

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 83
5623964

BETWEEN ROBERT EDGAR
 Applicant

AND TERRA LANA PRODUCTS
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Graeme Reeves, Counsel for Applicant
 James Gallagher, on behalf of Respondent

Investigation Meeting: 13 and 14 December 2016 and 25 January 2017 at
 Masterton

Submissions Received: At the investigation

Determination: 29 August 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] The applicant, Robert Edgar, claims he was unjustifiably dismissed by the respondent, Terra Lana Products Limited (Terra Lana) on 17 February 2016.

[2] Terra Lana accepts it dismissed Mr Edgar but considers its action justified.

Citation of Respondent

[3] The application, as initially lodged, identified two respondents; Terra Lana and Energy Smart Limited with Mr Edgar expressing the view that while he had been dismissed by Terra Lana he was employed by Energy Smart.

[4] Both respondents stated Terra Lana was the employer. This was discussed during a telephone conference and Mr Edgar agreed.

[5] Accordingly, and by agreement, the action against Energy Smart Limited was withdrawn and the citation amended accordingly.

Background

[6] Terra Lana is in the business of installing insulation and related products for consumers. Mr Edgar was employed by Terra Lana as a sales representative in the Masterton area.

[7] Mr Edgar says he was contracted to work for 40 hours a week and while on occasion he was required to do more, there was an informal agreement that if he did he would be able to take time in lieu. Mr Edgar claims management chose to remove the ability to take time in lieu towards the latter part of the employment and demanded he only work 40 hours a week. He says he responded by arranging he work four 10 hour days in order that he could meet clients outside normal working hours though this was later rescinded by Terra Lana. He also claims he had to travel significant distances and often went without a lunch break due to the travel commitment. Terra Lana says the 40 hour limitation was the result of concerns Mr Edgar raised about his hours and the return to a five day week the result of an agreement with Mr Edgar when he voiced reticence about wanting to do late appointments.

[8] Mr Edgar has a positive view of his employment up until early 2014. He says he had a good relationship with both colleagues and managers and was given pay rises to recognise the quality of his work. He says it was in February 2014 that problems started to arise which is not a surprise as there is evidence Mr Edgar had been heard to say in a staff meeting that he wished *smash David* (the Regional Manager, David Patchertt). Like other issues though this appears to have been addressed informally at the time and resolved.

[9] Ms Tankersley is of the view tensions started to arise earlier with Mr Edgar alleging she was misrepresenting clients' eligibility for assistance with insulation installation subsidies from the Energy Efficiency and Conservation Authority (EECA) and falsifying paperwork. It appears Mr Edgar raised these issues in both October 2013 and March 2014 and in doing so criticised the accuracy of paperwork, pricing and job scoping.

[10] Mr Edgar says he was of the view certain practices were potentially fraudulent and product was being installed that was not up to standard. On or about 26 May he met with Mr Patchett and aired his views which Terra Lana characterise as unsubstantiated. He also said he intended raising them with EECA and this he then did. He gave EECA details of five houses on which community service cards had, in his words, been misused. Mr Edgar goes on to say:

EECA responded saying that the declarations had been signed by Terra Lana Limited company management.

[11] Terra Lana says the documents were actually completed by Mr Edgar. It also adds it was not its role to determine the accuracy of a client's declaration. It also notes that as far as it is aware EECA chose not to act on the allegations.

[12] Mr Edgar goes on to say that since raising his concerns with EECA he has been unfairly treated and targeted by management. He claims staff were being inappropriately pressured and Ms Tankersley had changed her management style and had become *nice to management and mean to staff*. He says he was excluded from attending a Wellington Home Show and given travel times which did not enable regular breaks.

[13] Terra Lana accepts Mr Edgar had raised the issue of travel time and breaks at various times. It says these were discussed and changes made in order to address Mr Edgar's concerns.

[14] Terra Lana also says it had both employment and behavioural concerns regarding Mr Edgar for some time. For example Ms Tankersley is of the view that since she disciplined Mr Edgar's son, who also works for Terra Lana, for a fault while installing insulation in October 2014 Mr Edgar has subjected her to *unrelenting fictitious accusation* and been difficult and uncooperative. Terra Lana notes what it considers aggressive behaviour and says its concerns were often discussed with Mr Edgar and he also had plenty of opportunity to air any concerns he might have. It notes Mr Edgar had a habit of eliciting client complaints and expresses concern these were predominately from woman toward whom Terra Lana believes Mr Edgar has a dismissive attitude, especially older woman. That said Terra Lana concedes its approach to its issues with Mr Edgar was informal until late in the employment. It

would appear the leniency was granted as Mr Edgar was considered good at his core job – the generation of sales.

[15] On 1 December there was an acrimonious telephone conversation between Mr Edgar and Mr Patchett. Mr Edgar does not talk about it in his brief. Mr Patchett says Mr Edgar sounded extremely annoyed; expressed concern at the way he was being treated and said he was returning to the depot. Mr Patchett says the call made him concerned for Ms Tankersley's safety. Mr Edgar returned, left the car keys and departed. He then took nearly a fortnight off work due to what he says was stress though he also accepts he never said this was an issue at the time. A contemporaneous note suggest his prime concern remained what he saw as fraudulent EECA paperwork, management's inaction in respect to it and what he saw as general unfair treatment since he raised the issue.

[16] It should also be noted that at this time Ms Tankersley was also on leave as a result of stress she says was caused by Mr Edgar and his behaviour.

[17] On 22 December 2015 when Mr Edgar received a letter advising Terra Lana had various concerns it wished to discuss. It followed the acrimonious telephone conversation between Mr Edgar and Mr Patchett of 1 December and cites the following concerns:

- (a) Your threatening behaviour to other staff.
- (b) Your ongoing complaints towards management.
- (c) Your undermining of your branch manager and other company employees.
- (d) Your contemptuous attitude towards management.
- (e) Your lack of participation in team events.

[18] The letter goes on to advise Terra Lana was also looking at concerns Mr Edgar had raised about Ms Tankersley and due to the seriousness of the issues the general manager, Mr James Gallagher, wished to be involved with the investigation but was not available until the week beginning 18 January 2016. The letter advises the matter was not, at that stage considered disciplinary but could become so. The letter was signed by Mr Patchett and asked that if Mr Edgar had any questions he contact Mr Patchett in the first instance.

[19] That letter was followed by a further letter on 20 January 2016. It advised Mr Edgar was required to attend a disciplinary meeting on 26 January to discuss the five

concerns already raised. Mr Edgar was advised Mr Gallagher would be in attendance and that he could have a representative or support person present.

[20] Between the letter and the meeting, which went ahead as scheduled on 16 February, there were two further incidents. First Terra Lana received a letter complaining that Mr Edgar has been making improper enquiries about tenancy arrangements at a residence which he had visited and which he thought might be the subject of an improper application for an EECA subsidy. It alleges Mr Edgar ... *seems to be going to [your customers] trying to discredit them by implying there is something underhand about the way you are conducting your business ...*

[21] The other incident occurred on 11 February and resulted in an accusation Mr Edgar spoke to Ms Tankersley in an inappropriate and aggressive way.

[22] These were discussed during the meeting of 16 February which was attended by Mr Gallagher, Mr Patchett, Mr Edgar and Mr Edgar's son. It went for a long time – about four hours. It was also recorded and there is an 84 page transcript.

[23] The following day, 17 February, Mr Edgar received a further letter from Mr Gallagher. It confirmed Mr Edgar had been suspended following the meeting the previous day. It also referred to some specific points Mr Edgar had raised and which had required further inquiry.

[24] The letter then went on to say:

Rob, you have a history of threatening behaviour with our organisation which has been dealt with by David Patchett. It was therefore entirely rational that David was sufficiently threatened for Lyn's safety following the highly aggressive phone conversation on 1st December 2015. I also believe Lyn's account of your behaviour on Thursday 11th February to be accurate as witnesses confirm you said (amongst other things) in a forceful and aggressive manner "make up your mind woman". You admit using a forceful and even an aggressive tone to address your manager. I consider your aggressive behaviour deplorable. It created a work environment that has put other staff wellbeing at risk.

[25] The letter goes on to note Mr Edgar admitted that he sought to have Ms Tankersley sacked. Terra Lana also expressed a view Mr Edgar had *trumped up what perhaps at most should have been questions round particular houses meeting EECA funding criteria into accusations of fraud*. It notes Mr Edgar referred to Ms Tankersley as the *wicked witch of the west* and stated Mr Gallagher found that

derogatory and offensive. The letter goes on by suggesting Mr Edgar had, by making false accusations to EECA, jeopardised significant lines of funding and commented on the client inquiry in January. There is also comment about Mr Edgar having sold competitors' products without authority or a price list. The letter closes by stating Terra Lana had concluded the above constituted serious misconduct and Mr Edgar was being dismissed.

Determination

[26] This determination has not been issued within the three month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority decided exceptional circumstances, or more correctly a series thereof, existed to allow a written determination of findings at a later date.

[27] Mr Edgar claims he was unjustifiably dismissed. Terra Lana accepts it dismissed Mr Edgar but says it was justified in doing so.

[28] Section 103A of the Act states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred.

[29] How that is interpreted is now well settled with the effect of s.103A of the Employment Relations Act 2000 (the Act) being comprehensively considered by the Full Bench of the Employment Court in *Angus v Ports of Auckland Ltd* and *McKean v Ports of Auckland Ltd*.¹ In that judgment, the Court makes it clear the Authority's task is to assess whether the employer's response to the conduct complained of is within the range open to a fair and reasonable employer in the circumstance of the case. If the response is one a fair and reasonable employer might reach then the decision to dismiss is lawful.

[30] Section 103A also requires the Authority consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations. A sufficient investigation requires, as a bare minimum, the employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

¹ [2011] NZEmpC 160

[31] It is Mr Edgar's view Terra Lana cannot justify the dismissal either substantively or procedurally. For example, with respect to procedure and the meeting he says:

Much like the letter, there were very few specific incidents relied on and it was mostly just general accusations which were levelled at me. I felt that the issues I raised at the meeting were not even considered by management as they just kept talking over the top of me. It seemed to me that management were not interested in hearing my side of the story and had already decided to try to get rid of me as I was causing trouble for them, particularly in questioning their work ethics and dealings with the EECA.

[32] Mr Edgar also raises a number of substantive issues including:

- a. He is not of violent disposition and the comments made to Ms Tankersley on 11 February fall at the minor end of the scale;
- b. There were no details about how he may have been aggressive toward Mr Patchett on 1 December;
- c. His having raised his concerns with EECA was not improper as Terra Lana was not addressing the issues and he had warned it of what he was going to do;
- d. That while he was the subject of complaints from customers *these are a regular occurrence in many business' ... and are not considered reason to support a dismissal for serious misconduct.*

[33] Unfortunately for Mr Edgar I cannot agree.

[34] A number of factors influenced Terra Lana's decision to dismiss but forefront was a concern he had a history of threatening behaviour which was taken to a new level on 1 December 2015 and thereafter. Of particular concern was the fact that even after the issue was raised Mr Edgar persisted with inappropriate behaviour as was exhibited by his interaction with Mr Tankersley on 11 February. To that was added a view that during the disciplinary meeting his attitude was combative and contemptuous. Mr Gallagher, the decision maker, concluded Mr Edgar was incapable of recognising the issues and would not therefore change. He felt he had a duty to protect other staff from such behaviours and the only way he could do so given Mr Edgar's inability to recognise the issues was to bring the employment to an end.

[35] Add to that additional instances of inappropriate behaviour including what Terra Lana saw as false accusation to EECA exacerbated by inappropriate approaches to clients to try and gather evidence supporting the claims. Terra Lana concluded the trust and confidence essential to the maintenance of an ongoing relationship had gone.

[36] Given the evidence I am not surprised Terra Lana reached the conclusion it did. A number of witnesses gave evidence on its behalf. That evidence, which went undisturbed by questioning, illustrated Mr Edgar as someone who was quite capable of expressing himself forcefully and in a way that could cause concern or offence. The evidence also suggested it had been occurring for some time but was treated leniently as Mr Edgar was good at generating sales.

[37] Mr Edgar's own evidence gave credibility to the impression created by the company's witnesses. With respect to the phone call to Mr Patchett on 1 December he advised he had no great recollection of what was said. He did however say that as a result of the fact he was running late to an appointment in Woodville and then had a call from his son who was having issues with some of his colleagues, he (Mr Edgar) just *lost the plot and let fire*.

[38] There was then the 11 February event. Ms Tankersley described Mr Edgar as being *aggressive, very angry and loud*. She describes feeling threatened and fearing he may become violent. Her evidence is supported by another who said she felt sufficiently concerned about Ms Tankersley's safety she made it obvious she was present and taking an interest in what was occurring. She also described Mr Edgar's demeanour as aggressive and threatening.

[39] Again Mr Edgar made no mention of the event in his brief but when questioned he at least accepted he raised his voice and this was followed by an acknowledgement *the shouting was one way*. While, as submitted, Mr Edgar may not be of violent disposition the evidence is he made others fear he may be and, as was conceded in submissions, the behaviour was *robust* and probably unacceptable.

[40] There is then evidence Mr Edgar had lost faith in his manager, Ms Tankersley. He accepts he sought to have her dismissed and does not deny he was trying to have her held responsible for what he believes was wrongdoing in respect to EECA subsidies. Indeed, he still considers that to be the case though the evidence does not

support his conviction and there is no evidence EECA was convinced the issues warranted investigation.

[41] Finally I note Mr Edgar repeatedly gave evidence which confirmed he considered his relationship with Ms Tankersley irretrievable and he could no longer accept her leadership. Indeed it was suggested in submission Terra Lana could have addressed these issues by arbitrarily relocating Mr Edgar.

[42] Similarly I note evidence he felt some disdain toward Mr Patchett. It is difficult to see how there can be a viable employment relationship in a situation where the employee has a dysfunctional relationship with his managers and no longer wishes to be subject to their control.

[43] There is then Mr Edgar's evidence he was under strain as result of the work requirements but in answering questions his evidence also confirms Terra Lana was willing to address the issues when he raised them and did agree to alterations in his hours of work. Indeed Mr Edgar's own evidence is he had an hour and a half per appointment when others had an hour though he explains the difference by saying others did not do the job properly. There was also his initial criticism of the return to a five day week but when answering questions he conceded the change was agreed.

[44] Again and while it is alleged Mr Edgar was the subject of improper treatment since raising his concerns with EECA there was no supporting evidence in his brief and a paucity thereof when giving oral evidence.

[45] Turning to the process adopted during the meeting of 16 February. As already said s 103A requires an employer put its concerns, allow an opportunity to respond and consider the response with an open mind.

[46] The meeting was originally about Mr Edgar's attitude and behaviour toward his managers which was leaving staff fearful for both themselves and others. Also the meeting was recorded. It lasted about four hours. That is a considerable time over which the issues could be canvassed and the transcript shows they were. There were also adjournments during which Terra Lana made enquiries to ascertain the veracity of responses Mr Edgar had made. The transcript also shows Terra Lana's concerns were explained and while other issues ultimately influenced the decision to dismiss such as the EECA approach and the inquiries Mr Edgar was making about clients, the

transcript shows these only became a focus of discussion as a result of Mr Edgar's explanations.

[47] A consideration of the transcript, which is the best evidence of what occurred that can possibly be available, leads me to conclude the enquiry was adequate and met the requirements of s 103A.

[48] I also conclude the evidence shows there was substance to Terra Lana's concerns. They warranted an enquiry and dismissal was an option open to the employer on the evidence it gathered and the responses offered by Mr Edgar. As alleged by Mr Gallagher, Mr Edgar was, at times, belligerent in the meeting. He exhibited a failure to understand there might be grounds for concern and/or satisfy Terra Lana there might be a behavioural change. That these attitudes remained by the time of the investigation was confirmed by the fact he failed to address, or even recognise the occurrence of two key events which led to his dismissal in his brief despite knowing by then the influence they had had on the decision.

[49] Given the evidence I heard I conclude Terra Lana could reach the conclusion it did – that its concerns were unlikely to be addressed and an untenable situation would continue should Mr Edgar remain. It could no longer trust him to act appropriately.

Conclusion and Costs

[50] Having considered the evidence and in particular the transcript of the meeting of 16 February I conclude Terra Lana has discharged the onus it carries of establishing dismissal was an option open to it in the circumstances. Mr Edgar's claims therefore fail.

[51] With respect to costs I note Terra Lana was self-represented so recoverable costs are likely to be minimal. I therefore express an initial view they should lie where they fall. I do however note any decision regarding costs is reviewable and if Terra Lana, as the successful party, therefore wishes to seek a contribution toward costs it should do so within four weeks of this determination.