

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 174
5323216

BETWEEN

TREVOR DAVIDSON
Applicant

AND

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

Member of Authority: G J Wood

Representatives: Nikki Flint for the Applicant
Peter Macdonald for the Respondent

Investigation Meeting: 7 July 2011 at Wellington

Submissions: 7 July 2011

Determination: 10 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Trevor Davidson, claims that he was unjustifiably dismissed from his employment with the respondent (Gee & Hickton/Bledisloe). By contrast, Gee & Hickton claim that Mr Davidson's dismissal was justified.

[2] This determination follows a previous investigation by the Authority, where it was found that Mr Davidson's final warning was justified, but the subsequent failure by Gee & Hickton to allow him to return to work, and its stopping of his pay were unjustified. This is because it could have allowed Mr Davidson back to work and then continue the new disciplinary process that it had stayed since 23 September. That determination dealt only with events up until 15 December.

[3] The background to these events is fully set out in my unchallenged determination [2011] NZERA Wellington 41 and do not need to be repeated here in any detail. There I noted that there were further allegations of unauthorised phone calls, following the final warning. At a disciplinary meeting Mr Davidson gave, for the first time, his suffering from cancer as the reason for the unauthorised calls that led to both the final warning and the new disciplinary investigation. In particular, the explanation was that Mr Davidson had made a personal telephone call during work hours because he was suffering from a particularly serious cancer scare. He had had a cancerous growth on his head, which was of particular concern to him as his family has a history of serious skin cancers. The phone calls had been about his cancer situation generally and attempts to deal with the issues at that time. His explanation over Gee & Hickton's latest concerns was that he was still suffering from the psychological effects of the cancer and was on medication which increased his state of anxiety. Thus when he heard that his daughter had been told that he was suicidal he was so anxious that he rang her immediately, in breach of Gee & Hickton's reasonable protocols. This was because he did not want her to worry about him being suicidal when he was not.

[4] He asked that the warning be quashed and that he be cleared in the current investigation. I noted that while there was no obligation on the employer to quash warnings in such circumstances, as the final warning had already been issued, Mr Davidson's explanation would be taken into account by a fair and reasonable employer in any subsequent disciplinary action that relied on the final warning.

[5] As noted in my earlier determination Gee & Hickton later unjustifiably refused to allow Mr Davidson to return to work, while negotiations continued over the future of his employment. When these finally broke down, the disciplinary meeting resumed some ten weeks later, on 6 December. That meeting appeared to focus on an argument over whether Mr Davidson had been accused of serious misconduct or just misconduct. In actual fact the issue was one of misconduct. That issue did not appear to be addressed in any detail, because the parties went on to focus on without prejudice discussions. However Mr Davidson was given a chance to make further responses in writing, which he did.

[6] On 17 December 2010 Gee & Hickton decided to dismiss Mr Davidson. Gee & Hickton's General Manager, Mr Gavin Murphy, wrote in the dismissal letter:

The point is that we have consistently said that, due to the long history of misconduct issues that we have discussed with you both formally and informally, for the employment relationship to continue and for you to be given yet another 'chance', we needed some form of assurance that the same, repeated incidences of misconduct will not reoccur. In that regard your representative's 'protocol' suggestion seemed reasonable but, regrettably and despite our best efforts, the opportunity to reach such an agreement has become so protracted as now to be impossible.

[7] The letter then focused on efforts to reach a compromise, as set out in my earlier determination. The letter then goes on to state:

It is our view that we have shown considerable flexibility in our attempts to reach a constructive outcome. We nevertheless feel that, no matter what we suggest, it is likely that a further obstacle will be put in the way of reaching an agreement.

This letter is therefore to advise you that, for the reasons stated, the final written warning of 23 July 2010 should stand. Further, we consider that we have run out of options with regard to settling outstanding matters in a way that would allow return to work. We now have an obligation to conclude this process. We therefore advise that your employment will terminate as from 5pm Friday 17 December 2010. The reason for that determination is that, in the absence of receiving an appropriate, written assurance in the form of the draft Protocol that provides an undertaking as to future conduct, it is our decision that it would be unreasonable to expect that we maintain this employment relationship. This decision is made in the context of the final written warning to which you are currently subject.

You will be paid by direct credit into your nominated bank account any accrued holiday pay and 'notice in lieu' as provided for in your employment agreement.

[8] Mr Davidson filed another grievance, this time for unjustified dismissal. The matter has been unable to be resolved, despite numerous efforts by all concerned. It therefore falls to the Authority to make a determination.

