

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 41
5323216

BETWEEN

TREVOR DAVIDSON
Applicant

AND

BLEDISLOE NEW ZEALAND
LIMITED t/a GEE &
HICKTON FUNERAL
DIRECTORS
Respondent

Member of Authority: G J Wood

Representatives: G O'Sullivan and N Flint for the Applicant
P Macdonald for the Respondent

Investigation Meeting: 13 January 2011 at Wellington

Further Information: By 9 March 2011

Determination: 11 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. The applicant, Mr Trevor Davidson, claims that his employment with the respondent (Gee & Hickton/Bledisloe) was unjustifiably disadvantaged by the issuing of a final warning and his later suspension. Gee & Hickton claims that the final warning was justified and that Mr Davidson was never suspended by it but rather, in the course of a further disciplinary investigation, due to defaults by Mr Davidson himself the parties were unable to agree on satisfactory terms for Mr Davidson to return to work.

Credibility

2. I accept that all witnesses were doing their best to inform the Authority of what had happened over relevant events. However, the job of the Authority is to determine each issue in factual dispute on the balance of probabilities (i.e. what is more likely to have occurred than not). In doing so, I have had regard first and foremost to the documentary evidence. Where there is a direct credibility difference between Mr Davidson and Gee & Hickton, I have preferred the evidence of the latter's assistant manager, who was called without notice, because of the spontaneity of his evidence and the lack of any obvious reason for him to give evidence in favour of one party or the other. However, while I accept the thrust of his evidence, I do not accept the dates he gives for when Mr Davidson informed him about one major issue.

Factual discussion

3. While Mr Davidson had been employed by Gee & Hickton for over four years at the relevant times, he had been subject to many performance-related concerns, leading to formal warnings, in the last 18 months. In particular, on 10 February 2010, Mr Davidson was given a written warning from Gee & Hickton's general manager for making private telephone calls during work hours, *shirking* and returning late from lunch. Mr Davidson knew, from then on at least, that if he wanted to make calls during work time he had to seek permission from a manager.
4. Mr Davidson was informed that, for the next six months, any further instances of:

lateness, personal telephone calls during work hours, avoiding carrying out work during work hours and/or failing to obey a legitimate instruction from management will, along with any other established misconduct, result in further disciplinary action
5. During this period, however, Mr Davidson had a serious cancer scare, which was particularly concerning to him as his family has a history of serious skin cancer. He kept Gee & Hickton's assistant manager informed of his medical appointments and that he may have a cancerous growth. During this period, the general manager was absent overseas.
6. On 23 June 2010, Mr Davidson had a biopsy with his specialist physician, and on 14 July he met the specialist again, who told him that although the growth on his head had been cancerous, the lesion had been completely excised. However,

further surgery was planned for August, to be on the safe side. In the meantime, the general manager had returned and the assistant manager reported to him several instances of concern about Mr Davidson's behaviour in his absence. These related to incidents between 16 and 28 June, involving again the use of the telephone at work. I accept that the reasons given at the time by Mr Davidson related to tenants and dental work, but not to his cancer scare.

7. I accept, on the basis of the evidence of the assistant manager, that for whatever reason (him being extremely stressed at the time) Mr Davidson did tell the assistant manager that he did not have cancer soon after he was told by his specialist on 14 July that the cancerous growth had been excised. For instance, one reason could have been that it was part of Mr Davidson's coping mechanisms for him to minimise his health concerns to his employer.
8. On 19 July he was given notice of an investigation meeting relating to private telephone calls (those that appeared to have taken place in the general manager's absence referred to above) continuing at an unacceptable level. The ongoing use of his cell phone for private calls was said to be of serious concern to Gee & Hickton.
9. At the meeting, the issue of the phone calls in particular was discussed. I conclude that at that meeting, rather than *pour his heart out* about his cancer situation as Mr Davidson claims (and although he did explain that he had had health issues to do with a head scratch that developed into a lump), his focus instead was on trying to save his job by apologising rather than explaining away what he had done, which he knew was wrong. In that regard, he specifically said that he understood why he was at a disciplinary meeting, and fully acknowledged that he had let himself down. Furthermore, he stated that he would not use the phone again and was very sorry.
10. Mr Davidson was issued the next day with a final written warning, which was to last for nine months. The letter notes, as found above, that he acknowledged continuing to make such calls, that he had been spoken to on many occasions about this, that he had failed to carry out his duties diligently and on occasion returned to work late after lunch. The letter states:

The effect of this warning is that, should there be any further established instances of the various examples of misconduct referred to on previous

occasions, or any other misconduct that relates to unsatisfactory work behaviour, then your employment would be terminated.

11. Unfortunately, matters were not resolved at that point. The general manager claimed that on 7 September he had caught Mr Davidson making another private call, which Mr Davidson explained was to his daughter. Mr Davidson was formally invited to a disciplinary meeting on 9 September. On 13 September Mr O'Sullivan intervened on behalf of Mr Davidson. He raised a grievance, claiming an unjustifiable action over the warning of July, together with successfully seeking an adjournment of the disciplinary meeting.
12. That meeting took place on 23 September. At the meeting, it was Mr Davidson's position that his behaviour had been affected by a major cancer scare and that the 7 September conversation related to concerns his daughter had about his health, which (in part at least because some medication he was taking increased his state of anxiety) he felt obliged to respond to immediately. However, he accepted that in doing so he had breached the prohibition on using the phone, as he had not sought permission. The general manager raised the point that this was the first that Gee & Hickton had specifically heard about the cancer issues.
13. On behalf of Mr Davidson, it was suggested, as recorded in written notes of the meeting, that he be given another chance and that he would agree that if he did use his phone at work, or there was any other misconduct then his employment could be put in jeopardy. Gee & Hickton wanted time to reflect on matters and it was agreed by both parties that Mr Davidson would remain absent from work on pay, until the immediate issues were resolved.
14. On 24 September, Gee & Hickton sought all relevant health documentation from Mr Davidson, to be provided that day. Mr Davidson was then informed that *until the requested information is provided and we have announced our decision your client's extended leave will continue.* That information was provided on 27 September and dealt with not only the cancer scare, but also the impact of all the stressors that Mr Davidson was under in the relevant period.
15. On 28 September, Mr Macdonald wrote on behalf of Gee & Hickton to Mr O'Sullivan. He noted that the health issues, including psychological issues:

... raise serious doubts as to whether Trevor should return to a workplace that is so safety sensitive.

We are also concerned that other aspects of your client's "personal relationships" would, if correct, be likely to impact on Trevor's marriage and therefore contribute to the stress that he is experiencing.

My client is quite alarmed at the apparent extent and scope of health issues that Trevor continues to face and emphasises the regret that Trevor has never brought these matters formally to his employer's attention.

As you will appreciate my client has an obligation to ensure that a "safe workplace" is provided and, particularly taking into account the naturally stressful nature of my client's industry, Gee & Hickton are not, on the basis of the medical evidence provided, in a position to give such an undertaking.

It is my client's view that, taking account of these circumstances, and accepting that my client has now been formally made aware of them, we request that Trevor agrees to a full and independent medical assessment. ...

On receiving the results of the medical assessment or, in the event that you do not agree to such an assessment, my client will make a final decision as to whether it is fair in the circumstances to hold Trevor accountable for the misconduct that has been repeatedly alleged.

16. There were delays in communications that occurred subsequently, which I accept can be at least partially explained by the pressing needs of Mr O'Sullivan's practice and Mr Davidson being unable to be contacted because he was at the side of his dying mother in another city.

17. On 5 October, Mr O'Sullivan noted again that the medical evidence showed that the medication Mr Davidson was taking had made him unnecessarily anxious and had had to be changed, and this had caused him to wrongly phone his daughter while at work. It was therefore submitted that the current disciplinary investigation was not appropriate and that Mr Davidson now wished to return to work, which was supported by his doctor.

18. Mr Macdonald responded on 6 October, noting that:

...Trevor's various claims that have been advanced as an "excuse" for not obtaining the required authority before making personal phone calls were never, at the relevant time, brought to the attention of his employer.

19. He was to be allowed to return to work, however:

...conditional on two requirements being met:

We would require a full medical assessment to be conducted and the results of that medical assessment would need to confirm that Trevor was fully fit and able to return to his contractual duties and...

