

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 63
5302037

BETWEEN BRIAN RUBIE
Applicant

AND BRAMBLES NEW ZEALAND
LIMITED t/a RECALL NEW
ZEALAND
Respondent

Member of Authority: K J Anderson

Representatives: M Whitehead, Advocate for Applicant
J Douglas, Advocate for Respondent

Investigation Meeting: 8 September 2010 at Auckland

Submissions Received: 20 September 2010 for the Respondent
22 October 2010 for the Applicant

Determination: 17 February 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Rubie, claims that, pursuant to s 103(1)(b) of the Employment Relations Act 2000, his employment has been affected to his disadvantage by an unjustified action by his employer (“Recall”); namely a written warning issued to him on 12th March 2010. Mr Rubie asks the Authority to find that he has a personal grievance and order the removal of the warning from his personal employment record and award compensation of \$5,000. Conversely, Recall says that the warning was justified because Mr Rubie failed to adhere to the company’s safety reporting procedures and engaged in misleading and deceptive behaviour.

Background Facts and Evidence

[2] Recall operates a business that provides document management services, including the storage, filing and destruction of documents and files. Mr Rubie has been employed as an Information Centre Specialist and a Shift Leader for approximately 10 years.

[3] On 26th January 2010, while making a delivery, Mr Rubie injured his left arm. This apparently involved a stretched tendon and muscle strain. Mr Rubie says that he recorded the injury in the company accident register the next day, as the injury occurred at the end of his shift. Mr Rubie says that he wasn't aware of the injury being serious but on 7th February 2010, he aggravated it to the extent that he was unable to attend work the next day. On 8th February 2010, Mr Rubie sent a text to his supervisor, Ms Dianne Bennett: *Been sick overnight and still not right. Hope to be in tomorrow.* Mr Rubie sent another text early the following day (9th February) confirming his absence: *Hi Di, still not right, off to doc later, regards.* Later that day he attended his personal doctor and then sent a further text notifying Ms Bennett of his visit to the doctor: *Been to docs, be back on Thursday.*

[4] Mr Rubie returned to work on Thursday, 11th February 2010. The evidence of Mr Jayson Hutchins, the Information Centre Manager for Recall, is that he was present when Mr Rubie presented his medical certificate to Ms Bennett and "was surprised" to learn that Mr Rubie had a work related injury, as he had advised that he was sick. Mr Hutchins informed Mr Rubie that there was potentially an issue because under the company's policy, in regard to the management of work related injuries, staff are asked to see the company doctor, instead of their personal doctor.

[5] On the same day (11th February) Mr Rubie was required to meet with Ms Gaylene Armstrong, the Business Unit Manager for Recall, to discuss the work related injury. Also in on the meeting (via teleconference from Wellington) was Mr Russell McArtney, the National Risk Manager for the company. According to Ms Armstrong, the apparent purpose of this meeting was "to discuss the events leading up to the injury and the reporting thereof ..." A record was compiled of matters discussed. Mr Rubie received a copy. There was no further involvement by Ms Armstrong.

[6] Mr Rubie was required to meet with Mr Hutchins on 12th February 2010. Mr Hutchins says that the purpose of this meeting was to “investigate further” what had caused the injury to Mr Rubie. Mr Hutchins says that as the Information Centre Manager, he needed to: “look into the accident more closely to see if there were ways we should change the way we work” and that health and safety issues had to be considered. Mr Hutchins says that there was also an issue related to Mr Rubie acknowledging that he had sent a text saying he was sick rather than having a work related injury.

[7] Via a letter from Mr Hutchins dated 2nd March 2010, Mr Rubie was requested to attend a meeting the next day. The germane content of the letter is:

On the 7th of February 2010 you have failed to report the fact that you aggravated an injury previously reported on the 26th of January, subsequently you have failed to report to your shift leader on the 8th of February 2010 of the fact that the reason for not [sic] attendance for work was in relation to a work place injury. I would now like to convene an investigation meeting to discuss the following matters that adversely affect our commitment to safety but is also in breach of Company policy.

The key points discussed will be:

1. Failure to report aggravation of the injury.
2. Failure to advise reason for non attendance in relation to a work place injury.

Mr Rubie was advised that a possible outcome of the meeting is that disciplinary action may be taken.

[8] At the commencement of the meeting on 3rd March, Mr Rubie presented a letter setting out his view of matters; in particular that there was effectively nothing more that he could add as he had already given his explanations at two previous meetings (11th and 12th February 2010). There appears to have been very little achieved by this meeting.

[9] Via a further letter from Mr Hutchins dated 4th March 2010, Mr Rubie was requested to attend another meeting on 9th March 2010. Mr Rubie was informed that:

To be clear, a possible outcome of this meeting and process is that serious disciplinary action may be taken up to termination of your employment. Based on the possible outcome you are invited to bring a representative or support person.

[10] At the meeting on 9th March, apart from Mr Hutchins, Ms Violetta Trajcevski, the Senior Human Resources Manager for Recall, participated via a teleconference.¹

¹ Ms Trajcevski is based in Australia.

Mr Rubie says that he apologised for any “trouble” he may have caused. He then left the meeting and it appears that Mr Marcos Mota, the General Manager for Recall, participated in the teleconference. The evidence of Ms Trajcevski is that the final decision as to any disciplinary action to be taken was left with Mr Hutchins as the line manager that had been involved in the meetings with Mr Rubie.

[11] The outcome of the meeting on 9th March 2010 was that on 12th March 2010, Mr Rubie received a “First & Final Written Warning.” The letter (from Mr Hutchins) is produced in full below as it, in essence, sets out Recall’s reasons for the disciplinary action and I accept, it is a reasonable summary of events leading up to the issuing of the warning:

This letter is to confirm the outcome of the investigation and subsequent disciplinary interviews held with you and myself on 03/03/2010 and the 09/03/2010, where in both meetings you elected not to have a representative present. During the second interview on the 09/03/2010, you stated that you bypassed Company safety reporting procedures by failing to report a related injury when notifying your absence from work. You also failed to notify that you had attended your family doctor regarding a work related injury. This disregard to follow Company procedures that are an integral part of our business is unacceptable and your actions are in breach of the Company’s Zero Harm Policy.

The Company has provided you with continuous training, both in your capacity as an employee and in your role as Shift Leader, on the Company’s Zero Harm Policy that included our process for reporting work related injuries. You have also attended several Engage Meetings on safety breaches of late.

This letter serves as a First & Final Warning regarding your continued employment with Recall. Should either your Supervisor or myself be required to take any further disciplinary measures against you, subject to investigation into the circumstances surrounding the incident, your employment with the Company may be terminated.

As discussed in our interview on 09/03/2010, I urge you to comply with the safety reporting procedures and develop a more positive attitude to your workplace responsibilities.

This letter of warning shall remain on your personal file for the duration of your employment with the Company. I trust you will accept this challenge.

[12] Following the receipt of the warning, Mr Rubie instructed his advocate to raise a personal grievance via a letter dated 25th March 2010. However, an unreasonably short time (4 working days) was allowed for the grievance to be addressed; as on 1st April 2010, Mr Rubie’s advocate commenced proceedings with the Authority. Ms Trajcevski responded to the raising of the grievance on 8th April 2010. The parties were directed to attend mediation on 17th June 2010.

[13] It appears that following mediation, Recall appropriately (and as required in my view) reconsidered the duration of the warning and at a meeting with Mr Rubie on 6th July 2010, Mr Hutchins informed him that the warning would now remain on his

personal file for 12 months rather than the duration of his employment. Mr Rubie subsequently received an amended warning letter with the duration reduced to 12 months. Oddly, while the original warning letter is dated 12th March 2010, the amended letter is dated 10 March 2010.

Analysis and Conclusions

[14] In regard to Mr Rubie's claim of an unjustified action by his employer affecting his employment to his disadvantage, the test that the Authority must apply is provided by s 103A of the Employment Relations Act 2000. The Authority must objectively consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time that the respective actions occurred.

[15] And in regard to the personal grievance claim, the requirements of s 103(1)(b) of the Act are twofold: an unjustified action on the part of the employer; and the employment must be affected to the employee's disadvantage. This principle was considered by the Court of Appeal in *Matthes v New Zealand Post Ltd* [1994] 1 ERNZ 994 at 997. While this case was decided under the jurisdiction of the Employment Contracts Act 1991, the Employment Relations Act 2000 provisions have been carried over from the previous regime. In *Matthes*, upon a finding of an unjustifiable action in relation to procedural fairness, the Court held that:

The only other question for the Employment Court's decision under para (b) was whether the particular employee's employment or a condition of the employment was affected to the employee's disadvantage by that action. In the words of the paragraph it is whether "the employment ... is ... affected to the employee's disadvantage by some unjustifiable action". That necessarily involves focusing on the present employment, considering the changes that have occurred, and assessing their impact on the employee.

[16] Applying the above test to the circumstances faced by Mr Rubie, the change that occurred was that he had a formal warning imposed upon his employment record where none existed before and clearly having a final warning on his record, initially of indefinite duration and then for 12 months, has the potential to make his employment less secure.² It follows that I must find that Mr Rubie has been disadvantaged in his employment. That then takes us to the primary issue that must be determined:

² *Alliance Freezing Co (Southland) Ltd v NZ Engineering etc IUOW* (1989) ERNZ Sel Cas 575.

Was the issuing of the first and final warning unjustified?

