

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 242
3020153

BETWEEN EMILY SMITH
 Applicant

A N D BROOKBY QUARRIES
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: E. Smith in person
 P. Swarbrick/M. Bowen, Counsel for Respondent

Investigation Meeting: 24 April and 16 July 2018 at Auckland

Submissions Received: 29 June and 16 July 2018 from Applicant
 16 July 2018 from Respondent

Date of Determination: 3 August 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Although Ms Smith’s dismissal was substantively justified, it was carried out in a procedurally flawed manner. Therefore Ms Smith has a proven personal grievance of unjustified dismissal.**
- B. I decline to award any lost remuneration because the procedural flaws did not cause Ms Smith any lost remuneration and she has not mitigated her losses by seeking employment.**
- C. In these circumstances I decline to award any compensation.**
- D. Costs are reserved. The parties are to file any memorandum in relation to costs within 14 days of the date of this determination.**

Employment Relationship Problem

[1] Emily Smith was dismissed by her employer Brookby Quarries Limited (BQL) for her part in the purchase of “Poweralls” a lithium battery portable jumpstarter for staff. Ms Smith alleges the dismissal was unjustified.

Relevant Facts

[2] Ms Smith was employed as an Administration Assistant by Brookby Quarries Limited (BQL) on 14 October 2013. She signed an employment agreement on 19 June 2014 with a position description attached.¹ One of her duties included “ordering goods and services through Greentree and reconciling against invoices”.

[3] Greentree is the system the respondent uses for the ordering of goods. The Greentree system assigns an order number. Once the order information has been inputted, this automatically generates an email to the relevant manager for approval. The manager then either approves the purchase or not, and once approved the goods can be ordered. Ms Smith’s manager was the then Quarry Manager JD.

Powerall Purchase

[4] On 14 November 2016 Ms Smith contacted a supplier regarding the purchase of Poweralls for staff Christmas gifts. The goods were to be charged over three months and the products were not to show as Poweralls:

Hi ...

[JD] would like to get 25 x poweralls for the staff for Christmas presents. These are to be charged over November/December and January but if they cannot be show [sic] as that particular product.

Can you please advise how we can do this and I will raise POs.

Regards,
Emily Smith

[5] The supplier employee replied the same day at 2:20pm:

Hi Emily, does the below look ok, 9pcs charged nov.8EA charged Dec Jan. Described as roller bearings.

PBJS 12,000-RD9.0EA cylindrical roller bearing \$142 ea plus GST.

PJS 12,000-RD8.0EA cylindrical roller bearing \$142 ea plus GST.

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¹ Schedule 2 parties’ employment agreement, tab 1, common bundle of documents (CBD).

[6] Ms Smith then raised a purchase order on 14 November for “PBJs 12,000-RD9.0EA cylindrical roller bearings”. She did not raise the remaining two purchase orders for December and January because she was aware at the time this would cause problems. She then replied at 2.31 pm:

Hi ...

Yes that’s fine. November PO – BBY109056. With December and January if you could just send me a delivery note and I will raise a PO, if I do them all now they will show up in numerical order and could pose a problem.

Thanking you:

Regards,

Emily

[7] Ms Smith also made enquiries about paying for an upgrade to a 24-volt of the Powerall she was to receive. She was told to discuss the matter with JD.²

[8] The supplier issued a tax invoice for “PBJs 12,000-RD Powerall Jumpstarter deluxe 400A 12v” on 21 November 2016. This is because the reference number “PBJs 12,000-RD” referred to Poweralls not cylindrical roller bearings.

[9] The supplier delivered the Poweralls in November or December 2016.

[10] In December 2016 a delivery note DN#83766483 was sent to Ms Smith. On 19 December 2016 she sent a purchase order for “Cylindrical Roller Bearings DN#83766483”. On 20 December 2016 the supplier issued a tax invoice for “PBJs 12,000-RD cylindrical roller bearings”.

[11] Similarly on 23 January 2017 the supplier produced delivery note #83801137. Ms Smith sent a purchase order for “Cylindrical Roller Bearings DN#83801137” that same day.³ The supplier issued a tax invoice for “PBJs 12,000-RD cylindrical roller bearings” also on the same day.

[12] It is accepted the Poweralls were gifted in December 2016 to staff including Ms Smith.

[13] In December 2016 the purchase of several BBQ’s was authorised by Steven Alan Riddell, Executive Director as Christmas gifts for staff including Ms Smith.

² Tab 6 and 7 CBD.

³ Tab 4 and 5 CBD.

Investigation Meeting 25 May 2017

[14] In 2017 BQL instigated an investigation into Ms Smith's manager JD regarding the unauthorised purchase of Poweralls in December 2016. Mr Riddell was appointed to investigate and interview the staff. He arranged to interview Ms Smith on 25 May 2017.

[15] Ms Smith texted the supplier employee she had been dealing with regarding the Powerall purchases on 24 May 2017. She asked if he would see JD tonight and speak to an employee Linda about her situation. Around this time Ms Smith obtained copies of the purchase orders and invoices. I infer from this text messaging to the supplier employee and Ms Smith's evidence she spoke at length about these documents to Linda that she had the purchase orders and invoices in her possession by 24 May 2017.

[16] On 25 May 2017 Mr Riddell interviewed Ms Smith. John Hansen, a Human Resources Advisor was also present and took notes. It is accepted those notes were not given to Ms Smith prior to dismissal.

[17] It was during this meeting Ms Smith was allegedly asked by Mr Riddell if she was aware of any "amended or altered coding of invoices, ie order number, code, or description." Ms Smith replied "Not that I'm aware of". Mr Riddell is then recorded as asking Ms Smith if she "recalled an invoice from [a supplier] relating to the purchase of 25 battery packs" referring to the Poweralls. Ms Smith said she did not remember the invoice and told them "not that I can remember right now". She advised she was aware the Poweralls were given to staff as a Christmas present. The record of this conversation formed the basis for one of the allegations leading to dismissal.

[18] Later that evening at 7:51pm on 25 May Ms Smith spoke to JD and texted the supplier employees she had been dealing with regarding the purchase of the Poweralls. She sought their assistance in misleading BQL about the purchase of the Poweralls:

Hi [supplier employee] further to our conversation tonight maybe you ... if asked could say that [the supplier] gifted the poweralls to [JD] for the workers as a goodwill gesture like others do barbeque lunches and I've spoken to [JD] If you need to contact him try [phone number] ... thanks ...

Disciplinary Meeting

[19] After the meeting Mr Riddell made contact with the suppliers Chief Executive. The supplier conducted their own investigation. He provided copies of the above emails and texting between Ms Smith and the supplier employees. He also told Mr Riddell his staff had received verbal and written instructions from Ms Smith to manipulate the items ordered to conceal their identity. This information formed the basis for two of the allegations leading to dismissal.

[20] On 1 June 2017 BQL sent Ms Smith a letter inviting her to a formal disciplinary meeting. It attached copies of the above emails and texting between Ms Smith and the supplier. It did not attach copies of the purchase orders or invoices.

[21] The letter stated “as a result of information we have received from [the supplier]” there were the following allegations of misconduct:

- “1. That you were knowingly involved, with [JD], in the ordering of 25 Poweralls from [the supplier] using Brookby’s account.
2. That you deliberately arranged for the transaction to purchase the Poweralls to be disguised as the purchase of other items, so that the purchase was not identifiable by Brookby.
3. That you knew the items were intended as gifts for the Quarry staff when that had not been authorised by the company.
4. That you text messaged the [supplier’s employee] after you became aware of our investigation and asked him to, if asked, say that [the supplier] gifted Poweralls to [JD] for the workers “as a goodwill gesture”.
5. That this text message was sent following discussions between you and [JD].
6. That you misled us in our original interview with you by telling us that you did not recall the Poweralls invoicing.”

[22] The parties met on 14 June 2017. At the conclusion of that meeting Ms Smith was advised her employment would be terminated. This was confirmed by letter of the same date.

[23] On 29 August 2017 Ms Smith raised a personal grievance of unjustified dismissal by email.

Issues

[24] At an earlier telephone conference on 26 March 2018, the parties agreed there was a single issue for determination namely whether Ms Smith was unjustifiably dismissed by Brookby Quarries Limited.

Law

[25] The fact that Ms Smith's employment was terminated is accepted. Therefore the onus falls upon BQL to justify whether its actions "were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred".⁴ The test is whether, having regard to the resources available, BQL sufficiently investigated the allegations, raised the concerns with Ms Smith, gave Ms Smith a reasonable opportunity to respond and genuinely considered her explanation prior to dismissal.⁵

[26] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in Ms Smith being treated unfairly.⁶

[27] Serious misconduct will generally involve deliberate action that is adverse to an employer's interests. It does not generally consist of mere inadvertence, oversight or negligence.⁷ It is, however, conduct which "*deeply impairs or destructive of that basic confidence or trust that is an essential of the employment relationship*".⁸

[28] The Authority is to stand back and consider the factual findings and evaluate whether a fair and reasonable employer would characterise the conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. A careless act can lead to dismissal for serious misconduct. The matter needs to be considered in light of all

⁴ Section 103A(2) Employment Relations Act 2000 (the Act).

⁵ Section 103A(3) of the Act.

⁶ Section 103A(5) of the Act.

⁷ *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 (EmpC at 319).

⁸ *Northern Distribution Union v BP Oil NZ Limited* [1992] 3 ERNZ 483.

the circumstances and ultimately must revert back to the primary consideration to be made under s 103A of the Act.⁹

Was there serious misconduct?

[29] Ms Smith was employed as an Administrative Assistant. Her role involved ordering of goods. She was responsible for raising the purchase orders for any goods and checking these off against invoices. Her role required her to use the purchasing system Greentrees for ordering goods. This provided her employer with visibility about what Ms Smith was ordering on their behalf and being delivered. This required her to accurately describe the goods ordered. Her role required judgement, integrity and trust.

[30] There is little doubt Ms Smith knew at the time she raised the purchase orders that they were inaccurate and did not describe the goods being delivered as Poweralls.

[31] Her emails to the supplier on 14 November evidenced her knowledge the Greentrees system matched her purchase orders with the delivery notes and invoices. The only purpose of her emails to the supplier on 14 November was to prevent the actual goods purchased from being visible within Greentrees.

[32] When pressed for an explanation about the purpose of the alleged concealment Ms Smith spoke about the need to record the Poweralls as “main plant” and JDs instruction overriding the usual methodology for purchase orders. There was no reasonable evidential basis to justify concealment of goods as main plant when they were not. I do not accept it was reasonable in these circumstances for Ms Smith to divert from the expected method of purchase ordering upon JDs instruction. This is especially where she was being asked to breach of the terms of her employment.

[33] Her later actions in December 2016 and January 2017 further concealed the goods purchased. These were staff Christmas gifts presumably gifted in December 2016. The purchase order she processed in January 2017 was for goods the supplier had already delivered in December. The process she employed throughout November to January 2017 can only be aimed at concealing the purchase and delivery of the

⁹ *Paul Hines v Eastland Port Limited* [2018] NZEmpC 79 at [78] citing *Minhinnick v New Zealand Steel Ltd* [2010] NZEmpC 30, [2010] ERNZ 73 at [25] and [27] and *Chief Executive of the Department of Inland Revenue v Buchanan* [2005] ERNZ 767 (CA) at [36].

goods from detection through the Greentrees system. This was in breach of the express and implied terms of her employment.

[34] She knew in advance she was to receive and did receive a Powerall as a staff Christmas gift. She undertook these actions knowing she would benefit. This does not assist her claims she was merely following orders.

[35] Her subsequent misconduct on 25 May in asking the supplier to lie about the purchase of the goods was her own initiative. It was not an instruction from JD as her boss. I do not accept this was naivety on her part. She was well aware JD was being investigated about his purchase of the Poweralls and that she was also under scrutiny. Her text message deliberately sought to mislead BQL about her purchasing of the Poweralls at a time when they were investigating possible misconduct. This behaviour infers she knew her actions were wrong.

[36] Standing back this conduct was destructive of the confidence BQL must have in Ms Smith to act in its best interests. A reasonable employer could have determined Ms Smith's conduct was serious misconduct in the circumstances.

Was the process the employer followed leading to the dismissal fair and reasonable?

[37] Ms Smith submits there has been a failure to supply all information relevant to the dismissal prior to it occurring; disparity of treatment; lack of training; the repurposing of 25 May 2017 meeting; failure by BQL to sight physical copies of the purchase orders and failure to genuinely consider her responses shown by the lack of breaks taken on 14 June before dismissal occurred.

No defects

[38] Ms Smith raised an issue about the disparity of treatment between herself and JD. Respondent counsel advised JD resigned. Ms Smith believed he should have been dismissed similarly to her. That is not disparity of treatment.

[39] Ms Smith alleged she was not "fully trained" to do her job as alleged by BQL. This was irrelevant to the alleged misconduct. This was not a training error. It was deliberate misconduct.

[40] Ms Smith submitted it was unfair BQL used the 25 May meeting that was about JDs actions in purchasing the Poweralls to discipline her. Employers are entitled to raise concerns with employees about any matters that pertain to potential serious misconduct, no matter how they are discovered. There is nothing unfair in this employer doing this.

[41] Ms Smith raised an issue about whether Mr Riddell sighted the physical copy of the purchase order or not. This is irrelevant to her personal grievance.

[42] Ms Smith claimed there was only one break taken during the disciplinary meeting on 14 June 2017 before she was dismissed at the end. BQL alleges it took two breaks of an undetermined length to consider her responses and give her an opportunity to respond to their preliminary decision.

[43] The recording does not provide the time taken for breaks because it was paused while breaks occurred. The transcript makes reference to breaks of 5 minutes or more being taken in two places. Firstly partway through the meeting Mr Hansen states he and Mr Riddell are going to “pop next door for a chat.”¹⁰ Secondly Mr Riddell refers to leaving to allow Ms Smith to consider the preliminary decision to dismiss and provide any further information before returning.¹¹

[44] The length of the breaks is not extensive between 5 to 10 minutes at most. It would be speculative to suggest they should have been longer because there is nothing to suggest Ms Smith required more time to consider the preliminary decision or wished to present further information. I do not find there was any defect.

Failure to provide all information

[45] The duty of good faith in s4(1A)(c) of the Employment Relations Act 2000 (Act) requires BQL to provide access to information relevant to the continuation of Ms Smith’s employment and an opportunity to comment on it before dismissal. However even if this type of breach occurs, s103A(5) of the Act requires consideration of whether this breach was more than minor and caused unfairness before a personal grievance can be proven.

[46] Ms Smith submits that there were failures to provide the following documents:

¹⁰ Transcript CBD Tab 13 p 52.

¹¹ Transcript CBD Tab 13 p 53.

- Copies of the invoices and purchase orders relating to the Poweralls;
- Any discussions between Mr Riddell and an employee known as “Linda”;
- Copies of the minutes of the 25 May and 14 June 2017 meetings;
- All of the information given by the supplier to Mr Riddell.

[47] In respect of the invoices and purchase orders Ms Smith accepted at hearing that she had her own copies of the invoices and purchase orders prior to dismissal. There was no defect in BQL failing to supply her with yet another copy. The information was before her to comment on prior to dismissal. There was no defect or if there was it was minor and did not create unfairness for Ms Smith.

[48] No particular discussion between Mr Riddell and Linda is identified as having any impact upon the decision to dismiss. I see no defect here.

[49] However the failure to provide the notes of the 25 May meeting prior to dismissal was a defect. Ms Smith disputed their accuracy. She did not recall being warned about misleading BQL regarding the Powerall invoicing. The notes formed the basis for one of the allegations of serious misconduct namely that she “misled us in our original interview with you by telling us that you did not recall the Poweralls invoicing.”

[50] Similarly Ms Smith was also not told about Mr Riddell’s discussions with the supplier prior to dismissal. There were material discussions about Ms Smith’s culpability. The supplier had also conducted its own investigation and concluded Ms Smith had instructed the suppliers staff “to manipulate items to conceal their identity”¹² inferring she, not JD was at fault. This information was not conveyed to her prior to dismissal to comment upon. This supplier information formed the basis for BQLs allegations of misconduct because its letter stated as a result of the information we received from the supplier that the allegations were being made.

[51] These were not minor breaches and did create unfairness. This is because Ms Smith had no opportunity to raise her concerns about the accuracy of the 25 May notes. She should have been provided with all of the suppliers information given to Mr Riddell, including the commentary about her culpability and the investigation undertaken. Both pieces of information were material to the dismissal decision.

¹² Brief S Riddell para 14 sworn 24 April 2018.

[52] Although Ms Smith's dismissal was substantively justified, it was carried out in a procedurally flawed manner. Therefore Ms Smith has a proven personal grievance of unjustified dismissal.

Remedies

[53] Ms Smith is entitled to seek an award of lost remuneration and compensation given she has a proven personal grievance.

Lost Remuneration

[54] Section 123(1)(b) and s 128(1) of the Act confirm that before an award for lost remuneration is made, the loss must be as a result of the grievance. Where procedural errors do not result in lost remuneration no award is appropriate.¹³

[55] The procedural errors here did not result in lost remuneration. Any actual loss suffered arose from the decision to dismiss, which was substantially justified. Consequently, no award for lost remuneration is appropriate. Ms Smith also accepted she did not mitigate her losses by seeking employment.

[56] I decline to award any lost remuneration because the procedural flaws did not cause Ms Smith any lost remuneration and she has not mitigated her losses by seeking employment.

Compensation

[57] Ms Smith gave evidence of depression partly due to this event and partly due to her pre-existing injury that has kept her from finding alternative work. She withdrew from family and friends and lost trust in her ability to care for her grandchildren. She also felt hurt because the dismissal was instantaneous.

[58] Given there were contributing factors to her depression that had no relation to the dismissal an award of \$5,000 is appropriate subject to any reduction for contributory behaviour.

¹³ *Waterford Holdings Ltd v Morunga* [2015] NZEmpC 132 at [37].

Contributory behaviour

[59] An employee's conduct may be relevant to reducing remedies. I am required to "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance" and if the actions so require, reduce the remedies that would otherwise have been awarded.¹⁴

[60] 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.¹⁵

[61] There is jurisdiction for a 100 per cent reduction under s 124. This is dependent upon the circumstances, although such a result is likely to be rare.¹⁶ The Court has required there to be outrageous or particularly egregious employee misconduct to justify the removal of any remedy.¹⁷

[62] The Employment Court has reduced remedies by 100% where a dismissal was substantively justified but procedurally flawed including where there were allegations an employee deliberately misled its employer.¹⁸

[63] Ms Smith's behaviour caused the dismissal and was blameworthy. Ms Smith sent all of the emails to the supplier including the last email on 25 May seeking its assistance in misleading BQL about the Poweralls. The manipulation of the Greentrees system also breached the terms of her employment. I also take into account that she has profited from this behaviour because she received a Powerall.

[64] The process was not so deficient that there were incorrect conclusions reached about her conduct. If she had been provided with the material information, her dismissal would still have occurred. In these circumstances I decline to award any compensation.

¹⁴ Section 124 of the Act.

¹⁵ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82 at para.[49].

¹⁶ *Knapp v Locktite Aluminium Specialties Ltd* [2015] NZEmpC 71.

¹⁷ *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136.

¹⁸ See note 13 above and *Lawson v New Zealand Transport Agency* [2016] NZEmpC 165.

[66] Costs are reserved. The parties are to file any memorandum in relation to costs within 14 days of the date of this determination.

T G Tetitaha
Member of the Employment Relations Authority