

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 437
3116812

BETWEEN BRAYDON TAYLOR
Applicant

AND BAYLEY DEVELOPMENTS
LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Dave Cain, advocate for the Applicant
Hamish Burdon, advocate for the Respondent

Investigation Meeting: 10 June 2022

Determination: 5 September 2022

DETERMINATION OF THE AUTHORITY

- A. Bayley Developments Limited (BDL) acted justifiably in dismissing Brandon Taylor for serious misconduct. Mr Taylor's personal grievance application is declined.**
- B. BDL did breach statutory provisions by making a deduction from Mr Taylor's wages and by not providing time and wage records when requested by his representative. For those breaches BDL must pay a penalty of \$1,000 to the Authority, within 28 days of the date of this determination, for transfer to the Crown account once paid.**
- C. Costs are reserved with a timetable set for the parties to lodge memoranda if an Authority determination of costs is needed.**

Employment Relationship Problem

[1] Bayley Developments Limited (BDL) dismissed Braydon Taylor on 6 March 2020 for serious misconduct. He had worked for BDL for six months as a builder.

[2] Mr Taylor said he was not given a reasonable opportunity to respond to allegations about his conduct and one of the reasons given for his dismissal was not fairly put to him for response before BDL made the decision. He sought remedies of lost wages and distress compensation for a personal grievance of unjustified dismissal.

[3] Mr Taylor also sought a penalty against BDL for a deduction made from his final pay and for failure to provide his representative with full wage and time records when requested to do so.

[4] BDL said it followed a fair process before concluding it had lost trust and confidence in Mr Taylor. It said an incident which occurred on the day of his dismissal, and which was referred to in a letter sent to him the next day, was simply a further instance of why its director Giles Bayley had already decided to dismiss Mr Taylor and did not need further investigation or opportunity to comment.

The Authority's investigation

[5] For the Authority's investigation written witness statements were lodged by Mr Taylor; Mr Bayley; BDL's office administrator Gill Haynes; and Margaret Revell, a human resources advisor who conducted the disciplinary meetings with Mr Taylor on BDL's behalf and corresponded with him about the arrangements for them.

[6] During the Authority's investigation meeting each witness, under affirmation, answered questions from me and the parties' representatives. The representatives also gave oral closing submissions on the issues for determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the ER Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The issues

[8] From assessment of the written and oral evidence, and conclusions reached from it, the following issues required determination:

- (a) Was BDL's decision to dismiss Mr Taylor, and how that decision was made and carried out, what a fair and reasonable employer could have done in all the circumstances at the time?
- (b) Were amounts due to Mr Taylor deducted in breach of s 4 and s 5 of the Wages Protection Act 1983 and, if so, should BDL be ordered to pay a penalty for that breach?
- (c) Did BDL breach s 130 of the ER Act by not supplying wage and time records when requested and, if so, should BDL be ordered to pay a penalty for that breach?
- (d) Should either party contribute to the costs of representation of the other party?

BDL's concerns and its disciplinary process

[9] BDL's business is based in Te Awamutu. At the time of Mr Taylor's employment, BDL had 11 builders working in four teams on various sites. At one site, near Parakai, workers were provided with overnight accommodation.

[10] In December 2019 Mr Taylor's supervisor reported a concern about Mr Taylor arranging for his girlfriend to stay overnight with him at the motel used by BDL. Mr Taylor and his girlfriend had reportedly used a room not booked or paid for by the company and without advising the motel of use of the room. Ms Haynes dealt with the issue informally by telling Mr Taylor not to do that again. It was not a topic Mr Bayley dealt with when he conducted a 90-day employment review with Mr Taylor in late December.

[11] Mr Bayley did however mention, among other concerns, an instance where Mr Taylor had arranged to borrow a company utility vehicle to pick up some furniture. His supervisor said he had agreed to Mr Taylor using the vehicle on the understanding that the vehicle was needed for around 90 minutes. In fact, Mr Taylor drove from Te Awamutu to Papakura and back, a journey taking somewhat longer. Mr Bayley came to know of this only because, while driving over the Bombay Hills that particular day,

he happened to see one of his company vehicles driving the other way and then made inquiries about who was using it and why.

[12] A letter given to Mr Taylor about his employment review, dated 7 January 2020, advised that review of his work in future would include looking at honesty, attention to instructions and working as part of a team.

The first disciplinary meeting

[13] By early February some other concerns had arisen. Mr Taylor was notified of them by letter on 4 February and attended a disciplinary meeting with Ms Revell, Ms Hayne and his supervisor on 11 February.

[14] One concern was about a further instance of Mr Taylor's girlfriend visiting his motel accommodation in Parakai – this time on 28 January 2020. His team leader, who was sharing the motel unit with Mr Taylor, had asked her to leave.

[15] Another concern related to texts Mr Taylor sent his supervisor on 29 and 30 January saying he would not be at work on those days. His employment agreement required absences to be reported by telephone, not text. Mr Taylor's evidence was that he had developed food poisoning overnight on 28 January and had spent the next two days at his girlfriend's house in Auckland, about half an hour's drive from Parakai.

[16] On 31 January, when Mr Taylor turned up for work at the Parakai site, the team leader told him in very blunt language to leave the site and to contact their supervisor. The team leader was the person who had asked Mr Taylor's girlfriend to leave the motel on 28 January. He was angry that Mr Taylor had then not come to work for the following two days, leaving the team leader to carry on with the work there on his own. The concern BDL raised about that situation was that Mr Taylor had not followed the direction to contact the supervisor.

The second disciplinary meeting

[17] On 19 February, a Wednesday, Mr Taylor was notified of a further disciplinary meeting to be held on 21 February, a Friday. The notice was part of a five-page letter which discussed his responses at the earlier disciplinary meeting. The letter advised that BDL's investigation was ongoing but could result in outcomes ranging from "no

action” to a warning or dismissal. It asked Mr Taylor to contact Ms Revell if he needed to change the time of the meeting “to accommodate a support person or representative”.

[18] The next day (20 February, a Thursday), Mr Taylor sent his supervisor a text message saying he had been given tickets for a three-day music festival and “was wondering” if he could take Friday off work. In his oral evidence Mr Taylor said he was given the free tickets on the Thursday, after being notified of the disciplinary meeting to be held on the Friday. In his text to his supervisor Mr Taylor said he would email Ms Revell and “reschedule the [disciplinary] meeting for next week”. His supervisor replied: “Sorry can’t give you tomorrow off and need to keep progressing”.

[19] However at 8.05am on the next morning, the Friday, Mr Taylor sent his supervisor this message:

Morning, sorry its late notice but I’m not coming in today, also I’m out of minutes hence why I’m texting rather than calling if you want to discuss feel free to ring me otherwise I’ll see you Monday cheers.

[20] He also sent Ms Revell a text at 8.06am: Hey, sorry for late response, would it be possible to reschedule the meeting for any time next week.”

[21] After consulting with Ms Haynes at BDL Ms Revell sent Mr Taylor an email setting the disciplinary meeting for Monday, 21 February and telling him the meeting would address the issue of his unauthorised absence from work that Friday. She noted his request on Thursday to change the meeting to attend a three-day festival had been declined. She referred to discussion at the earlier disciplinary meeting about the issue of calling his supervisor before the start time if absent. She said Mr Taylor had accepted in that meeting that he had failed to follow that procedure but understood it was a requirement in his employment agreement. She continued:

Today you failed to phone [your supervisor] before your start time and sent a text instead. This is considered repeated failure to follow reasonable instructions and falls under serious misconduct.

[22] Ms Revell sent Mr Taylor a text about that email. At 12.30pm Mr Taylor replied by text that he had received the email and the Monday date and time for the meeting “sounds good”.

[23] At the disciplinary meeting on Monday, 24 February Mr Taylor told Ms Revell and Mr Bayley that the festival tickets “were a gift” and he “would have lost more

money than I would have earned when I was working” if he had not used the tickets. A transcript of the meeting, which was recorded, shows Mr Taylor said he was “completely at fault for what happened on Friday” and was “willing to take responsibility and consequences for that”.

[24] In a letter dated 2 March Ms Revell advised Mr Taylor of the outcomes BDL proposed for the concerns raised with him. Warnings were proposed for earlier instances of not notifying his supervisor of absences in the required way. BDL also said it would review its procedures regarding overnight accommodation, setting clearer rules about visitors and use of bedrooms. However, on the concern regarding Mr Taylor’s absence on 21 February to attend the music festival despite leave being refused, BDL proposed dismissing him on the grounds of serious misconduct. It said taking the day off when the leave was not approved, and then failing to notify his supervisor by telephone, were instances of serious and repeated failure to follow a reasonable instruction and had breached the trust and confidence BDL could have in Mr Taylor as an employee.

[25] The letter advised Mr Taylor he should provide any response in writing to Mr Bayley by 6pm on 5 March and Mr Bayley would finalise his decision by 10am on 6 March.

[26] Although the letter was dated 2 March, Mr Taylor was not given it until 4 March. As a result he had less time to respond than it suggested. He did not provide any written response by the end of 5 March.

[27] On his way to work on 6 March Mr Taylor went to the Mitre 10 store in Te Awamutu and bought a pair of work boots, charging them to BDL’s account at the store. An invoice was automatically generated and sent electronically to BDL at the time of purchase. It showed the pickup time for the boots as 8.06 am. Mr Taylor arrived at work around 8.30am, about half an hour after his usual start time. Ms Haynes saw the invoice and passed it to Mr Bayley when he arrived at the office later that morning.

[28] Mr Taylor’s evidence was that he had spoken to Mr Bayley on 6 March about purchasing a new pair of boots and had his permission to do so. This was unlikely as Mr Bayley did not arrive at the office until after 10am and the boots were purchased at 8.06am.

[29] In a text exchange on 26 February Mr Taylor had asked Ms Haynes about BDL paying for him to get some new work boots and where to buy them. Ms Haynes had replied “only thru Farmlands” and told him she would need to give him a card to take when making the purchase. On 4 March Mr Taylor had, by text, asked again about getting new boots as his were “past the point of usable”. Ms Haynes replied that his request would have to wait until after a decision was made on 6 March about his disciplinary process.

[30] On arriving at the office on 6 March Mr Bayley had a supervisor confirm a meeting time with Mr Taylor for 4.30pm that afternoon. At that meeting, also attended by Ms Haynes, Mr Bayley referred to the purchase of the boots that morning as another instance of Mr Taylor’s “repeated behaviour that was not changing”. He said he explained that “even after receiving the preliminary outcome [Mr Taylor] still proceeded to act in a manner without permission”. He told Mr Taylor he was dismissed on two weeks’ notice for serious misconduct.

[31] By letter sent to Mr Taylor on 7 March Mr Bayley confirmed the dismissal in this way:

After reviewing the summary and reviewing the investigation, as well as your behaviour on the morning of Friday 6th March 2020 regarding boots, I am terminating your employment with [BDL] as per meeting at 4.30pm on Friday 6th March. You will work out your 2 weeks as per contract.

The test of justification

[32] In responding to Mr Taylor’s personal grievance application BDL had to establish that its actions in investigating its concerns about his conduct, and then reaching a decision to dismiss him for serious misconduct, met the objective standard of what a fair and reasonable employer could have done in all the circumstances at the time.¹ This involves considering, firstly, whether the particular conduct for which he was dismissed was of a nature and degree that a fair and reasonable employer could have characterised as deeply impairing or destructive of the confidence and trust essential to the employment relationship. Secondly, the statutory test checks whether the employer carried out its disciplinary process and reached its decision in a fair way. This includes undertaking sufficient investigation, telling the worker about the employer’s concerns and providing a reasonable opportunity to respond to those

¹ Employment Relations Act 2000, s 103A(1) and (2).

concerns. The employer must then genuinely consider any explanations given before making its decision.² Minor defects in the employer's process will not make a dismissal unjustifiable under the statutory test if those defects did not result in the worker being treated unfairly.³

Serious misconduct established

[33] There was no significant dispute about the facts of what Mr Taylor did on 21 February. He took the day off after being told he was not allowed to do so. He made his arrangement to go to the festival after being told of the disciplinary meeting scheduled for 21 February. He said he would lose money if he did not use the tickets but, in his evidence, confirmed they were a gift and cost him nothing. And, while the notice of the meeting said he could reschedule the meeting if this was needed for a support person or representative to accompany him, that was not the reason he sought the leave or the change of meeting date. In his evidence to the Authority Mr Taylor said he needed the day off because he felt under stress because of the disciplinary investigation. It was not a reason he had put to BDL to consider when asking for a day's. Instead he took the day off anyway and sent his supervisor a text about his absence, rather than telephoning, knowing that was one of the concerns being addressed with him in the disciplinary process.

[34] The instruction to call not text was a contractual term which BDL could reasonably have in its employment agreement. As Mr Bayley explained in his evidence, BDL relied on workers calling in before their start time, if sick or absent for some other reason. BDL's teams of workers often travelled to the various sites in one vehicle and they needed to know if a worker was not coming to work.

[35] Mr Taylor had confirmed in the previous disciplinary meeting that he had looked at the relevant term in his employment agreement and understood he needed to call and not just text. In those circumstances BDL could have reasonably concluded he deliberately defied that arrangement on 21 February. And Mr Taylor, in the 24 February disciplinary meeting, volunteered that he was "completely at fault", was "willing to take responsibility and consequences for that" and "there was no excuse for that for any reason whatsoever".

² Section 103(3).

³ Section 103(5).

[36] In those circumstances BDL could have reasonably concluded Mr Taylor's conduct that day, which was a repetition of earlier instances, was serious misconduct.

[37] A similar conclusion was open to a fair and reasonable employer regarding unauthorised purchase of boots on the company's account on the morning of 6 March. On the balance of probabilities Mr Taylor had not established he had gained express permission from Mr Bayley that morning to go and buy the boots. On the contrary, Ms Haynes' evidence and her text correspondence with Mr Taylor established he was told he did not have permission and, even if he were to get it, use of the company's account at Mitre 10 was not the appropriate means to get boots. While there is a dispute about whether this conduct was fairly put to Mr Taylor for response before a decision about his dismissal was communicated to him, going ahead and buying the boots in the way that he did was, in the circumstances, was reasonably capable of being characterised as serious misconduct.

A fair process and outcome

[38] The evidence of both Ms Revell and Mr Taylor established that BDL carried out its disciplinary process in a way that met the requirements of the statutory test. Mr Taylor was notified of concerns, meetings were held, explanations given and, as shown by the correspondence, genuinely considered. The preliminary conclusions demonstrated that BDL accepted some of Mr Taylor's explanations. Its decision to review and put in place clearer policies about visitors to work-provided accommodation was one example. It fairly gave him notice of the additional disciplinary concern caused by his unauthorised leave and failure to properly report it on 21 February. It also fairly gave him notice of the proposed consequence of dismissal. While that was done by letter hand delivered to him on 4 March, with a response expected the next day, it was not a defect in the process that resulted in him being treated unfairly because Mr Taylor neither intended nor sought to make any response to it. He had, on his own evidence, already "surrendered" to the outcome of dismissal as inevitable.

[39] Arguably, Mr Taylor did not have an adequate opportunity to respond to the "boots" issue which arose from his unauthorised purchase on the day of his dismissal. However, if this were a defect in BDL's process, there were two reasons it cannot be grounds for determining Mr Taylor's dismissal was unjustified. Firstly, Mr Bayley's evidence established that Mr Taylor would have been dismissed on 6 March anyway, regardless of the boots issue that arose that day. It did not change the outcome. It

simply reinforced the conclusion that Mr Bayley had already reasonably reached that BDL's employment relationship was too deeply impaired by Mr Taylor's repeated failure to comply with its requirements for reporting absences. And, secondly, even if Mr Taylor had been given a longer opportunity to explain his purchase of the boots, the evidence established that he had not been authorised to do so and what he did amounted to repetition of failure to follow instructions.

[40] In closing submissions made on his behalf, Mr Taylor criticised the expectation that he work out two weeks' notice as being inconsistent with BDL's decision that its confidence in its employment relationship with him had been too deeply impaired to continue. However the employment agreement said BDL "may" dismiss a worker without notice for serious misconduct. It did not require that any dismissal for serious misconduct *must* be instant and without notice. Mr Bayley's evidence on that point was that he wanted to provide Mr Taylor with some time to find alternative employment. It was not unreasonable for Mr Bayley to provide that opportunity.

Dismissal reasonable

[41] The statutory test of justification allows for a range of responses that, assessed objectively, a fair and reasonable employer may make, including in its decision on whether dismissal is the appropriate sanction for serious misconduct in the particular circumstances. While BDL could have opted to give Mr Taylor another chance to meet its requirements about reporting absences, its decision in light of what Mr Taylor did on 21 February was within the range of responses that could reasonably be made.

[42] Accordingly, for the reasons given, BDL did not act unjustifiably in investigating concerns about Mr Taylor's conduct and then deciding to dismiss him. His personal grievance application is declined.

Breaches of employment standards

[43] Mr Taylor sought imposition of a penalty on BDL for two breaches of statutory employment standards. The first concerned the sum of \$230 BDL deducted from his pay on 9 March. It was the cost of the boots he had purchased on 6 March. The second concerned failure to provide his representative with copies of his wage and time records when requested.

[44] The deduction was said to breach sections 4 and 5 of Wages Protection Act 1983 (WPA). Those sections prohibit deductions without written consent or, where an employment agreement allows for deductions, without first consulting the worker about a specific deduction. Mr Taylor was not consulted about the deduction. He was simply told by email from Ms Haynes that it was being made. This was a breach of the WPA and BDL was liable to a penalty for it.⁴

[45] Failure to provide a worker or their authorised representative with immediate access to wage and time records is a breach of s130(2) of the ER Act. An employer failing to comply with such a request for records is liable to a penalty.⁵

[46] Mr Taylor's representatives made such a request under s 130 when they raised his personal grievance in March 2020. By the time they lodged his application to the Authority in August 2020 those records had not been handed over and a penalty was sought for that omission. The records were provided to his representative in April 2022.

[47] The failure to more promptly comply with the request appeared, from evidence of Ms Revell and Ms Haynes, to have arisen from a misunderstanding that the payslips Mr Taylor received during his employment were sufficient. The limited information on the payslips was not enough to meet the statutory requirement to provide wage and time records on request. BDL was liable to a penalty for the breach.

[48] A penalty for the two breaches could, in this case, sensibly be globalised. While the maximum for such breaches of employment standards is up to \$20,000 for a company, the shortcomings here was at the lower end of the scale. Repetition of the breaches was unlikely. The loss or damage was minimal. However, the importance of emphasising the obligations on all employers to comply with employment standards required imposition of a penalty to mark the breaches. BDL had access to and received professional human resources advice in the process that led to the end of Mr Taylor's employment so had the means to check its obligations. BDL must now pay a penalty of \$1,000 into the Authority within 28 days of the date of this determination. Once paid, the Authority must transfer that amount to a Crown Bank Account.

⁴ Wages Protection Act 1983, s 13.

⁵ Employment Relations Act 2000, s 130(4).

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If they are not able to do so and an Authority determination on costs is needed BDL may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Mr Taylor would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[51] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Robin Arthur
Member of the Employment Relations Authority

⁶ See www.era.govt.nz/determinations/awarding-costs-remedies.