[17] The submissions for Mr Rubie are that the warning was unjustified for several reasons. Firstly, there is not a clear policy in existence pertaining to a requirement that employees must attend a company doctor in the event of incurring a workplace injury and/or in circumstances such as those applying to Mr Rubie who was at home when he found himself unable to work. Recall have not produced any evidence of a policy requirement but the evidence of Mr Hutchins is that three years ago, the company introduced a new safety programme called “Resafe” the details of which are available on the company intranet. Mr Hutchins says that all employees have access to the Resafe details. In response to this, Mr Rubie says that he does not have access to the Resafe details as his computer will not “open the screens.” The evidence of Mr Rubie’s supervisor, Ms Bennett, is that not all staff were aware of the policy but since the circumstances regarding Mr Rubie came about, she has told staff of the company’s requirements pertaining to work injuries. In regard to being able to directly access the Resafe policy the weight of the evidence tends to support Mr Rubie’s assertion that he did not have detailed knowledge of it.

[18] However, Recall also points to an “Engage” team meeting that took place in February 2009 which Mr Rubie attended. A record of this meeting shows that under “General Business Item Raised and Discussed” the matter of workplace injuries and the process to be followed was discussed. This included provision for a team leader to accompany an injured employee to a “Doctor/Medical Provider.” Given that Mr Rubie has worked for Recall for 10 years, including being a shift leader; and his acknowledgement that he had taken employees to a company Doctor, I conclude that it is more probable than not that he was aware of the requirements in regard to reporting a work place injury and also the requirement to attend a company Doctor. The evidence of Mr Rea is that in regard to his particular injury, after making contact with Mr Hutchins, the company paid for a taxi to bring him from his home into work and he was then driven to the company Doctor.

[19] In regard to the unfairness of the warning, Mr Rubie drew the attention of the Authority to other employees whom he says incurred workplace injuries in similar circumstances to him. Mr Rubie says that the company gave these employees more assistance in regard to ensuring they complied with the company’s policy hence there

is some disparity between how he was treated as compared with these other employees. However, having heard from the employees in question (Mr Hano, Mr Turner and Mr Rea), I conclude that their circumstances were sufficiently different than those applying to Mr Rubie to find that there has been no unfairness on the grounds of disparity. Indeed, the evidence of Mr Rea (above) is that he was aware of the requirement to notify Mr Hutchins of his injury whilst at home.

[20] Given the above findings, the examination returns to whether or not the issuing of the warning was something that a fair and reasonable employer would do in all the circumstances. Recall says that the text messages that Mr Rubie sent to his supervisor were “misleading and deliberately deceptive” and that it can be inferred that Mr Rubie chose not to accurately report his injury because he did not want to “run the risk” of the company Doctor certifying him as only fit for light duties. While I accept that the texts that Mr Rubie sent were misleading, I think that it is going too far to assert that Mr Rubie was being “deliberately deceptive” which is a somewhat higher test. On the other hand it does appear that Mr Rubie has an aversion to being placed on light duties as he acknowledged this in response to a question from Ms Douglas and I conclude that he deliberately misled his supervisor Ms Bennett that he was sick, rather than attending his Doctor due to a workplace injury. I find that this action by Mr Rubie was misconduct which following a proper investigation, warranted disciplinary action.

[21] However, I find that in all the circumstances the issuing of a final written warning and the general process, including the overarching involvement of a number of senior managers within Recall, was unfair and unreasonable. Notwithstanding the obvious (and appropriate) importance that Recall places on its health and safety policies and procedures, it seems to me that the involvement of so many senior managers must be seen as somewhat of an overreaction under the circumstances and it is not surprising that Mr Rubie felt that he was under particular scrutiny and now feels insecure about the tenure of his position. Furthermore, given that Mr Rubie had 10 years of unblemished service, I find that it was particularly unfair and unreasonable to issue him with a first and final warning that was to remain on Mr Rubie’s personal file for the duration of his employment. While Recall later recanted about the duration of the warning, this was most probably brought about by a realisation (following mediation) that such duration could not possibly survive a legal challenge.

Determination

[22] For the reasons set out above, I find that the issuing of a first and final warning to Mr Rubie, in all the circumstances, was an unfair and unreasonable action by his employer. Mr Rubie has a personal grievance pursuant to s 103(1)(b) of the Employment Relations Act 2000 (“the Act”) in that he has been unjustifiably disadvantaged due to his employment becoming potentially less secure in the event of a further transgression by him. However, I also find that Mr Rubie’s actions, in misleading his supervisor in regard to the content of the texts that he sent, warranted a disciplinary sanction. It is the order of the Authority that the present first and final warning on Mr Rubie’s personal file be removed and replaced with a first written warning which shall expire on 10th March 2011.

[23] Turning to the consideration of an appropriate remedy, Mr Rubie seeks a payment of compensation in the sum of \$5,000 under s 123(1)(c)(i) of the Act. While it is accepted that Mr Rubie has been affected by the spectre of a final warning on his record, taking into account the provisions of s 124 of the Act and the substantial contribution that Mr Rubie made to the circumstances leading to the grievance, Brambles New Zealand Limited is ordered to pay to Mr Rubie the sum of \$1,000.

Costs: Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the outcome and that the investigation meeting was completed within half of a day. In the event a resolution cannot be reached, the applicant has 28 days from the date of this determination to file and serve submissions with the Authority. The respondent has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority