

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN David Townsend (Applicant)
AND Prospace Designz Limited (Respondent)
REPRESENTATIVES Fergie Mackay for Applicant
Mike Mooney for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 17 May 2005
MEETING
DATE OF 30 May 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

Introduction

1. The Respondent, Prospace Designz Limited (Prospace), summarily dismissed the applicant, Mr David Townsend, just before Christmas 2003. Mr Townsend claims his dismissal was unjustified because there was no good cause for it and the process used was entirely unfair to him.

Mr Townsend's Employment

2. Prospace designs and builds fit outs of commercial premises. It employs 24 people and is owned and run by Mr George Russell. In January 2001 Mr Russell decided to take Mr Townsend on to do spray painting work. Mr Townsend worked largely on his own in a spray booth. He did not sign an employment agreement until the end of that year.
3. Unfortunately, by the last month of 2003 Mr Russell had become very dissatisfied with a number of aspects of Mr Townsend's performance. As a result, following discussion and agreement with Mr Townsend, Mr Russell issued him with what was

said to be a three month probationary period, but in effect can be seen as a final warning, in writing. During that period Mr Townsend was required to “*demonstrate a significant change in attitude, conduct and performance*”. A final review was set to take place on or around 12 April 2004.

4. Particular concerns that Mr Russell had related to hours of work, not smoking in the building, keeping the workshop tidy and improving quality control. The agreement concluded with an understanding that failing to address and abide by these terms and conditions may result in termination of employment.
5. Subsequent events were to indicate to Mr Russell that Mr Townsend’s performance (and in particular his attitude to work) had not improved.
6. First, and perhaps the principal matter of concern to Mr Russell, was Mr Townsend’s behaviour at the staff Christmas party on 19 December 2003. A traditional work shout commenced without Mr Russell in attendance. A number of people had had quite a lot to drink before Mr Russell arrived at around 7.30pm, some four hours later. Mr Townsend was not one of those people.
7. In Mr Russell’s absence there had been a lot of skylarking between a number of the workers. At one point one employee splashed Mr Townsend with water and ice. Mr Russell did not see this occur. Mr Townsend decided that he would retaliate, but he did so by escalating the behaviour and in a calculated manner, as his was not an immediate response to the splashing. What he did was attempt to ‘dunk’ the employee who had splashed him into the ‘drinks bucket’, which was filled with ice. As might be expected, that worker resisted Mr Townsend’s efforts, but as a result his legs were badly scraped on the sharp edges of the bucket and his shoulder was injured when he was forced onto the floor. The incident was over almost as soon as it began, but it led Mr Russell to close down the function. While Mr Townsend’s actions were clearly deliberate, a number of witnesses told the Authority that it was all part of the general skylarking and therefore it was not seen as an aggressive attack. Mr Russell drew his own conclusions, which were that Mr Townsend’s actions were both inappropriate and aggressive and caused the end of an otherwise enjoyable celebration.

8. Early the next week Mr Russell received a call from a client who claimed that Mr Townsend had either not delivered its work, or not arranged for it to be picked up, before he closed the paint shop for Christmas. When Mr Russell went to collect the work he noted a sign Mr Townsend had posted, which contained a contact mobile phone number, and which stated “*due to excessive drinking may not respond (burp)*”.
9. Mr Russell had also recently become aware that Mr Townsend had entered into a relationship with Mr Russell’s administration clerk/receptionist, which he did not consider was appropriate.
10. All of this was too much for Mr Russell. Accordingly, at 1.00pm that day, he phoned Mr Townsend and asked him to come to a meeting, without telling him what it was about. He also got the administration clerk to attend the meeting, which took place at 3 o’clock that afternoon. Mr Russell commenced the meeting by stating that he was not happy about Mr Townsend and the clerk having a personal relationship while in his employment. He went on to comment that the clerk would not have been appointed had she been in such a relationship with Mr Townsend when she first applied for the position.
11. Mr Russell then went over the Christmas party incident and how Mr Townsend’s behaviour was unacceptable and aggressive. Mr Townsend explained his actions were meant solely as a bit of fun. Mr Russell then went on to complain about the sign on the door, which he considered unprofessional. Mr Russell explained that this was a note that was meant to be taken in the spirit of Christmas.
12. Mr Russell then went over the matters previously raised in the meeting of 8 December. He said that the workshop was still a mess. Mr Townsend said that he had tidied the workshop up and that it was tidier than most other premises in town. Mr Russell told Mr Townsend that he was only interested in his own premises, not those of others. Mr Russell then told Mr Townsend that he was having difficulty getting people to help Mr Townsend out because they didn’t get on with him, and that was why a previous painter had been transferred. Mr Townsend did not accept that analysis.
13. Mr Russell then said that he had had various problems with Mr Townsend during the year and basically he had had enough. He said that he preferred not to have some one

like Mr Townsend in his employment as he had already cut him a fair amount of slack. Mr Townsend asked if he was being fired and Mr Russell eventually answered that he guessed that that was it – thus in effect agreeing with Mr Townsend. Mr Townsend responded by telling Mr Russell that he would see him in Court. When leaving, Mr Townsend asked for the reasons for his dismissal to be put in writing.

14. After Mr Townsend left Mr Russell asked the clerk about several matters in relation to her relationship with Mr Townsend and how the termination of Mr Townsend's employment might affect her work.
15. Mr Russell obliged Mr Townsend's request for reasons and wrote to him the next day, 23 December, clarifying why he had been dismissed from his job. Mr Russell covered the performance matters that had been agreed on 8 December; his view of what had happened at the Christmas shout; Mr Townsend's failure to ensure that a client got its work before Christmas and the unprofessional sign and his failure to keep the workshop clean. He then stated:

"Dave it has become apparent that I am, as they say, pushing "water" up hill with a rack in my genuine attempts at trying to resolve issues with you.

I would have thought that anyone serious about wanting to retain his job would have handled all of the above much differently.

You have further complicated matters by becoming involved with Cheryl our full time office lady.

This has now placed her own position in jeopardy, as there is a clear and obvious conflict of interest between all parties...

I enclose a cheque for \$2,190.00 being four weeks pay less tax. I offer this in lieu of notice and as full and final settlement for the termination of your employment. Acceptance of this payment will be acknowledgment, on your behalf, that you accept these terms and will make no further claim against Prospace Designz Ltd or myself personally."

16. Mr Townsend refused to accept this sum, but instead raised a personal grievance. Despite mediation and further attempts to resolve the matter during the investigation meeting, no agreement eventuated, so it falls to the Authority to make a determination.

Unjustifiable Dismissal

17. I do not accept Mr Mooney's submissions on behalf of Prospace that no investigation into the Christmas shout incident was required as Mr Russell personally witnessed the matter. Such a view is only available in exceptional circumstances. What is important in this case is the motives that Mr Townsend had for his actions (*Finsec v. Australian Mutual Provident Society* [1992] 1ERNZ280 applied). There was a lot of evidence about motive, from Mr Townsend and other witnesses to the event besides Mr Russell himself, which he could have investigated, but he chose not to.
18. In any event, it was clear from Mr Russell's own evidence, as backed by the notes of the meeting of 22 December and the dismissal letter, that Mr Townsend was not dismissed just because of the Christmas shout incident. Rather Mr Russell, I find, dismissed Mr Townsend because he had given him a last chance on the 8 December, yet, some two weeks later, his attitude did not seem to have improved and if anything had worsened. Furthermore, Mr Townsend had entered into a relationship with one of Mr Russell's staff that he considered quite inappropriate. All of these factors weighed together led to Mr Russell's dismissal of Mr Townsend, I conclude.
19. However, dismissal in these circumstances could only have occurred following a proper investigation and on notice. The basic rules of a fair and reasonable procedure include notice of the specific allegations and the likely consequences, a real opportunity to respond and an unbiased consideration of the worker's explanation. Clearly Mr Russell's investigation, such as it was, consisting of one meeting held without prior notice, did not meet any of these tests. Mr Russell had decided, I find, to dismiss Mr Townsend before he even held the meeting.
20. In all, Mr Townsend's behaviour had become such, in Mr Russell's eyes, that he simply could not put up with it any more. Mr Russell's reaction, although no doubt borne out of frustration, was in breach of accepted standards and therefore Mr Townsend's dismissal was unjustifiable.

Remedies

21. Mr Townsend claims lost remuneration until 31 March 2004. In that period he would have earned \$8840 at Prospace, but in fact only earned \$4509.45. He therefore lost \$4330.55 in remuneration.
22. Mr Townsend is also entitled to compensation for the way that his dismissal impacted on him. He gave evidence that he had the worst Christmas ever; that he felt useless as a tradesman and that he was very angry and depressed as a result of being fired for the first time in his life. He also was upset at having to spend all his savings on maintaining himself and his family during the period he was unemployed. In all the circumstances of this case I consider that appropriate an award of compensation would be \$6,000.00.
23. I am also required to take into account the extent to which Mr Townsend's actions contributed to his dismissal. In this context I am most concerned by his assault of another worker at the Christmas function. Having heard the evidence of many of those at the function I consider that had Mr Russell conducted a full and fair inquiry he might have been able to conclude that Mr Townsend had committed serious misconduct justifying summary dismissal. However, as noted above, Mr Russell did not dismiss Mr Townsend for that reason alone, did not conduct a fair inquiry and his conclusions were different to those that I have reached after a full investigation into the circumstances of the matter.
24. Mr Townsend, on his own evidence and that of others, was not drunk. Mr Townsend's actions were deliberate, as he spoke of seeing his chance to get back at the other worker. Mr Townsend's response was also an escalation of events, as previous skylarking had been of a much less serious nature. Furthermore, the impact on Mr Townsend's victim was quite serious, although medical attention was not required. The Authority can not condone such actions, even although they took place in a social environment outside of work hours, Mr Townsend did not mean to cause the injuries he did and he later apologised to his victim.
25. On the other hand, Mr Townsend was not responsible for Mr Russell predetermining the matter, following an unfair process and taking into account irrelevant

considerations such as Mr Townsend's relationship with a co-worker. In all the circumstances this case I consider that Mr Townsend's contributory actions were sufficiently serious so as to halve the remedies awarded to him.

26. I therefore order the respondent, Prospace Designz Limited, to pay to David Townsend \$3,000.00 in compensation and \$2,165.23 gross in lost remuneration.

Costs

27. Costs are reserved.

G J Wood
Member of Employment Relations Authority