Determination

[9] It is clear, particularly from the letter of dismissal, that the dismissal was the final act in an ongoing series of decisions by Gee & Hickton to keep Mr Davidson away from its workplace, in this case permanently. The letter of dismissal relies significantly on the issue of the protocol not being agreed to Gee & Hickton's satisfaction, which I have already found was not a justifiable reason to keep Mr

Davidson away from work. Gee & Hickton may have felt that, as a result, Mr Davidson could not be trusted if he came back to work, because there was no reasonable expectation that he would meet the requirements reasonably placed on him. However that fails to take into account the issue of Mr Davidson suffering from an aggressive and potentially life threatening form of cancer, which had claimed the lives of relatives of his. It was not required to take those matters into account in issuing the final warning, because it did not know of them. However when it came to dismiss Mr Davidson it did know all of the details. In these circumstances a fair and reasonable employer would not have dismissed Mr Davidson, because he had put forward reasonable explanations for breaching the telephone call protocols that led to both the final warning and to his dismissal. No fair and reasonable employer would have failed to have given Mr Davidson the benefit of the doubt in these circumstances. He was in a particularly vulnerable position during the whole period, but never was compassion more called for than when Mr Davidson phoned his daughter, who was labouring under the misapprehension that he was suicidal. He did breach the requirements of his position by making a private telephone call, but his explanation was both genuine and reasonable. Surely a worker suffering a life threatening cancer scare should not be dismissed for making a telephone call to his daughter during work hours, even if in breach of his job requirements, especially when taking medication that caused him to be even more anxious than usual? While I accept that he should have asked for permission and that permission would have been granted to make that call, his failure to do so can not in the circumstances be seen as so serious as to justify his dismissal. This is particularly so when Gee & Hickton relies on previous warnings, which it accepts, given his cancer problems, would not have been issued in the first place had it known of them. As Gee & Hickton must be taken to have known, in dismissing someone for repeated misconduct all warnings leading up to the dismissal must be justified, not just the final decision to dismiss.

[10] If Gee & Hickton had taken all these matters into consideration, rather than focusing on why its plans to seek a protocol were not formally agreed to, then I am confident its decision would have been different. I therefore determine that Mr Davidson's dismissal was unjustified.

Remedies

[11] Mr Davidson has remained unemployed until the date of the investigation, namely a total of 29 weeks. However Mr Davidson was paid three weeks pay in lieu of notice, which needs to be taken into account.

[12] Mr Davidson has not properly mitigated his loss. His efforts to find work were sporadic, and appeared to focus mainly on a new business venture doing mobile lube services. He applied for only a few jobs and turned down an opportunity to become a shuttle bus driver because of the cost of \$300 - \$400. He has not pursued the opportunity to take up part time or casual work.

[13] While Mr Davidson blames his age and Gee & Hickton for his lack of motivation to seek work, I do not accept that it is to blame for his lack of efforts to find work. There is no evidence that it has stood in his way, for instance in failing to provide genuine references etc, or otherwise tried to harm Mr Davidson's job prospects.

[14] I accept that it may have taken Mr Davidson time to get over his dismissal and that he was dismissed just before Christmas, a notoriously difficult time to find work. Given Mr Davidson's failure to properly mitigate his losses, but taking into account the impact of the Christmas period, I set lost remuneration resulting from the grievance as being for eight weeks. There are no grounds for extending that finding.

[15] Mr Davidson gave significant evidence over the impact of the dismissal on him both economically and emotionally, which was supported by his wife. He has already been compensated for all the actions of Gee & Hickton that were unfair to him prior to the decision to dismiss, namely \$5,000. In all the circumstances of this case I therefore consider that appropriate compensation for his dismissal alone is \$7,000.

[16] I must next assess contribution. I do so on the basis that any conduct by Mr Davidson that contributed to the grievance must have been blameworthy. The making of the calls can not in any way be seen as blameworthy, for the reasons given above about his medical condition. However, despite his condition, Mr Davidson could and should have sought permission for those calls, in which case matters would not have come to this. Furthermore, matters would not have had to focus on the two key telephone calls had Mr Davidson not been previously consistently guilty of other behaviours in breach of his employment agreement that warranted disciplinary action.

[17] In all the circumstances of this case I set contribution at 25%. Mr Davidson is therefore entitled to \$5,250 in compensation and six weeks lost remuneration. As with my last determination, in the continued absence of information being provided to the Authority on Mr Davidson's pay, I expect the parties to calculate that sum, with leave to revert to the Authority in the extremely unlikely event, given that they have agreed previously on this matter, that agreement on this sum is not able to be reached.

[18] I therefore order the respondent, Bledisloe New Zealand Limited trading as Gee & Hickton Funeral Directors, to pay to the applicant, Mr Trevor Davidson, six weeks lost remuneration and \$5,250 in compensation under s.123(1)(c)(i).

Costs

[19] Costs are reserved.

G J Wood
Member of the Employment Relations Authority