The signing by Trevor of a memorandum/protocol that would state that, over the next nine months, should Trevor be subject to any further allegations of misconduct of any kind, and should those allegations be established, then Trevor understands and accepts that his employment would be terminated.

In noting that Trevor remains absent from work, our request is that this arrangement continues until a medical assessment is completed and the "protocol" is signed by both parties. In this regard, the absence from the date of this letter will be authorised as additional, paid "sick leave".

20. Quite appropriately, the parties also agreed to attend mediation. However, Mr Macdonald did not get a prompt response to his letter of 6 October. On 15 October he wrote again, after mediation had been deferred by Mr Davidson until November. Part of his email states:

Whatever the issues to be discussed at mediation, the question of Trevor's return to work in the interim is quite separate and needs to be addressed with urgency. If Trevor is "fit and able" to return to work, then he is required to do so. My client therefore requires a response to that part of my letter of 6 October that requests Trevor's agreement to an independent medical assessment which remains a justified prerequisite for "safe workplace" reasons before such a return can be agreed to. Should we not receive your client's agreement in this regard by 5pm Friday 2010 my client's undertaking as to paying Trevor while the "health"/return to work issue is resolved will lapse and Trevor will remain on unpaid leave from that time until either all matters relating to his employment are resolved or he presents to his employer a full health clearance that confirms that there are no known, ongoing stress or other issues that, on a return to work would be likely to have a negative impact on either Trevor or his employer.

21. Mr O'Sullivan responded promptly stating that Mr Davidson was seeking an independent assessment.
22. Again on the same day Mr Macdonald responded, accepting that assurance, but also drawing attention

...to our letter of 6 October 2010, and, in particular, the "second" requirement with regard to a return to work. That requirement related to your recommendation, which we have accepted, that any return to work would be on the basis of the "protocol" re "any further" misconduct being signed by your client.

Provided these matters can be confirmed by close of business today, Trevor will continue to be paid at least until the receipt of the medical assessment.

23. Mr O'Sullivan wrote back again on 15 October stating that he could not take such instructions that day and asking that the matter be deferred until the next week. This request was declined by Mr Macdonald. Mr O'Sullivan replied, again

repeating that he could not get instructions that day and noted that Mr Davidson had agreed to an independent assessment and that Gee & Hickton

... would regard any misuse of cell phone or telephone as grounds for instant dismissal, subject of course to a procedurally and substantively fair process.

We do, however, note the statement in your 6 October letter, that you wish Trevor to remain away from work until the medical assessment is completed and a "protocol" is signed by both parties. Accordingly, we do not regard your unilateral alteration to this arrangement as being in good faith.

24. Mr Davidson's pay was halted from that date, 15 October.
25. On 19 October Mr O'Sullivan replied to the letter of 6 October, asking whether Mr Davidson was now entitled to return to work and noting that - *In our view, making Trevor's return to work conditional, as you have done, amounts to an unlawful suspension.* Gee & Hickton were formally informed that Mr Davidson was at his dying Mother's bedside.
26. On 22 October Mr Davidson was given clearance to work by an independent practitioner. Mr O'Sullivan asked for Mr Davidson to be reinstated to the payroll at least. Mr Macdonald responded stating that both conditions had to be met and a protocol had yet to be signed. He also indicated that there was no suspension, and that it was accepted that authorised paid leave would only last for a reasonable period. I note that such an agreement could only possibly have been implied, and that such an agreement was never explicitly agreed to by Mr Davidson, who wanted to come back to work.
27. Mediation was unsuccessful and on 4 November Mr Macdonald wrote to Mr O'Sullivan setting out three options, one of which was a return to work, subject to the two conditions (of which only the second remained), with another being completion of the disciplinary process which had been adjourned on 23 September.
28. On 9 November Mr O'Sullivan responded stating that as far as he was concerned, Mr Davidson had met both the conditions of Gee & Hickton.
29. On 10 November Mr Macdonald replied attaching the draft protocol and stating that upon signature Mr Davidson would be welcome to return to work.

30. No reply was received until 19 November at which point Mr Macdonald wrote that unless Mr Davidson was prepared to sign its protocol then it would hold a final disciplinary meeting the next week, in relation to the September allegations. At that point Mr Davidson had already filed the present claim in the Authority.
31. In response on that date, Mr O'Sullivan agreed to withdraw that claim provided there was reinstatement, lost salary was paid, the final warning was withdrawn and a contribution to costs was made.
32. Gee & Hickton through Mr Macdonald still wanted a response to the protocol and wrote so on two occasions.
33. In the absence of acceptance of the protocol, Gee & Hickton gave notice of a disciplinary meeting to take place in early December. A week later there was again no response, with Mr Macdonald then required to write again. Mr O'Sullivan later responded agreeing to meet on 6 December.
34. On 6 December there was a meeting which appeared to focus (before it went into a without prejudice phase) on an argument about whether Mr Davidson had been accused of serious misconduct or just misconduct, which did not take the issues any further.
35. Mr Davidson was given the chance to make further responses in writing. He stated the main reason for the call was his daughter's concerns about his health and the anxiety caused by the drugs which made Mr Davidson feel he had to contact her, despite the prohibition on use of cellphone. He also noted that the use of the cellphone would not provide grounds for dismissal in any event, particularly given that Gee & Hickton

appears to have accepted Trevor's medical evidence, and has indicated that it would not have issued the current final warning if it had been aware of Trevor's medical state at the time. Accordingly, a fair and reasonable employer would not rely on the final warning, and would consider it withdrawn.

36. There must have been further correspondence, not provided to the Authority, which dealt with the issue of the protocol, as the wording appeared to then be agreed. However, Gee & Hickton made it clear that the agreement would also require a clause stating that all claims and legal actions against Gee & Hickton would be withdrawn, and that there would be no payment for lost wages. That

was not agreed to, so therefore on 14 December Gee & Hickton made another offer, agreeing to pay half of the lost wages since 15 October.

37. The only possible relevant parts of the parties' employment agreement relate to a small number of clauses. First there is sick leave, which gives the power to Gee & Hickton to require Mr Davidson to consult a medical practitioner for the purpose of receiving a report in relation to his medical condition when he has been absent for illness for more than three days. Second there is the part of the agreement that provides for termination without notice for being found to suffer from *a diagnosed mental or physical illness that impairs or precludes employment with the employer*. Third, there is the provision under clause 15.7 for the employer to suspend on pay for up to a month, and thereafter without pay.
38. Gee & Hickton has not, however, sought to rely on any of these provisions because of the particular circumstances in this case. I agree with that approach.
39. No settlement offers have been agreed to by both parties, despite numerous attempts to resolve matters, including discussions at the investigation meeting.
40. It therefore falls to the Authority to make a determination. That determination will not canvass issues beyond 15 December which may (but hopefully will not) be part of future proceedings. For these reasons I do not intend to focus on the merits of Mr Davidson's explanation for his behaviour on 7 September.

The law

41. An employee's inability to work because of an employer's refusal to allow him or her back constitutes a disadvantage to that employee's employment, whether or not it can be described as a suspension: *Radio NZ v. Snowdon* [2003] 1 ERNZ 12. The question is whether or not that disadvantage is justifiable. The relevant test is set out in s.103A, namely whether the employer's actions and how the employer acted (determined on an objective basis) were what a fair and reasonable employer would have done in all the circumstances at the time.
42. There is no issue that a warning does constitute a disadvantage to an employee's employment.

Determination

43. I accept, given the lack of explanation from Mr Davidson at the time, that the final warning he was issued with on 23 July was justified. Mr Davidson was already on a clear warning for misconduct such as using the telephone at work. Mr Davidson knew that he was not entitled to make such personal calls during working time without permission. He accepted the same at the disciplinary meeting, of which he had proper notice. He did not give a detailed explanation of his cancer scare, nor use it as an excuse or explanation. In those circumstances the issuing of a final warning in the face of clear and accepted misconduct was what a fair and reasonable employer would have done and how it would have acted.
44. The later explanation about the cancer scare does not make the warning unjustified, because that question can only be assessed *at the time* of the warning. Furthermore, there is no obligation on an employer to quash warnings in such circumstances, but the explanation would be taken into account by a fair and reasonable employer in any subsequent disciplinary action that relied on the July warning. Overall, Mr Davidson was treated fairly.
45. The same can not be said, however, for the way Gee & Hickton treated Mr Davidson subsequently. I accept that it became genuinely frustrated, given that it thought it had an agreement on how to proceed, with the delays. Any employer would expect such a process to have been concluded within three weeks of the disciplinary meeting on 23 September.
46. However, the form of self-help remedy that Gee & Hickton applied to Mr Davidson was not what a fair and reasonable employer would have done from 15 October, when it stopped Mr Davidson's pay and refused to allow him to return to work.
47. Furthermore, while there may have been many delays by Mr Davidson, there were also delays by Gee & Hickton, the mediation intervened and there are instances of unclear communication from Gee & Hickton, such as whether the issues related to misconduct or serious misconduct, and whether only one or both conditions of Gee & Hickton's had to be met before Mr Davidson could return to work. Thus the above also contributed substantially to the delays and frustrations of both parties.

48. As at 15 October Gee & Hickton knew that Mr Davidson was arranging for an independent medical assessment, and that he would regard any misuse of phones as grounds for instant dismissal. By 22 October the independent assessment had been provided to Gee & Hickton. There could be no doubt from that date that Mr Davidson was fit for work, but Gee & Hickton would not allow him to do so, insisting instead on the signing of the protocol, which would have resolved the separate disciplinary issues.
49. In fact while ordinarily it would be justifiable for Gee & Hickton to pursue all matters, and insist on prompt responses from Mr Davidson, the situation changed completely when Mr Davidson's pay was cut. The impact of this on Mr Davidson can only have been to increase pressure for acceptance of Gee & Hickton's view of the other issues, which are not directly related to his fitness for work in a medical sense.
50. Those were not the actions of a fair and reasonable employer. That is particularly so when Gee & Hickton had other options. In fact the option that it utilised on 6 December (and I do not criticise it for so delaying other than the fact that it was refusing to pay Mr Davidson) was the obvious option open to it, ie to continue the disciplinary process. Thus it could have allowed Mr Davidson back to work, and continued the disciplinary process that it had stayed since 23 September.
51. It therefore follows that the actions of Gee & Hickton in stopping Mr Davidson's pay from 15 October and refusing to allow him to return to work were a disadvantage to his employment (they certainly made his employment less secure) and were unjustifiable, as it was not appropriate for Gee & Hickton to keep him away from work when he was fit to return and Gee & Hickton had medical evidence to support that.
52. Finally, I note that even if Gee & Hickton had consistently treated the two preconditions to Mr Davidson's return to work as both requiring a satisfactory outcome (which I accept was the case consistently put by Gee & Hickton except in two parts of an email of 15 October) that does not make its refusal to allow Mr Davidson to return to work justifiable, for all the reasons given above.

Remedies

53. Mr Davidson is entitled to lost remuneration from 15 October to 15 December and I so order. In the absence of any information on his remuneration being provided to the Authority, I leave it to the parties in the first instance to calculate that sum, with leave reserved to revert to the Authority in the unlikely event that agreement is not be able to be reached.

54. Mr Davidson also seeks compensation for humiliation, loss of dignity and injury to his feelings. I accept that having his pay cut while he had to leave town to attend to his dying mother was not only financially personally embarrassing to Mr Davidson, but also had a longer term impact on him financially.

55. I also accept that the evidence of Mr Davidson's wife that the impact of matters on him was terrible, that he had sleepless nights and that it was hard to get him to be positive after years of working.

56. In all the circumstances I consider appropriate compensation to be \$5,000 and so order.

57. In so determining, I make no award for the justified warning, or for any events that happened subsequent to 15 December. I have limited that award solely to the impact on him of having to deal with not having any pay and not being able to return to work when in the midst of the disciplinary process.

58. In these circumstances I make no deduction for contributory conduct, as it was Gee & Hickton that stopped Mr Davidson's pay and prevented his return to work. The delays were unfortunate rather than blameworthy, and any misconduct that led to the disciplinary process is too remote, particularly as these were not the direct cause of Gee & Hickton's actions that led to the grievance.

Costs

59. Costs are reserved.

G J Wood

Member of the Employment Relations Authority