

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 105
5417427**

BETWEEN BARRY SIMPSON
 Applicant

AND DDS (2006) LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Sacha Beacham, Advocate for Applicant
 Jeff and Paul Ottaway, Advocates for Respondent

Investigation Meeting: 14 March 2014 at Auckland

Submissions received: 17 March 2014 from Applicant and from Respondent

Determination: 24 March 2014

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Barry Simpson, claims that he was unjustifiably dismissed by the Respondent DDS (2006) Limited (DDS) on 5 April 2014. Mr Simpson claims that the decision to dismiss him was unjustifiable on substantive and procedural grounds.

[2] Mr Simpson further claims that he was unjustifiably disadvantaged by being suspended from his employment on 3 April 2013.

[3] DDS denies that Mr Simpson was unjustifiably dismissed or unjustifiably disadvantaged in his employment.

Issues

[4] The issues for determination are whether:

- The suspension of Mr Simpson constituted an unjustifiable action by DDS

- If deemed to be an unjustifiable action, whether the suspension constituted a disadvantage pursuant to s 103(1)(b) of the Employment Relations Act 2000 (the Act)
- Mr Simpson unjustifiably dismissed by DDS
- DDS should be issued with a penalty in respect of a failure to provide a correct individual employment agreement to Mr Simpson

Background Facts

[5] DDS is a business specialising in the laying of underground cables including copper or fibre optic cables. It employs approximately 50 employees consisting of skilled and unskilled workers including drivers, excavators, and drillers. At the time Mr Simpson commenced employment with DDS, DDS was contracting to a company which was installing broadband connections throughout Auckland.

[6] Mr Simpson commenced employment with DDS on 24 September 2012 as a Labourer. He was issued with a written '3 Month Trial Contract' signed by Mr Jeff Ottaway, the Director of DDS responsible for operational matters, including the recruitment and management of employees.

[7] Following the completion of the three month trial period Mr Simpson was issued with an individual employment agreement (the Employment Agreement) dated 18 December 2012 and signed by both parties on 1 January 2013 (although Mr Simpson said that he did not receive it until 1 January 2013) which also contained a trial period provision as clause 1.3 but noted in that same clause that this had finished on 21 December 2012.

[8] Mr Simpson's duties involved driving to various sites around Auckland and assisting with the digging up of pavements and the installation of broadband fibre optic cables.

[9] On 8 March 2013 Mr Simpson attended a staff meeting held to discuss various matters, including the behaviour of employees whilst working at various sites. He said that the matters discussed included instructions that employees were not to engage in "wolf-whistling" or to act in any way that might offend a member of the public.

[10] As part of the meeting process the DDS employees including Mr Simpson signed a document below a statement which said:

It was also clearly explained to me by DDS management the importance of on-site conduct from the time of walking thru our yard gates until the time we leave thru yard gates & if on-site misconduct is excersised (sic) by any staff member, that it could result in employment termination & by signing minutes to this staff meeting I understand that I agreed to uphold these standards or pay the price.

Incident on Tuesday 2 April 2013

[11] On the afternoon of Tuesday 2 April 2013 Mr Simpson had been returning to the DDS site in a DDS truck driven by a colleague. The truck had stopped at red traffic lights at an intersection on the road and was waiting to turn right in the third hand side lane.

[12] Behind that truck there had been two other DDS trucks, all positioned in the third right hand turning lane. Mr Simpson said he had been sitting in the passenger seat with his arm out of the window.

[13] Shortly after the truck had stopped at the intersection another DDS truck driven by Mr John Whippy had crossed the intersection in front of the trucks waiting at the red light, and a DDS employee in the truck behind that which Mr Simpson was in had sounded a very loud air horn, and Mr Simpson said he had waved at Mr Whippy after which he had turned to wave at the DDS employees in the trucks behind.

[14] Mr Simpson said that as he had turned to wave at the DDS employees in the trucks behind the one he was in, he had noticed a lady in a black Commodore car waiting at the same traffic lights in the far left lane. Mr Simpson said he had noticed the Commodore car as it was a model of car he liked.

[15] Mr Paul Ottaway, the director of DDS responsible for financial matters, said later that afternoon he had received a telephone call from the husband of the lady who had been driving the black Commodore car. The husband, who had been irate and threatening to come to the site, alleged that his wife had been subjected to lurid comments and wolf-whistling by a DDS employee in a blue truck.

[16] Mr Paul Ottaway said he had tried to calm the man down by assuring him that the matter would be taken seriously and that he would call him back. During this conversation Mr Craig Hooker, a Project Manager at DDS, entered the office and overheard the conversation.

[17] Mr Hooker offered to talk to the drivers who were on site to try to ascertain which trucks were at the traffic lights during the alleged incident. As a result of these enquiries he

had ascertained that Mr Simpson and Mr Casey had been in one of the three trucks which had been at the intersection at the time of the alleged incident.

[18] Mr Paul Ottaway said Mr Hooker had returned to the office, spoken to the lady's partner and obtained a description of the employees in the truck from which he had concluded that Mr Simpson and Mr Casey were the employees involved in the complaint.

[19] Mr Paul Ottaway said he had decided to leave the matter to be dealt with by Mr Jeff Ottaway.

[20] Mr Simpson said that during that evening he had received a telephone call from a DDS employee who said that he had heard that a complaint had been made concerning him (Mr Simpson) and a 'road rage' incident that day.

[21] Following that telephone call, Mr Simpson received a telephone call from Mr Hooker who had also told him there had been a complaint made by a female in a car and that she and her partner were angry at him. Mr Simpson said he had explained that he had been waving, not the lady in the black Commodore car, but at Mr Whippy,. When Mr Hooker had asked him how he knew it was a black Commodore car, he had explained about his liking for the model.

[22] Mr Jeff Ottaway said he had received a call that evening from Mr Hooker who told him about the complaint and that he believed it had involved Mr Simpson and Mr Casey on the basis that a blue truck had been cited in the complaint and they had been in the only blue DDS truck at the intersection at the time of the incident.

Suspension Wednesday 3 April 2013

[23] The following day, Wednesday 3 April 2013, when he arrived at work, Mr Simpson said he had been asked by Mr Jeff Ottaway (Mr Ottaway) to go into his office. Mr Ottaway informed him of the allegations against him, which Mr Simpson said he had denied, however Mr Ottaway had informed him that he had to be suspended. Mr Simpson said he had been given no opportunity to have any input into this decision prior to its being made by Mr Ottaway.

[24] Mr Ottaway agreed that he had told Mr Simpson about the allegations and there had been a discussion during which Mr Simpson had denied the allegations. Mr Ottaway, when asked at the Investigation Meeting whether he had given Mr Simpson the opportunity to provide any input on the decision to suspend him, said he had explained to Mr Simpson the reason for the suspension.

Thursday 4 April 2013

[25] The following day, Thursday 4 April 2013 Mr Simpson had delivered a written statement as requested which stated:

To Whom It May Concern

I Barry Simpson wish to explain my explanation of what happened yesterday, on the 2/4/13. We had stopped at Browns Rd lights. Me and Rob were at the lights and behind us was Chris and behind Chris was Brownie on the transporter. Coming through the lights from the opposite side of the road was Whip. We all tooted, and waved at Whip. I looked to my left and saw a lady looking at us. I think she thought that we were tooting at her. I think if I have offended her in any way, then I am deeply sorry.

[26] As he had not heard from Mr Ottaway, Mr Simpson telephoned him later that day and Mr Ottaway told him to come to see him the next day at 9.00 a.m. for a chat. Mr Ottaway said he had told Mr Simpson that he could have a support person with him at the meeting; however Mr Simpson said he had not been told that he could have a support person with him.

[27] Mr Ottaway said that following the suspension meeting on Wednesday 3 April 2013 he had spoken to the lady complainant who had described the DDS employee about whom she was complaining. From that description Mr Ottaway said he recognised the person in question as being Mr Simpson.

[28] Mr Ottaway said he had also spoken to Mr Whippy and some of the other drivers involved in the incident who had told him that they had heard the horn and seen: "*some jumping around in the cab*" in which Mr Simpson had been a passenger but had not noticed Mr Simpson waving

Friday 5 April 2013

[29] On Friday 5 April 2013 when Mr Ottaway met with him, Mr Simpson said that Mr Ottaway had told him: "*Sorry, I have to let you go*", and explained that the reason for the dismissal was 'road rage' and inappropriate behaviour towards a female complainant.

[30] Mr Ottaway confirmed that he had decided that, based on the evidence of his investigation, he had no other option but to dismiss Mr Simpson. Mr Ottaway also confirmed that he had not considered any other option to dismissal.

[31] Mr Ottaway said that he had understood Mr Simpson to have another job in prospect. Mr Simpson said that he had not had alternative employment in prospect at the time of the meeting on 5 April 2014, however he agreed that Mr Ottaway had offered to assist him find another job.

[32] Mr Barry Simpson Snr said that Mr Simpson had informed him of his dismissal following the meeting with Mr Ottaway and as he had been concerned because he believed that Mr Ottaway had not followed the correct procedure, he had suggested that he and Mr Simpson go to see him.

8 April 2014

[33] Mr Ottaway said he had agreed to meet with Mr Simpson and Mr Simpson Snr and did so on Monday 8 April 2014. During that meeting he had explained his reason for the dismissal decision.

[34] Mr Simpson Snr said that whilst he had explained to Mr Ottaway that he did not believe the correct procedures had been followed, Mr Ottaway had been quite satisfied with the decision he had made.

[35] Mr Simpson raised a personal grievance with DDS 13 April 2013. The parties subsequently attended mediation however this did not resolve matters and on 6 September 2013 Mr Simpson filed a Statement of Problem with the Authority.

Determination

Did the suspension of Mr Simpson constitute an unjustifiable action by DDS?

[36] The Employment Agreement states at clause 27:

27 Suspension

27.1

The Employer may suspend the Employee from his or her duties whilst the Employer conducts an investigation in relation to any matter that may concern the Employee if in all the circumstances the Employer considers it appropriate. The Employer will seek the Employee's input before suspension. Suspension will be on full pay.

[37] The Employment Court in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is a requirement to apply the rules of natural justice to a decision involving suspension¹.

[38] Additionally there is a legislative requirement that that parties to an employment relationship deal with each other in good faith as set out in s4 of the Act:

S4(1A)The duty of good faith in subsection (1)-

(a) *requires the parties in an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

(b) *without limiting paragraph (a), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected-*

- 1. access to information, relevant to the continuation of the employees' employment; about the decision; and*
- 2. an opportunity to comment on the information to their employer before the decision is made.*

[39] I accept that clause 27.1 of the Employment Agreement gave the employer a contractual right to suspend, however it also gave the employee a contractual right to provide an input into that decision before suspension takes place.

[40] The Employment Court judgment in *Tawhiwhirangi v Attorney-General in respect of Chief Executive Department of Justice* established that there is nonetheless a requirement to apply the rules of natural justice to a decision involving suspension².

[41] There is no evidence that Mr Ottaway had commenced any investigation prior to the suspension decision being implemented. On the contrary he confirmed at the Investigation Meeting that he not undertaken any investigation at the time when he had suspended Mr Simpson.

¹ [1993] 2 ERNZ 546

² [1993] 2 ERNZ 546

[42] I find that with regard to the matter of suspension, Mr Simpson was in effect presented with a *fait accompli* on 3 April 2013. I accept Mr Simpson's evidence that he was not provided with any opportunity to provide any input to the decision to suspend him, and Mr Ottaway's evidence in which he stated that: "*I had no option but to stand him down on pay*" indicated that his mind was closed to any input that Mr Simpson may have provided if he had been given the opportunity to provide any.

[43] I determine that the suspension of Mr Simpson was an unjustifiably action by DDS.

If it was an unjustifiable action, did it constitute a disadvantage pursuant to s 103(1)(b) of the Act?

[44] Suspension is a drastic measure as was noted in the Court of Appeal judgment in *Birss v Secretary of State for Justice*³ in which Richardson J stated:

Suspension is a drastic measure which if more than momentary must have a devastating effect on the officer concerned. The prejudice occasioned the officer by a suspension can never be assuaged even if he is ultimately vindicated at the disciplinary hearing and is then restored to office and paid his arrears of salary.

[45] Mr Simpson was suspended for only a short time prior to his dismissal; however I find that his suspension as a result of an unjustifiable action by DDS did constitute a disadvantage in his employment.

[46] I determine that Mr Simpson was unjustifiably disadvantaged in his employment by reason of the suspension.

Was Mr Simpson unjustifiably dismissed by DDS?

[47] Mr Simpson was dismissed on 2 April 2013. The test of justification in s103A of the Act states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer*

³ [1984] 1 NZLR 513

could have done in all the circumstances at the time the dismissal or action occurred.

[48] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. DDS must establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[49] As noted, Mr Simpson was suspended prior to Mr Ottaway commencing an investigation. I note that at the suspension meeting Mr Simpson denied that he had behaved inappropriately towards the complainant, and that he continued to deny that he had behaved inappropriately in the letter of explanation and apology provided to Mr Ottaway on 4 April 2013.

[50] Mr Ottaway commenced his investigation following Mr Simpson's suspension, taking evidence from the complainant and the other drivers who were at the road intersection that day and also from Mr Hooker.

[51] Mr Ottaway did not inform Mr Simpson of what they had told him, or give him an opportunity at the disciplinary meeting held on 5 April 2013 to comment on the statements they had given, or provide him with an opportunity to provide an explanation in response.

[52] There is no evidence that Mr Ottaway conveyed Mr Simpson's explanation to the complainant or that he provided her with a copy of Mr Simpson's letter setting out his version of events and his apology for any misunderstanding. Had he done so, there is a possibility that she may have withdrawn her complaint.

[53] Mr Ottaway confirmed at the Investigation Meeting that he had accepted the complainant's version of events in preference to that of Mr Simpson, since he had found her to a truthful, credible, witness, and that in respect of this incident he had not found Mr Simpson to be truthful. On the basis of this conclusion he had decided to dismiss Mr Simpson.

[54] At the time of the dismissal Mr Simpson had been employed by DDS for approximately 6 months, during which time he had had no formal complaints about his performance or his behaviour.

[55] In this situation I find that a fair and reasonable employer would have taken this fact into consideration when deciding whether or not Mr Simpson's evidence was to be

disregarded in preference to that of a hitherto unknown complainant, especially given the inconclusive nature of the evidence of the other driver witnesses

[56] Apart from substantive justification for a decision to dismiss an employee, the employer must also act in a procedurally fair manner; although any procedural defects which are minor and do not result in the employee being treated unfairly will not render an otherwise justifiable decision unjustifiable pursuant to s 103A (5) of the Act.

[57] I accept that DDS did not have access to HR resources, however I do find that the defects in the procedure adopted by DDS fell far short of the expectation of procedural fairness as set out in s 103A (3) of the Act, in particular:

- As previously noted, Mr Ottaway had suspended Mr Simpson prior to commencing an investigation;
- Mr Simpson had not been advised what information had been provided by the other witnesses interviewed by Mr Ottaway prior to the disciplinary meeting on 5 April 2013 so that he could adequately prepare and comment on it;
- Mr Ottaway had failed to provide the complainant with a copy of Mr Simpson's statement or information on the explanation as provided by Mr Simpson for her consideration;
- Mr Ottaway had accepted the evidence of the complainant in preference to that of Mr Simpson on the basis of preferring her credibility above that of Mr Simpson, an employee with a good work and behaviour record;
- Mr Simpson was not provided with an opportunity to provide an explanation at the disciplinary meeting held on 5 April 2014 prior to Mr Ottaway announcing his decision to dismiss such that I find that Mr Ottaway had predetermined to dismiss Mr Simpson prior to the meeting being held; and
- Mr Ottaway had given no thought to any other option other than dismissal, despite Mr Simpson's previously good performance.

[58] I determine that Mr Simpson was unjustifiably dismissed by DDS.

Should the DDS be penalised over its failure to provide the correct individual employment agreement to Mr Simpson?

[59] I find that the issuing of a “3 Month Trial Contract” and the issuing of the Employment Agreement subsequently did not accord with what is expected pursuant to s 65 of the Act.

[60] However I accept that DDS had provided Mr Simpson with information concerning his terms and conditions of employment and that there had been no extension of the statutory 90 day trial period. I therefore do not find that this failure to provide the correct documentation resulted in any disadvantage to Mr Simpson and I decline to award a penalty.

Remedies

[61] Mr Simpson has been unjustifiably dismissed and he is entitled to remedies.

Reimbursement of Lost Wages

[62] Mr Simpson took immediate steps to try to mitigate his loss by means of gaining alternative employment through Allied Workforce.

[63] Mr Simpson obtained some weeks of temporary employment via Allied Workforce before obtaining full-time permanent employment with his current employer which commenced on 6 May 2013.

[64] In total Mr Simpson was without employment for a total of three weeks.

[65] I order DDS to pay Mr Simpson the sum of \$1,650.00 gross pursuant to s 128(2) of the Act as reimbursement for lost wages for a period of 3 weeks.

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[66] Mr Simpson is also entitled to compensation for humiliation and distress. As the disadvantage grievance contributed to the unjustifiable dismissal grievance, I consider that the hurt, humiliation and injury to feelings experienced by Mr Simpson arise from the same cause.

[67] I find that in respect of both matters giving rise to a personal grievance, these being the disadvantage grievance and the dismissal grievance, Mr Simpson suffered financial hardship and distress.

[68] I find that Mr Simpson suffered hurt and distress and I order DDS to pay him the sum of \$5,000.00, pursuant to s 123(1) (c) (i) of the Act.

[69] I have considered the matter of contribution as I am required to do under s124. Mr Simpson did not contribute to the situation which gave rise to the grievances. There is to be no reduction in remedies.

Recommendation

[70] I recommend that DDS take legal advice concerning the issuing of individual employment agreements to employees, and put in place individual employment agreements which accord with the legislative requirements.

Costs

[71] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Respondent will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority