

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 477
5449248

BETWEEN PAUL WALTERS
 Applicant

A N D ISO LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: B Quarrie, Counsel for Applicant
 D J Erickson, Counsel for Respondent

Investigation meeting: 23 and 24 September 2014 at Tauranga

Submissions received: 24 September 2014 from Applicant
 24 September 2014 from Respondent

Date of Determination: 20 November 2014

DETERMINATION OF THE AUTHORITY

- A. Paul Walters was unjustifiably dismissed by ISO Limited;**
- B. An order that ISO Limited pay lost remuneration of three months' ordinary time remuneration less PAYE and reduced by 33% for Paul Walters' contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.**
- C. An order that ISO Limited pay compensation of \$5,000 reduced by 33% for Paul Walters' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- D. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 7 days from the date of this determination. The other party shall have 7 days to file and serve a reply.**

Employment relationship problem

[1] Paul Walters was employed by ISO Limited (ISO) until summarily dismissed on 15 January 2014 following allegations of serious misconduct towards his managers on 18 December 2013. He alleges he was unjustifiably dismissed and seeks compensation.

Facts leading to dismissal

[2] Mr Walters was employed as a shift manager initially by an associated company, New Zealand Associates Limited, and subsequently by ISO. The employment relationship was governed by an individual employment agreement dated 12 December 2012¹.

[3] Mr Walters was invited to attend a performance review meeting on 18 December 2013. The purpose of this meeting was to assess his ability to meet his KPIs and his operational performance. The meeting was run by his stevedoring manager, Lorenzo van der Putten and attended by other managers.

[4] Mr van der Putten had received feedback that a number of shift managers, including Mr Walters, had been “stirring things up” about the necessity to apply for annual leave for weekends. Mr Walters had submitted leave applications in advance for time off around three weekends through January to April 2014. Mr van der Putten believed this was being done to circumvent the use of his annual leave entitlement.

[5] The shift managers had been raising issues about annual leave and the way in which it was being granted with the respondent’s General Manager Stevedoring, Paul Cameron. Mr Cameron had undertaken to review the rostering system to give certainty as to days off. There were concerns employees had taken that to mean a change may occur in the way in which work was allocated and including the rosters to give certainty around days off including weekends.

¹ Common bundle of documents Document 2

[6] Mr van der Putten spoke to Dean Carter, General Manager Human Resources, about the above. Mr Carter suggested they tell Mr Walters they would not approve his leave applications at the performance review meeting on 18 December 2013.

[7] On 18 December 2013 Mr Walters met with Mr van der Putten, Mr Carter and David Blackburn, Duty Manager to undertake his performance review. At the beginning of the meeting Mr Carter told Mr Walters he wished to “*clear up any confusion there might be about the process around applying for weekend leave*” and “*make it very clear that Mr van der Putten had been unable to approve [his] leave and would not be able to approve it until closer to the time*”. He then told Mr Walters he “*should not assume that he could have the weekends off without using annual leave as it could transpire closer to the days in question that he may be required to work those weekends*”. Finally if Mr Walters wanted to guarantee certain days off he would have to apply for annual leave for those days².

[8] There was little dispute about what occurred following Mr Carter’s above comments. Mr Walters became upset and said this was all “*fucking bullshit*”. He raised his voice and used expletives. He told Mr Carter he had lied to him and when Mr Carter asked how he had lied to him, he referred to a work pattern that he was expected to work. Mr Carter asked who had told him that. Mr Walters replied “*you fucking did*”. Mr Carter denied promising him any set working pattern, to which Mr Walters replied “*once again [ISO had] shifted the goalposts and changed the rules*” meaning changing the rules to suit itself. Mr Walters told Mr Carter what they were doing was illegal, their competitors did not do this sort of “*bullshit*” and he was not going to stand for it. He threatened to quit and said ISO was going to lose foremen if they did not properly manage people.

[9] Mr Carter closed the meeting and Mr Walters went back to work.

[10] Mr Carter contacted Mr Walters for a further meeting on 20 December 2013. After the meeting he sent an email stating:

Paul

As agreed I will outline for you in writing here where we are at following our discussion today. That is that following the review meeting on Wednesday the company felt strongly that you had overstepped the mark in terms of what was said and

² Brief of evidence D R Carter, paras.3.2 to 3.5

how it was conveyed to myself and your manager and in particular how it was directed toward the company. You appear to see your employer in a very negative light and you made your thoughts on this point very clear and along with the fact that you disagree with the way we manage leave and allocate work it also appears that you believe we overwork you.

We feel now there are only two options. Firstly, we could take a formal route and initiate a process by which we discuss our issues and concerns (yours and ours) in order to evaluate your suitability for this role or secondly, you choose to resign as you alluded to in the meeting.

I know that you are on leave for the next two weeks but I would prefer to have some idea as to which option you wish to take as soon as possible.

[11] Mr Walters had booked annual leave to be taken immediately after the performance review meeting. Whilst on leave he became ill and it was thereafter converted to sick leave. He did not reply to the above email.

[12] On 10 January 2014 Mr Carter sent a letter initiating a formal disciplinary process and requiring Mr Walters' attendance at a meeting subsequently held on 15 January 2014. The letter set out the company's concerns as follows:

- *You are employed by ISO as shift manager. This is a position of responsibility and requires ISO to have full confidence in your efforts to act in its best interests at all times. Your employment agreement dated 12 December 2012 requires you to act in a "diligent, responsible and professional manner which enhances the employer's interests and good reputation".*
- *At meetings on [18] and 20 December 2013 your attitude and conduct was anything but diligent, responsible and professional and three of your managers witnessed an extremely disappointing display of disrespect and poor attitude toward both the management team and ISO.*
- *The meeting on [18] December 2013 was called to review your performance, but at this meeting we also clarified for you some issues about your future applications for leave. From there your attitude immediately became disrespectful and you not only questioned the legality of how we manage leave but you also brought into question the competence of those that manage leave. Further you became argumentative and*

made allegations that the company had been deceptive about how leave was managed which we refute. Specifically you informed us “that once again the goalposts have been shifted” and that “this is just bulls...t”. In addition to this you questioned the number of hours that you would be expected to work in 2014 and when your manager tried to explain how this would be managed you constantly argued that everyone’s hours would increase and you threatened that you and a number of other shift managers would leave because of this. At this point we were left with no option but to suspend the performance review so that you could calm down and consider your position.

- *We note also that during all of this you constantly made reference to the fact that you “loved the job”. This is hard to understand when we can see how unhappy you are with the allocation of work, the hours you are expected to work and your alleged inability to apply for leave when you needed it.*
- *A further meeting was scheduled for 20 December 2013 in order to try to resolve the outstanding matters. However, at this meeting you once again became argumentative and threatened to resign and make ultimatums with regards to your leaving.*

ISO is therefore of the opinion that you have acted in breach of your employment agreement with regards to acting in a professional, diligent and professional manner.

Further, ISO is concerned that your conduct is evidence of a serious breakdown in the trust and confidence between yourself and ISO. You have since gone on sick leave and these matters have been left unresolved.

ISO takes this behaviour very seriously. As noted above, you are in a position of trust and responsibility and ISO must be able to rely on you to act in its best interests at all times. ISO is concerned that your attitude towards the company and its management undermines your ability to perform your role properly and in its best interests.

[13] Mr Walters was informed that he may be subject to dismissal following this meeting and was advised to bring a support person.

[14] On 15 January 2014 Mr Walters attended a meeting with his support person, Conrad Headland, shift manager. The meeting was also attended by Mr Carter, Mr van der Putten and Melissa Vernal.

[15] Notes of the meeting were produced³. The meeting lasted approximately 45 minutes including a 10 minute break to consider Mr Walters' feedback prior to advising the respondent's decision. Mr Walters was subsequently dismissed effective immediately.

[16] On 16 January 2014 the respondent sent a letter formally confirming his dismissal and the reasons for it.

The disciplinary meeting was called to discuss your conduct and behaviour at your review on 19 December where, in our opinion, your poor attitude and total lack of respect for your manager and the company seriously undermined our ability to trust you to perform your role properly and in the best interests of the company.

In response to all this you said that you were prepared to stand by what you said and apart from the suggestion from your support person that you may have been under considerable pressure at the time, our concerns at the end of all that remain the same. Firstly, we believe there is a serious breakdown in trust and confidence between yourself and ISO and secondly, we believe strongly that you acted in breach of your employment agreement with regards to acting in a "diligent, responsible and professional manner which enhances the employer's interests and good reputation". Thirdly, we feel strongly that your attitude toward the company and its management on 19 December and again at your disciplinary meeting seriously undermines your ability to perform your role properly and in the best interests. As we have already outlined, this is especially critical as you are in a position of trust and responsibility and ISO must be able to rely on you to act in its best interests at all times. Therefore it was our final decision to terminate your employment without notice on the grounds of a serious breach of your employment agreement terms.

[17] On 21 January 2014 Mr Walters raised a personal grievance with the respondent. A statement of problem was filed on 14 April 2014 alleging unjustified dismissal. The matter is now before me for determination.

Issues

[18] The following issues arise:

- (a) Was Mr Walters' conduct on 18 and 20 December 2013 misconduct that a fair and reasonable employer could have dismissed him for?
- (b) Were the employer's actions leading up to dismissal what a fair and reasonable employer could have done in all the circumstances?
- (c) What remedies (if any) should be awarded?

Was Mr Walters' conduct on 18 and 20 December 2013 misconduct that a fair and reasonable employer could have dismissed him for?

[19] The respondent submits that this is serious misconduct as defined by the respondent's disciplinary policy. It also points to the applicant's acceptance of the conduct that occurred at the meeting on 18 December 2013. The applicant was unapologetic at the meeting on 20 December and "*stood by what he said*" at the disciplinary hearing.

[20] The ISO disciplinary policy⁴ defines serious misconduct as:

... conduct that might justify summary and instant dismissal. It is conduct that is likely to deeply impair the basic trust and confidence that is essential between an employer and employee.

[21] A number of examples are given of serious misconduct including insubordination:

7.4 Insubordination – this includes situation where a comment or remark has been made undermining the authority or status of another individual (whether an employee or not) and it constitutes such things as unruliness, cheekiness, impudence and defiance. It is not limited to instances where abusive language has been used.

[22] Both parties agree that Mr Walters' behaviour on 18 December 2013 was as set out in paragraph [8] above. It is well known Mr Walters could have been dismissed for serious misconduct.

[23] The letter dated 10 January 2014 sets out the employers concerns. It does not state his behaviour was "serious misconduct", refer to the above policy or identify the behaviour was insubordination. Instead the letter alleges a breach of the employment agreement "*with regards to acting in a professional, diligent and*

⁴ Document received 22 September 2014, policy statement 103.1 ISO disciplinary policy

professional manner” and the *“conduct is evidence of serious breakdown in the trust and confidence between yourself and ISO.”* Mr Walter’s comments were disrespectful, questioning the legality of leave and the competence of those who manage leave. It referring to Mr Walter’s comment *“that once again the goal posts had shifted”* as alleging the company had been deceptive.

[24] It is not until partway through the disciplinary meeting that Mr Headland identifies the company’s issue was in fact insubordination which is confirmed by Mr Carter.⁵ Prior to this revelation, the parties had spent most of the meeting discussing the company’s leave policies, not the issue of insubordination.

[25] In the letter and at the disciplinary meeting Mr Carter identified trust and confidence broke down when Mr Walters made comments such as *“[competitor] can do it better”* and *“I may as well quit”*.⁶ These comments do not appear to be insubordination as defined by the policy. The comments do not undermining the authority or status of another individual (whether an employee or not).

[26] At the meeting Mr Carter then referred to Mr Walter’s *“attitude toward employment terms”* including continuing *“to dispute the amount of hours people work”* despite evidence to the contrary and *“came to the review meeting [and] needed no prompting to explode ...”*⁷ This is not insubordination.

[27] The context for Mr Walter’s behaviour is relevant. He was not forewarned a controversial issue such as leave was being determined at the beginning of the performance review meeting on 18 December. Both Mr Walters and Mr van der Putten agreed that swearing was not uncommon in this workplace. Mr Carter also confirmed Mr Walters had never been warned previously about attitude and had been argumentative around his entitlements before.⁸ The respondent could not have been surprised by his behaviour on 18 December as a consequence. This was an ongoing pattern of this behaviour which the respondent continued to engage in with the applicant and had never previously disciplined him for.

⁵ Common Bundle of Documents Document 6 p27.

⁶ Common Bundle of Documents Document 6 p29

⁷ Common Bundle of Documents Document 6 pp27-28

⁸ Common Bundle of Documents p28

[28] There appears to be some misapprehension about what insubordination means. The ordinary meaning of insubordination is disobedience and rebellion.⁹ Given he has never been directed to cease his behaviour it would be difficult for an employer to reasonably conclude his behaviour was disobedient and rebellious in the circumstances.

[29] The respondent accepted the behaviour was not intimidation. Mr Carter states “*I don’t believe there was any level of intimidation nor was there any intended in the meeting.*” His concern appears to be Mr Walters’ “*forthright questions*” requiring him to “*back-peddle*”.¹⁰ Argumentative behaviour is not insubordination unless there was forewarning it would not be tolerated.

[30] The reality is that Mr Walters’ argumentative behaviour was tolerated by the respondent. Annual leave was a recurring bone of contention between Mr Walters and Mr van der Putten.

[31] There was some merit to his frustrations about leave. The grant of annual leave appeared to be a mix of policy and managerial discretion. Leave was at times granted on a first-come/first-served basis subject to further considerations including workloads, staffing and annual leave needs of other staff.

[32] Mr van der Putten was aware of Mr Walters’ and other shift manager’s discussions with Mr Cameron about leave and the impression they had gained as a result. Mr Walters’ comment about the goalposts shifting has merit in light of the discussions with Mr Cameron.

[33] The only possible evidence of insubordination is Mr Carter’s reference at the disciplinary meeting to the “*inference from [Mr Walters] that ‘you’ve lied to me since I’ve been here’ while questioning the manager about the way he manages.*” Insubordination requires an express comment or remark. “Inferences” are not part of the insubordination policy nor are they examples of disobedience or rebellion. The questioning of a manager was also an example of previously tolerated behaviour.

⁹ *The New Zealand Oxford Dictionary*, 1st Edition Edited by T Deverson & G Kennedy, New Zealand, Oxford University Press 2005

¹⁰ Common Bundle of Documents Document 6 p29

[34] Standing back and considering the above evidence, I determine Mr Walters' conduct was not misconduct which a fair and reasonable employer could have been dismissed him for in all the circumstances.

Were the employer's actions leading up to dismissal what a fair and reasonable employer could have done in all the circumstances?

[35] The respondent submits it complied with the statutory requirements. Mr Walters was given a letter setting out the respondent's concerns. The respondent submitted there was no more to discuss given Mr Walters accepted that he did what was alleged.

[36] The fact Mr Walter's employment was terminated is accepted. The onus falls upon the respondent 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*.¹¹ In applying this test, the Authority must consider the matters set out in s.103A(3) of the Employment Relations Act 2000 (Act). These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[37] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5)). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.¹²

[38] The employers concerns were not properly raised. As noted above it is not until the disciplinary meeting that insubordination is expressly raised. Neither the letter nor the disciplinary meeting refers to the ISO disciplinary policy.

[39] The letter refers to a breach of his employment agreement dated 12 December 2012 by failing to act in a "*diligent, responsible and professional manner which enhances the employer's interests and good reputation*". That is not necessarily a serious misconduct. Failure to act in that manner may be general misconduct as well.

¹¹ Section 103A(2) Employment Relations Act 2000

¹² *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

[40] The letter does not identify nor does it provide the relevant parts of the ISO disciplinary policy for Mr Walters to consider. There was no evidence he had been provided with any copy of this policy. Mr Walters denied seeing the policy or being aware of the definition of insubordination at hearing. At best the letter infers the conduct is insubordination.

[41] The first time insubordination is raised was partway through the disciplinary meeting when Mr Headland identified what the company's issues were, namely "*someone who could be insubordinate on the wharf*"¹³. This does not give Mr Walters opportunity to respond to that concern. Especially when he was not aware of the disciplinary policy being applied.

[42] There was also a failure at the meeting to sufficiently investigate the concerns about leave. Mr Walters explains his advance applications for leave were based upon his understanding of Mr Cameron's comments. Mr van der Putten suggests they need to determine what Mr Cameron's comments were¹⁴ but no further enquiries are made prior to the decision to dismiss.

[43] It was unwise for Mr Carter to act as the decision maker given he was also the complainant. At hearing he suggested Mr van der Putten was also a decision maker. This did not enhance the decision making process. Mr van der Putten was also a complainant. Both would have difficulty acting impartially in the circumstances.

[44] This company had more than sufficient human resources available to meet its statutory requirements. There were others available to undertake the decision making or provide independent advice. At the beginning of the disciplinary meeting Mr Carter referred to seeking outside advice from David Dragovich, Paul Cameron and Liam Dickson before making the decision to dismiss, but did not do so.

[45] The speed with which the final decision to dismiss was made detracts from the submission of genuine consideration of Mr Walters responses. There was only one disciplinary meeting. There was no further investigation of concerns. It took 10 minutes to decide to dismiss Mr Walters.

[46] There were issues raised at the disciplinary meeting warranting further investigation and consideration. Mr Walters had never been previously warned about

¹³ See above p.27

¹⁴ See above p.26

his attitude. The lack of any previous disciplinary action. The lack of forewarning about the discussion on leave. Comments about leave made by Paul Cameron needed to be investigated. The explanation of Mr Walter's behaviour arising from being 'cornered'. Mr Carter's acceptance the behaviour was not intimidation. Swearing being common in this workplace. None of these matters appear to have been given any weight prior to the decision to dismiss.

[47] The only matter that appears to have been given weight was Mr Walter's acceptance of his behaviour. This does not necessarily lead to a conclusion it was serious misconduct or allow an employer to avoid the requirements set out in s103A. These defects were not minor and did result in Mr Walter's being treated unfairly.¹⁵

[48] Accordingly the process leading to the dismissal of the applicant was not what a fair and reasonable employer could have done in all the circumstances. Paul Walters was unjustifiably dismissed by ISO Limited.

Remedies

[49] Given I have determined Mr Walter's has a personal grievance, he is entitled to seek remedies under s123 of the Act. Mr Walter's seeks lost wages, compensation for hurt and humiliation and costs.

Lost wages

[50] Section 128(1) requires the Authority to order lost remuneration equivalent to the lesser of the sum equal to the loss of remuneration or to three months' ordinary time remuneration. However, Mr Walters must act reasonably to mitigate the lost remuneration. If an employee has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement¹⁶.

[51] There is evidence of mitigation. Following dismissal, Mr Walters relocated to Auckland to find employment. He is a self-employed builder. He produced a cashbook showing he earned less than what he paid in outgoings in the months up to

¹⁵ Section 103A(5) Employment Relations Act 2000
¹⁶ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

31 March 2014. This was because he was forced to maintain two households – one for his family in Tauranga and one where he was working.

[52] An award of three months' ordinary time remuneration less PAYE is appropriate. This is subject to any reduction for contributory behaviour which I deal with below.

Hurt and humiliation

[53] Mr Walters seeks compensation under s.123(1)(c)(i) of the Act for hurt and humiliation and his legal costs.

[54] The amount of compensation for injury to feelings or other distress must be referable only to the harm done by the employer's behaviour¹⁷. The applicant gave evidence of requiring the sick leave following the meetings in December 2013 due to stress. He found it difficult to concentrate and felt on edge. His personal relationships suffered with his children and partner. He sought medical assistance for depression.

[55] An award of \$5,000 compensation is appropriate. This is subject to any reduction for contributory behaviour which I deal with below.

Contributory behaviour

[56] Section 124 of the Act requires me to consider the extent to which Mr Walters' actions contributed towards the situation that gave rise to the personal grievance. Contributory behaviour is behaviour which is causative of the outcome and blameworthy¹⁸.

[57] There is contributory behaviour here which was both causative of the personal grievance and blameworthy. Mr Walter's agitation and upset on 18 December gave rise to the disciplinary procedure. However, I do not apportion all of the blame to him. I accept he was taken by surprise by Mr Carter's comments on leave and his argumentative behaviour had been tolerated by the respondent including swearing in the workplace. A reduction of 33% in remedies is appropriate.

¹⁷ *New Zealand Institute of Fashion Technology v. Aiken* [2004] 2 ERNZ 340 at 344

¹⁸ *Goodfellow v. Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82

Orders

[58] Accordingly I make the following orders:

- (a) Paul Walters was unjustifiably dismissed by ISO Limited;
- (b) An order ISO Limited pay lost remuneration of three months' ordinary time remuneration less PAYE and reduced by 33% for Paul Walters' contributory behaviour pursuant to ss.123(b), 128 and 124 of the Employment Relations Act 2000.
- (c) An order that ISO Limited pay compensation of \$5,000 reduced by 33% for Paul Walters' contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.
- (d) Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 7 days from the date of this determination. The other party shall have 7 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority