do.

[44] Turning to Mr Roy's *disadvantage* claims. Mr Roy did not, via his statement of problem, claim a personal grievance by reason of unjustified disadvantage.² That

² Section 103(1)(b) of the Employment Relations Act 2000

raises a problem in that all of the events he cites are historic and there is no evidence Mr Roy raised these as concerns before attempting to do so via the investigation process. BRG says he did not and he does not refute its claim.

[45] The claims have not been raised within the 90 days required by s 114(1) and BRG does not agree to late submission. Given that and the absence of a s 114(3) application I will consider them no further though I do add an observation the supporting evidence was weak and the claims would likely have struggled.

Conclusion and costs

[46] For the above reasons I conclude Bike Retail Group Limited has discharged the onus it bears and justified its decision to dismiss Mr Roy.

[47] Mr Roy's claim therefore fails.

[48] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority