



New Zealand Employment Relations Authority Decisions

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UDK v Paramount Services Limited (Christchurch) [2018] NZERA 1138; [2018] NZERA Christchurch 138 (21 September 2018)

Last Updated: 28 September 2018

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

Attention is drawn to the order prohibiting publication of certain information

[2018] NZERA Christchurch 138

3021118

BETWEEN UDK Applicant

A N D PARAMOUNT SERVICES LIMITED

First Respondent

PARASERVE INTERNATIONAL LIMITED Second Respondent

Member of Authority: Peter van Keulen

Representatives: Robert Thompson, advocate for the Applicant

Darren Mitchell, advocate for the Respondent

Investigation Meeting: 21 and 22 June 2018 at Christchurch

Submissions Received: 22 June 2018 for the Applicant

22 June 2018 and 25 June 2018 for the Respondent

Date of Determination: 21 September 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paramount Services Limited dismissed UDK because it believed he had been threatening and abusive to other employees. Paramount concluded this was serious misconduct and summary dismissal was appropriate.

[2] UDK says his dismissal was unjustified because:

a. Paramount failed to follow a fair process.

b. The decision to terminate his employment was not substantively justified.

[3] In the course of dealing with UDK's alleged misconduct, Paramount placed him on discretionary leave. UDK says this was a suspension and was an unjustified action that caused disadvantage to his employment.

[4] UDK raised personal grievances in respect of both the suspension and the dismissal. It is these two grievances that I have investigated and will now determine.

Preliminary matters

[5] During the course of the investigation of these matters it became clear that UDK was paid by Paraserve International Limited rather than Paramount. UDK was concerned to ensure that if any remedies are awarded Paramount does not avoid payment. In the circumstances, the parties agreed that Paraserve International Limited should be joined as a second respondent simply as it accepted, that either it or Paramount could meet any obligation to pay remedies if awarded. Accordingly, I joined Paraseve International Limited to this claim as the second respondent.

[6] Given the nature of this claim, particularly the allegations made against UDK, the impact of the dismissal on UDK and his underlying health, it is appropriate that I prohibit from publication UDK's identity and any information about his health except as otherwise set out in this determination.

[7] I also consider it appropriate to protect the identity of certain employees who complained about UDK's behaviour because they did not give evidence in this matter and I would not want any adverse inference that might be drawn from the evidence about their complaints to be attributed to them.

[8] Therefore, pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

a. the name and identity of UDK, the applicant, and any information which may lead to his identification – he is referred to as UDK in this determination;

1 UDK also alleged that Paramount failed to meet its duty of good faith in its actions toward him, but he did not pursue this element of his claim.

b. the details of UDK's medical conditions including any current diagnosis and historical matters, except for anything that I set out in this determination;

c. the name and identity of the two employees at Paramount involved in this matter who are referred to as TDE and AVY respectively.

Issues

[9] There are two broad issues to consider for the unjustified dismissal grievance:

a. Did Paramount follow a fair disciplinary process in coming to the conclusion to dismiss?

b. Was the decision to dismiss substantively justified?

[10] Sections 4(1A) and 103A of the Act are relevant to the issue of whether Paramount conducted a fair disciplinary process. In this respect, the matters for me to consider are:

a. Did Paramount investigate the allegation of serious misconduct sufficiently;

b. Did Paramount outline the allegation, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to UDK for him to consider and respond to;

c. Did Paramount give UDK a reasonable opportunity to respond to the allegation of serious misconduct including specifically any information it did provide, before it made its decision to dismiss;

d. Did Paramount consider properly any explanation given by UDK before it made its decision to dismiss;

e. Are there any other factors that impact on procedural fairness;

f. If there was a failing by Paramount in any of the steps above, does that render the disciplinary process unfair?

[11] The matter I must consider on the question of substantive justification is whether dismissal was a decision a fair and reasonable employer could have come to in light of:

a. The gravity of the misconduct, including any effects of it; and

b. The circumstances of the misconduct and/or any mitigating factors.

[12] In order to resolve the unjustified disadvantage grievance I need to consider the following:

a. By placing UDK on leave did Paramount cause disadvantage to UDK's

employment or a condition of his employment; and b. If so, was Paramount's action justified?

Did Paramount follow a fair disciplinary process?

Did Paramount investigate the misconduct and the relevant circumstances, properly?

[13] I am not satisfied that Paramount investigated the alleged misconduct, including the circumstances that gave rise to the alleged misconduct adequately.

[14] It appears that in June 2017 Paramount became concerned that UDK was being abusive and aggressive to employees and suppliers. Paul Brown, Paramount's General Manager, said that employees had raised concerns with him but he was unable to provide specific details when I questioned him on this. However, I accept that employees must have raised concerns with Mr Brown because his response was to call UDK and discuss his conduct. This call occurred on 26 June 2017. During that call, UDK told Mr Brown to "get fucked".

[15] Mr Brown summarised that call in an email he sent to UDK in the evening of 26 June 2017. That email recorded:

[UDK], My call tonight was to see if I could help you firstly in your work and your personal situation. I advised I have over the last few working days had staff raise their concerns regarding your aggressive behaviour and feed back (sic) from suppliers you have been making derogatory comments about Paramount and people within. I am assuming that what I endured is what the other staff are stating. If so it is offensive and inappropriate. As I mentioned I want to help but it appears we are beyond that. Because I called you on a personal basis I will not take disciplinary action but respectfully urge you to seek help. I wish to advise I will not tolerate further abuse, bad language and aggression. If you (sic) there is another incident of abuse your continued employment with Paramount may be compromised. Thank you Paul

[16] So, in terms of these initial concerns, Mr Brown did not investigate them fully but he also decided that having raised the concerns they would not be taken any further in terms of disciplinary action, this was notwithstanding that he claimed he experienced some abuse directly.

[17] Mr Brown's actions might appear to be of no consequence to a subsequent dismissal and entirely appropriate in terms of an employer trying to de-escalate an issue before it got worse, however the initial concerns resurfaced. And, Paramount's subsequent handling of these initial concerns was problematic given its failure to properly investigate them at the time and because Mr Brown had advised UDK that Paramount would not take disciplinary action in respect of those concerns.

[18] On 6 July 2017, Mr Brown received two further complaints about UDK, one from an employee (TDE) relating to a call that TDE had with UDK on 26 June 2017 and one from another employee (AVY) relating to a call that AVY had with UDK on 6 July 2017.

[19] Mr Brown did not speak to TDE about his complaint and, in fact, the complaint was not made to Mr Brown but was set out by TDE in an email to another manager. There was no evidence from Paramount to show that anyone investigated the complaint but rather it appears that when Mr Brown received the email he treated it on face value as being a legitimate complaint.

[20] Mr Brown did speak to AVY about her complaint as AVY called him directly to complain. Mr Brown discussed her concerns and then asked her to put the complaint in writing and send it to him.

[21] After receiving these two further complaints, Mr Brown decided that Paramount needed to take some action. He discussed his concerns about UDK with Galvin Bartlett, Paramount's Managing Director. He then decided to place UDK on discretionary leave until Paramount had an opportunity to discuss its concerns with UDK.

[22] It was later on 6 July 2017 that Mr Brown called UDK to tell him he was being placed on discretionary leave. UDK did not respond well to this news and it is alleged that he became abusive and threatening to Mr Brown.

[23] Mr Brown then spoke to Mr Bartlett about the threats and abuse. Mr Brown was then removed from any further involvement with UDK and the alleged misconduct and Mr Bartlett decided that disciplinary steps were appropriate.

[24] The issue that arises here is Mr Bartlett did not make any independent investigation or enquiries into what Mr Brown told him. In fact, his evidence was that his decision to commence the disciplinary process was informed by the alleged abuse and threatening behaviour toward Mr Brown on 6 July 2017.

[25] Mr Bartlett then instructed Murray Hamilton, Paramount's National Key Account Manager, to conduct the disciplinary meeting and make a decision on the outcome. It is clear from the evidence that Mr Hamilton did not investigate any of the complaints either; he simply relied on the information conveyed to him by Mr Bartlett.

[26] The failure to investigate at this point creates two further issues for the disciplinary process. First, Mr Bartlett commenced the disciplinary process based on all of the complaints Mr Brown had received as well as both of Mr Brown's complaints. And second, the circumstances surrounding the alleged misconduct were relevant.

[27] On the first issue:

a. Paramount started a disciplinary process with UDK because of *further complaints* received after 26 June 2017. This means Paramount must have accepted the initial complaints were valid despite no investigation as to whether the misconduct complained of actually occurred, and if it did occur, the circumstances of the misconduct. Further, there was no proper opportunity for UDK to respond to the first allegations. In summary, UDK was in a disciplinary process because of the first complaints when Paramount did not know the detail of those complaints, and significantly, whether they were valid or at least credible, or whether UDK's behaviour might have been culpable.

b. Paramount then pursued the disciplinary process without either Mr Bartlett or Mr Hamilton investigating two of the second complaints. At the very least one of them should have spoken to TDE and AVY to get more detail of what their respective complaints were; without this Paramount proceeded on subjective assessments of UDK's behaviour that had limited factual content.

[28] Turning to the circumstances of the alleged misconduct, there are two relevant matters.

[29] UDK had separated from his wife, who also worked at Paramount; as a couple, the two of them had worked together from their home. I did not hear any substantial evidence about the breakdown of UDK's marriage but it was clear that UDK blamed Paramount, at least in part. UDK had also raised issues arising for him as a result, with Paramount and sought assistance – he was offered some counselling through his GP but Paramount was not prepared to fund any additional cost for this so that it could be provided more quickly.

[30] And UDK's relationship with Mr Brown had deteriorated after the call on 26 June

2017. The email that Mr Brown sent to UDK in the evening of 26 June which recorded his views of the earlier telephone conversation, crossed with an email sent from UDK to Mr Brown. UDK's email, which was copied to Mr Bartlett, recorded:

Mr Brown

Don't talk to me again.

You had a number of opportunities and rudely ignored my calls for help.

And now think ridiculing our past business failures that cost [UDK wife] and myself half of our net worth is going to help in anyway! (sic)

Go back to diplomacy school and learn how to treat people with a little bit of compassion.

I need to see some sign of the paramount family culture that we are out here promoting to new Spotless staff.

[31] Mr Brown did not do anything with this email and continued to deal with UDK. UDK emailed Mr Brown again on 5 July 2017. This email was copied to Mr Bartlett and Mr Hamilton. It was clear from the content, which I do not need to set out, that UDK was distressed about his marriage break up, Paramount's treatment of himself and his wife and the continued contact from Mr Brown. It specifically referenced a possible personal grievance and was written in capital letters.

[32] These emails should surely have raised some concern amongst Paramount management about UDK's health. Yet despite this, Mr Brown proceeded to interact with UDK, making the significant decision that he should be placed on discretionary leave and speaking to him directly about that on 6 July 2017, which caused the alleged outburst that UDK was being asked to explain in the disciplinary process.

[33] Mr Bartlett should have been aware of these emails and should have done more to understand what was going on, from an investigation of the misconduct standpoint and in terms of protecting UDK's health at work.

[34] In conclusion, on the investigation, or lack of it, the clear failings by Paramount meant Paramount's decision to commence a disciplinary process was misinformed and potentially misplaced and the process itself was progressed without full information being available to the decision maker or UDK.

Did Paramount provide relevant information and explain the allegation and the disciplinary consequences, to UDK?

[35] The failure to properly investigate the underlying complaints then causes problems for the rest of the disciplinary process.

[36] Paramount did provide relevant information to UDK about the alleged misconduct but that information was not sufficient to properly set out what the alleged behaviour was, as Paramount did not have this information.

Did UDK have an appropriate opportunity to respond to the allegation and the information provided?

[37] The next major failing on Paramount's part was to proceed to make a decision on the

alleged serious misconduct without holding a meeting with UDK.

[38] Paramount sent UDK a letter, dated 11 July 2017, which invited him to attend a disciplinary meeting on 17 July 2017. That meeting never took place as UDK's representative was not able to attend.

[39] Various attempts were made to re-schedule the meeting and Paramount became frustrated at the lack of progress in setting the meeting down. On 20 July 2017 Mr Hamilton sent an email to UDK's representative stating:

Please respond by 5pm tomorrow (21 July 2017) with an indication whether your client intends to take up the opportunity to meet. This is your client's opportunity to provide a response to the disciplinary allegations raised with him via our letter of 11 July. If we do not hear from you by this date and time, we will be making a decision based on the information we have at hand.

[40] UDK's representative sent a substantive response raising issues with Paramount's

conduct of the disciplinary process and the discretionary leave. The response concluded with

a request that the parties have without prejudice discussions prior to any disciplinary proceedings. Mr Hamilton responded on 21 July 2017, rejecting the offer to discuss matters on a without prejudice basis and concluding:

As previously advised, please respond by 5pm today with an indication whether your client intends to take up the opportunity to meet. This is your client's opportunity to provide a response to the disciplinary allegations raised with him via our letter of 11 July. If we do not hear from you by this date and time, we will be making a decision based on the information we have at hand.

[41] On Monday, 24 July 2017 at 9:12 am, UDK's representative responded stating he was free to meet from 2pm Friday or 8 am Tuesday. Then at 11:02 am that same day, Paramount sent UDK's representative a letter terminating UDK's employment with immediate effect.

[42] So, Paramount failed to give UDK an opportunity to respond to the allegations. I accept that in some circumstances continued delay in responding to allegations either by delaying a meeting or simply not responding to a request might justify an employer proceeding to make a decision without hearing from an employee but this was not such an occasion.

[43] On reflection, hearing the evidence from Paramount it appears that Paramount was frustrated and wanted to end the matter so it seized the opportunity to do so when UDK's representative did not respond by the deadline imposed. This alone was problematic but to do so notwithstanding that the representative did respond before the decision to dismiss had been conveyed was inexplicable.

Did Paramount consider UDK's response properly before it made its decision?

[44] As UDK did not have a proper opportunity to respond to the alleged misconduct, it follows that Paramount cannot have considered any response – it simply did not have a full response to consider.

Other matters

[45] There are two other matters that impact on the procedural fairness of the disciplinary process. These are Mr Brown's involvement given that he was effectively a complainant and whether a disciplinary process should have been invoked at all given UDK's health at the time of the alleged misconduct and the disciplinary process.

[46] I will not address these in detail, as I believe the other factors addressed are significant and resolve the question of procedural fairness but my view is Mr Brown's involvement in dealing with UDK on disciplinary matters should have been curtailed at an earlier point given UDK's adverse reaction to him. And, Paramount should have done more to review UDK's health given what he was complaining of, how he reacted to Mr Brown and that he asked for assistance to get counselling; and in assessing UDK's health Paramount should have considered more carefully and fully whether commencing a disciplinary process was appropriate at that time.

If there were any procedural failings, was the disciplinary process unfair?

[47] Paramount's failings were significant and this affected the process substantially such that it was unfair and the subsequent dismissal was unjustified.

Is Paramount's decision substantively justified?

Is the decision to dismiss justified in light of the severity of the misconduct?

[48] This question is simply whether a fair and reasonable employer in the circumstances could have decided to dismiss UDK.

[49] Given the procedural failings I cannot conclude that a fair and reasonable employer could have decided to dismiss UDK.

It was not clear that UDK had behaved in the manner complained of or even how some of those complaints actually manifested e.g. an allegation that he was aggressive to an employee without any particularisation of what he said or did – objectively a fair and reasonable employer had no basis to conclude that there was behaviour that amounted to misconduct.

[50] Even if there was misconduct of the nature alleged, the circumstances at the time of that alleged behaviour were such that I cannot say a fair and reasonable employer could have decided that summary dismissal was the appropriate sanction. UDK's personal situation, his adverse reaction to Paramount and Mr Brown and his clear need to be supported with his health at work are all relevant. In light of all of these things, I cannot see how a fair and reasonable employer could have decided that dismissal was appropriate.

Conclusion on unjustified dismissal

[51] The decision to dismiss UDK was not a decision that a fair and reasonable employer could have come to in all the circumstances and the dismissal was unjustified.

Suspension

Did the suspension cause disadvantage to UDK's employment or a condition of his employment?

[52] Whilst Paramount has consistently stated that it did not suspend UDK rather he was placed on discretionary leave, this does not justify its decision. Labelling the decision discretionary leave does not change what it was, it was a suspension as UDK was told to stop working and had his email access removed.

[53] The suspension did cause a disadvantage to UDK's employment.

Were Paramount's actions justified?

[54] The question of whether a suspension is justified turns on the procedural fairness and the circumstances of the alleged behaviour in the context of the employment. At its simplest, these are issues of fair process and justification.

[55] Not every instance of suspension requires the employee be told of the pending suspension with a view to the employee commenting on the proposal before a decision is made to effect a suspension or not.

[56] If there is some valid reason why the employee's view on a proposed suspension should not be sought before a decision is made then an employer cannot be said to have acted unfairly.

[57] In this case there was no consultation and I am not satisfied that the circumstances of this case warranted immediate suspension without consultation with UDK. In fact, given his health and the way he had appeared to feel about Paramount's lack of support for him and his wife, not involving him in a discussion about possible suspension was always going to be problematic.

2 *Graham v Airways Corporation of New Zealand Ltd* [\[2005\] NZEmpC 70](#); [\[2005\] ERNZ 587](#)

[58] I do accept that faced with some complaints about threatening and abusive behaviour, albeit complaints that had not been fully investigated, Paramount did have a basis to consider that suspension was required. An employer does owe a duty to protect the health and safety of all of its employees and if UDK posed a threat to this then suspension may have been appropriate.

[59] So suspension may well have been substantively justified but the failure to consult over it and the unilateral imposition renders the suspension an unjustified action which caused disadvantage.

Remedies

[60] As UDK has succeeded with his personal grievances, I must consider what remedies he is entitled to.

Compensation

[61] Turning first to consider compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act, UDK describes the effects of the dismissal on him as:

- a. Devastating, having an impact on him which he cannot describe;
- b. Knocking him around, requiring medication;
- c. Leaving him in a place of darkness and despair;

d. Causing feelings of betrayal and resentment;

e. Creating periods of darkness and depression.

[62] It is clear to me, from the evidence I heard that UDK had mental health concerns and that he was suffering during this time because of the breakdown of his marriage. The impact of the dismissal on him was very significant and not properly captured in my written record. However, some of that impact is attributable to UDK's personal situation and not the dismissal, so I must separate the effects of the personal situation out from the dismissal.

[63] In terms of the suspension, UDK said it created an environment where he was assumed to be guilty of the alleged behaviour before he had been heard. It exacerbated his illness and mental state.

[64] I have considered all of the evidence and the circumstances giving rise to it. I have balanced all of this and conclude that UDK should receive \$18,000.00 compensation for the unjustified dismissal and \$2,000.00 compensation for the suspension.

Reimbursement

[65] UDK seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to s 123(1)(b) of the Act.

[66] I am satisfied that UDK has a personal grievance and that he lost remuneration as a result of that grievance. As a result, pursuant to s 128 of the Act I must award UDK at least the lesser of his actual loss or three months ordinary time remuneration.

[67] UDK did not work set hours, he was employed to work full time but the number of hours he worked each week varied. I have calculated the average hours worked by UDK each week as being 52. UDK was paid \$31.50. Three months ordinary time remuneration based on 52 hours per week at a wage rate of \$31.50 is \$21,294.00.

[68] UDK's actual loss is higher than this as he was unemployed for more than three months following his dismissal. I will not exercise my discretion to award this greater amount to UDK as I am not satisfied, applying a counterfactual analysis, that UDK's employment would have lasted longer than three months if he had not been dismissed when he was.

[69] UDK was enrolled in KiwiSaver so he is also entitled to reimbursement of the contributions lost as a result of his dismissal, being 3% of his lost remuneration.

Contribution

[70] As I have awarded remedies I must consider whether UDK has contributed to the situation that gave rise to his unjustified dismissal.³

3 Section 124 of the Act.

[71] When assessing if UDK's actions contributed to the situation that gave rise to his grievance I am looking for a culpable or blameworthy behaviour, which caused or contributed to his grievances, which in turn requires a reduction in remedies.⁴

[72] Given the flawed disciplinary process there is little evidence of proven behaviour or conduct by UDK, which can be said to be culpable or blameworthy. Essentially there is only UDK's admission that he swore at Mr Brown and that he was aggressive and angry toward him. I am satisfied that this behaviour is in part contributory and a small reduction in remedies is appropriate; I set the reduction for contribution at 10%.

Wage arrears

[73] UDK was suspended for two weeks and was paid for 80 hours during this time. UDK says he should have been paid for at least his ordinary weekly hours. I agree with this. I have already calculated that UDK's ordinary weekly hours were 52, so I accept he should be paid additional wages for 24 hours work. This is \$756.00.

Conclusion

[74] Paramount unjustifiably dismissed UDK and acted in an unjustified manner causing disadvantage to his employment. In satisfaction of these grievances Paramount or Paraserve International Limited must pay UDK:

a. \$18,000.00 for compensation pursuant to s 123(1)(c)(i) of the Employment

Relations Act 2000, which includes a reduction of 10% for contribution;

b. \$19,164.60 (gross) for lost remuneration pursuant to s 123(1)(b) and [s 128\(2\)](#) of the [Employment Relations Act 2000](#), which includes a reduction of 10% for contribution;

c. \$574.94 for reimbursement of other money lost, being employer KiwiSaver contributions, pursuant to [s 123\(1\)\(b\)](#) of the

[75] Paramount or Paraserve International Limited must pay UDK wage arrears of \$756.00 (gross) for wages not paid during UDK's period of suspension. Paramount or Paraserve

4 Xtreme Dining Ltd v Dewar [\[2016\] NZEmpC 136](#)

International Limited must also pay an additional 3% of this amount as its employer contribution to UDK's KiwiSaver.

Costs

[76] Costs are reserved. The parties should seek to agree how they will deal with the legal costs incurred by taking part in these proceedings. If they cannot agree, any party seeking a contribution to its legal costs may lodge and serve a memorandum within 28 days of the date of this determination. The other party may then lodge and serve a memorandum in reply within a further 14 days.

Peter van Keulen

Member of the Employment Relations Authority