

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 99
5346696

BETWEEN	DAVID WAREING First Applicant
A N D	TYCO NEW ZEALAND LIMITED Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Brown, Counsel for Applicant
Scott Wilson, Counsel for Respondent

Investigation meeting: 21 February 2012 at Christchurch

Date of Determination: 22 May 2012

DETERMINATION OF THE AUTHORITY

Non publication order

[1] Part of the evidence provided prior to the investigation meeting was a report on Mr Wareing by Bryan Wright who is a registered psychologist. When it became apparent during the investigation meeting that this was a redacted version of the full report I was given a copy of the full report which was also made available to counsel for the respondent. By consent I make an order prohibiting the publication of the last paragraph on the first page and the first five paragraphs on the second page of the full report.

Employment relationship problem

[2] David Wareing worked fulltime for Tyco New Zealand Limited from June 2000 until he was summarily dismissed on 7 April 2011 following an incident on 29 March 2011.

[3] The incident involved what Mr Wareing describes as a heated discussion with his team leader (Gary Holden) where he used inappropriate words. Mr Wareing then left the premises in a fit of anger. During a phone call later that evening Mr Wareing told Mr Holden that he had quit. Tyco's manager (Garry van der Krogt) then wrote to Mr Wareing asking for written confirmation if he was resigning. When told by Mr Wareing that he was not resigning, Mr van der Krogt made it clear that the company would have to investigate the 29 March incident. Upon Mr Wareing's return to work there were a number of disciplinary meetings following which Mr van der Krogt dismissed Mr Wareing for serious misconduct.

[4] Mr Wareing believes he was right to challenge the work instruction which is what he says he was attempting to do. He disputes some of the details about the incident. He also says that his service for the company, workload stress and stress caused by the February 2011 earthquake were not recognised and that he feels no-one was listening to him.

[5] Because the dismissal occurred on 7 April 2011 I must assess whether Tyco's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time (my emphasis). In applying that test I must consider whether Tyco sufficiently investigated the allegations having regard to the resources available to Tyco; whether Tyco raised its concerns with Mr Wareing before dismissing him; whether Mr Wareing was given a reasonable opportunity to respond to the concerns before he was dismissed; whether Tyco genuinely considered Mr Wareing's explanation before dismissing him; and any other matters that I think are appropriate. I must not determine that the dismissal was unjustifiable solely because of defects in the process followed by Tyco if those defects were minor and did not result in Mr Wareing being treated unfairly.

Tyco's investigation

[6] Mr van der Krogt first heard of the incident from Mr Holden on 29 March. He was later told about the evening phone call. Mr van der Krogt wrote to Mr Wareing on 30 March asking for written confirmation of the resignation. When Mr Wareing confirmed that he had not resigned Mr van der Krogt required him to attend an investigation meeting on 4 April.

[7] At the 4 April meeting Mr Wareing read out a prepared statement giving his account of the incident and the lead up, which I will summarise. There had been a discussion on the Monday between Mr Wareing and Mr Holden about work priorities. Mr Wareing's view was that the branch work should be done first but Mr Holden wanted other work done (the "swappers" and the scrap extinguishers). Part way through the Tuesday afternoon Geoff Keir (workshop supervisor) told Mr Wareing that Mr Holden wanted the "swappers" done next and the scrap done on Friday. Mr Wareing thought this would delay the branch work and Mr Keir told him to discuss it with Mr Holden. Mr Wareing went to Mr Holden's office. Mr Holden told him that he knew what he was going to say and he was not going to listen. Mr Wareing thought it *puerile schoolboy behaviour* which he did not deserve and he lost his temper. He asked *Do you want me to get in my bloody car and piss off home?* Mr Holden responded *If you feel the need to do it then do it* which Mr Wareing did. Mr Wareing thought that Mr Holden had made no attempt to calm him down. There was a subsequent phone discussion during which Mr Wareing told Mr Holden *I have quit!* By way of explanation Mr Wareing referred to his concerns for the safety of his family immediately after the February earthquake, his commitment to his work and meeting deadlines despite that and his view that his efforts had been ignored. He thought that the incident had been blown out of proportion by Mr Holden.

[8] Mr van der Krogt gathered signed statements dated 31 March from others who claimed to have witnessed aspects of the exchange between Mr Wareing and Mr Holden. He also received a signed statement dated 31 March from Mr Holden which I will summarise. Mr Holden discussed with Mr Keir that they had three issues to resolve by Friday including tidying up the condemned units (scraps) outside the workshop back door which they agreed should be done on the Friday. Mr Keir told Mr Wareing this. Later Mr Holden saw Mr Wareing heading towards his office in an

agitated state saying he wanted to talk to him *now*. He told Mr Wareing he thought he knew what it was about and he did not want to discuss it then. Mr Wareing insisted that he wanted to talk to Mr Holden in his office so they entered the office. Mr Wareing said he wanted to discuss the matter but Mr Holden said he did not want to discuss it then. Mr Wareing erupted yelling *I work fucking hard for Wormld* (Tyco's trading name). Mr Holden attempted to calm him down but Mr Wareing said he was leaving. Mr Holden told him to calm down but Mr Wareing became louder and more verbally aggressive. Mr Holden told him to leave if that was what he thought he should do. Mr Wareing moved to a nearby store office. A couple of minutes later Mr Holden asked if he had calmed down enough to talk but Mr Wareing erupted again saying *Didn't you fucking listen to me the first time, I said I am fucking leaving. Just fucking ring me when you fucking want me*. Mr Holden said it did not need to be like that and Mr Wareing said *Holden, are you fucking deaf? I thought I could talk to you*. The exchange ended and Mr Wareing left the premises. When Mr Holden phoned him that evening Mr Wareing erupted on the phone saying that he had never been undermined like that before. Mr Holden told him to calm down and Mr Wareing said *What don't you fucking understand? I walked out on you today and I quit*.

[9] Having reviewed the material, Mr van der Krogt wrote to Mr Wareing requiring him to attend a disciplinary interview proposed for 6 April to deal with allegations that Mr Wareing refused to follow reasonable instructions and abused staff members amounting to serious misconduct. Mr van der Krogt provided copies of the witness statements, referred to apparent discrepancies and cautioned Mr Wareing that it was a serious matter which could result in dismissal and that he should bring a representative to the meeting.

[10] There are notes of the 6 April meeting. Mr Wareing does not dispute the accuracy of these notes which I will summarise. Mr van der Krogt put the allegation that Mr Wareing had lost control of his emotions and quit. He characterised Mr Wareing's response as an attempt to downplay the incident and portray himself as the victim. He said that Mr Wareing had refused to follow reasonable instructions and abused other staff in breach of the employment contract and in a manner inconsistent with Tyco's *Guide to Ethical Conduct*. Mr Wareing was given an opportunity to further explain his actions.

[11] Mr Wareing acknowledged that he may have sworn. He disputed refusing to follow instructions as he merely wanted to discuss them with Mr Holden. Mr Wareing said that the abuse was aimed at the company not the individuals. Mr Wareing spoke about the branch work and referred to safety procedures but Mr van der Krogt told him these matters were not relevant. Mr Wareing disputed some aspects of the witness statements. Mr van der Krogt mentioned the difficult situation Mr Wareing's workmates were in, saying that they had not over dramatised the events. Mr Wareing referred to his hard work which Mr van der Krogt accepted but referred to as not relevant. Mr Wareing referred to his own statement and the stress arising from the earthquake. Mr van der Krogt said everyone was under stress but that did not make it okay to abuse others. Mr Wareing said he was not appreciated but Mr van der Krogt referred to a number of occasions where Mr Wareing had been rewarded for his efforts. The meeting closed with Mr van der Krogt to consider what had been said and consult with others before meeting again with Mr Wareing the next day.

[12] Mr Wareing was given a copy of the notes from the 6 April meeting together with a formal request to attend a further meeting on 7 April. At that meeting Mr Wareing was given a further opportunity to comment. He admitted using the *F word* for which he apologised but said it was aimed at the company not any individual. He disputed the sequence of events as outlined by Mr Holden. He disputed the claimed refusal to follow instructions and he denied glaring at and barging past one of the witnesses (Diane Rayner). He repeated the points about working hard and being under stress. After Mr Wareing indicated that he had nothing further to add Mr van der Krogt adjourned the meeting.

[13] During the adjournment Mr van der Krogt spoke with his own manager (Alan Blacker). Mr van der Krogt's evidence, which I accept, is that he used Mr Blacker as a sounding board but it was ultimately his own decision to dismiss Mr Wareing. Mr van der Krogt also spoke to Tyco's HR department to get advice about compliance with Tyco's procedures. Mr van der Krogt decided that he should dismiss Mr Wareing. He reconvened the meeting, told Mr Wareing that his employment was terminated and made arrangements about the return of company property and final pay.

[14] Tyco is a large employer with comprehensive policies and procedures. I have been given a copy of Tyco's *Disciplinary Procedures Guidelines*. The document is a guide for disciplinary situations and reflects good practice. There is some emphasis on fully investigating allegations of misconduct and obtaining advice before dismissal.

[15] I find that Mr van der Krogt sufficiently investigated the allegations, raised them with Mr Wareing and gave him a reasonable opportunity to respond to those concerns before dismissing Mr Wareing.

[16] I have mentioned Mr Wareing's view that his explanations were not genuinely considered. In particular Mr Wareing says that the company took no account of his 11 years of hard work, stress from his workload, stress from the earthquake and his view that dealing with the scrap extinguishers would put them behind with other work.

[17] Mr van der Krogt's evidence, which I accept, is that he did consider Mr Wareing's otherwise good service and hard work but decided that Mr Wareing's conduct was such that the relationship of trust and confidence could not be restored. I will come to the justification for that view shortly but the point at present is that Mr Wareing's work record was never in issue.

[18] In his statement of problem Mr Wareing says that Tyco failed to provide him with a safe working environment by continually increasing his workload and ignoring his complaints resulting in work related stress. There is little evidence to support this claim. I note that the report by his psychologist only refers to one workplace stressor (the incident on 29 March that preceded the dismissal). Mr Wareing's evidence is that he worked very hard and knew that if he took time off for holidays or sick leave no-one would cover his work. However, leave records show that Mr Wareing had taken some leave entitlements. Mr Wareing had very little time off work due to the February 2011 earthquake but that was his own decision. The evidence indicates that Tyco offered support in various ways to employees including Mr Wareing. As Mr van der Krogt said during the disciplinary investigation, everyone was under stress from the earthquake but it did not excuse Mr Wareing's conduct.

[19] Mr Wareing was entitled to have and express a different view about work priorities but again that could not excuse Mr Wareing's conduct.

[20] For the foregoing reasons I do not accept that Tyco failed to properly consider Mr Wareing's explanations. To the contrary, I find that Mr van der Krogt did genuinely consider what Mr Wareing said. He simply did not accept that as sufficient to excuse the conduct.

The circumstances

[21] Tyco has a policy called *The Guide to Ethical Conduct*. In April 2010 Mr Wareing acknowledged in writing that he would comply with this policy. The policy includes a commitment to a harassment-free work environment and requires employees to avoid bullying, abusive language and intimidating behaviour. Tyco's *Disciplinary Procedures Guidelines* includes as examples of serious misconduct *harassment of another worker, ...whether provoked or not, Refusal to perform normal duties and to follow all reasonable instructions and Failure to abide by any company ...Code of Conduct*. In summary, it was well known to Mr Wareing that Tyco would not condone conduct such as his on 29 March.

[22] During Tyco's investigation Mr Wareing challenged some aspects of Mr Holden's and the witnesses' statements. I have already summarised Mr Holden's statement and mentioned part of Mr Keir's statement. Mr Keir also reported that Mr Wareing was *having a go at Gary, he was using lots of bad language* and that *David has always had issues following verbal instructions*. Mr Hodson described Mr Wareing as being in an agitated state of mind. Mr Hassan stated that Mr Wareing was *using very strong language* and went in with *a bit of an attitude*. Ms Rayner described Mr Wareing barging past her, raising his voice and using *lots of F words*. Mr van der Krogt preferred these accounts and thought that Mr Wareing was attempting to trivialise his own conduct in how he responded to Tyco's concerns.

[23] Mr Wareing saw a distinction between abusive language directed at Mr Holden and abusive language directed at the company. However, Mr van der Krogt considered that neither was consistent with Mr Wareing's

obligations to Tyco. Overall Mr van der Krogt thought that the witnesses had not exaggerated their statements so he preferred their accounts to that of Mr Wareing.

[24] Mr Wareing challenged Mr Keir's statement. Mr Keir was Mr Wareing's direct supervisor. Mr Keir states that Mr Wareing refused to accept his instruction about work priorities saying *I'm not doing that, this will affect the 7 day branch turn around*. It is clear that Mr van der Krogt saw this as a refusal to comply with lawful and reasonable instructions.

[25] In his statement Mr Keir expressed concern about not wanting to continue to work under the stress of wondering how Mr Wareing might react in the future. During the 6 April meeting Mr van der Krogt raised with Mr Wareing his concern about the affect on other staff from the incident.

[26] There is now a suggestion that Mr Wareing may have been suffering from an acute stress disorder at the time of the 29 March incident. That emerges in the report of the psychologist who saw Mr Wareing in November and December 2011. The report mentions this as a possibility but does not make that diagnosis. The report does say that Mr Wareing suffered a panic attack on the day of the incident. However, during Tyco's investigation Mr Wareing referred to stress, a point which Mr van der Krogt considered but decided did not excuse Mr Wareing's conduct. Accordingly the report adds nothing to the circumstances as at the time of the dismissal. However, the report goes on to comment that Mr Wareing seems to have been significantly affected by the dismissal. That view would be material if Mr Wareing has a valid personal grievance claim.

What could a fair and reasonable employer have done?

[27] I have already determined that Mr van der Krogt fully and fairly investigated Tyco's concerns.

[28] The information disclosed by that investigation resulted in Mr van der Krogt accepting the accounts from the others, rejecting Mr Wareing's account to the extent of any differences and not accepting that the matters advanced by Mr Wareing by way

of explanation excused his conduct. Those were all conclusions available to a fair and reasonable employer.

[29] I am referred to *Dodd v DE & LM Spence* [2002] 2 ERNZ 572 to support the contention that a fair and reasonable employer could dismiss someone who behaves as Mr Wareing did. In that case the employee's swearing was regarded by the Court as *insulting, provocative and insubordinate conduct* towards her supervisor sufficient for substantive justification for a dismissal. This case predated the 2004 statutory test for justification so was decided in accordance with *W&H Newspapers Ltd v Oram* [2000] 2 ERNZ 448.

[30] *Coffey v The Christchurch Press* [2008] ERNZ 385 is a case decided after the introduction in 2004 of a statutory test for justification but before the most recent amendment in April 2011 to s.103A of the Employment Relations Act 2000. Mr Coffey had worked at the Press for 44 years and was a renowned sports journalist. He had received warnings in 2003 and 2006 for abusive language directed at his supervisor. In December 2006, following a further incident of abuse directed at his supervisor, Mr Coffey received a final written warning. There was a further incident in March 2007. The supervisor made a significant mistake in editing Mr Coffey's copy. It was corrected before publication but the mistake prompted an abusive tirade from Mr Coffey. Following investigation Mr Coffey was dismissed on notice. The Court described the case as finely balanced.

[31] In the present case Mr Wareing's conduct was worse than in *Dodd* and no less abusive than the final incident in *Coffey*. *Dodd* involved one incident with an element of provocation while *Coffey* involved an abusive outburst against a background of warnings for similar incidents. However, the test for justification in the present case is closer to that in *Dodd* than to the test in *Coffey*. If the conduct in *Dodd* was sufficient to justify instant dismissal, so too must be Mr Wareing's conduct.

[32] I find that a fair and reasonable employer could have dismissed Mr Wareing. It follows that he does not have a sustainable personal grievance.

Conclusion

[33] Mr Wareing was justifiably dismissed.

[34] Costs are reserved. Any claim for costs must be made by lodging and serving a memorandum within 28 days. The other party may have 14 days in which to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority