

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 420
3054812

BETWEEN

AMBROSE SMITH
Applicant

AND

THE ELECTRICAL
TRAINING COMPANY
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Greening for Applicant
Natalie Tab for Respondent

Investigation Meeting: 16 July 2019

Oral Determination: 16 July 2019

Record of Oral
Determination: 17 July 2019

RECORD OF ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Smith was employed by The Electrical Training Company Limited (ETCO) as an electrical apprentice. The terms and conditions of his employment were set out in a written employment agreement signed by the parties on 25 July 2016.

[2] ETCO employs apprentices and “seconds” them to “host” companies to provide the apprentice with broad training opportunities in all aspects of the electrical industry which allows the employees to obtain registration as a qualified electrician. ETCO also provides night classes and block course tuition to its apprentices.

[3] Where an apprentice falls short of required standards while working with a host company ETCO will work with that apprentice to assist them to improve their performance. If ETCO is not successful in assisting the apprentice to raise their performance it will remove them from the host company's business and provide a replacement.

[4] Mr Smith's employment and apprenticeship was not without difficulties. ETCO spent time and effort to assist Mr Smith to improve in his work and studies. Despite this, at the time he was dismissed Mr Smith had completed and signed off only one full component of his academic requirements.

[5] A review of Mr Smith's record also shows he was removed from a number of host companies as a result of his skills being below the expected standard of an apprentice of his level. He was also subject to disciplinary processes and performance improvement plans during his employment.

[6] Following a complaint from a host company in September 2018, Mr Smith was dismissed. He challenges that dismissal which he says was unjustified.

Issues

[7] In order to resolve Mr Smith's application I must determine whether he was unjustifiably dismissed and if so, what if any remedies should be awarded.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Event leading to disciplinary process

[9] At the time the event leading to Mr Smith's dismissal occurred he was a third year apprentice. While working for a host company Mr Smith was working on an apartment building undertaking wiring for a heater connection. When wiring the connection Mr Smith failed to follow the required standards when he did not strip the plastic sleeve from around the wire before connecting it. Mr Smith had not installed the heater because he did not have it with him at the time.

[10] Another third year apprentice employed by the host company found Mr Smith's mistake when he went to install the heater. He sent a photo to Mr Smith via text message asking if Mr Smith had done all the connections in the building the same way. Mr Smith responded by text saying he had, and acknowledging that he did not strip the plastic sleeve and said "...sorry bro lazy".

[11] The text messages were relayed to the host company and Mr Smith's response meant all of his connections needed to be checked by the host company.

Disciplinary process

[12] On 5 September Mr Smith received a written invitation to attend a disciplinary meeting the following day. In its letter ETCO advised Mr Smith that he had not met agreed performance standards as set out in his employment agreement. In particular ETCO alleged Mr Smith had not met the requirements of an apprentice in his third year, had used more equipment and taken longer on a job than expected and failed to refer customer questions to a supervisor.

[13] In addition to the performance concerns ETCO alleged Mr Smith had breached aspects of its code of conduct. ETCO alleged Mr Smith's conduct constituted serious misconduct as follows:

1. Refusal to obey a lawful instruction
5. Failing to observe safety rules and operational procedures or any other irresponsible actions which result in injury to self or other persons; or result in damage to Company property or to property of others.
8. Acts which seriously affect quality, safety or the Company's public image.

[14] These allegations of serious misconduct related to the wiring incident. The letter asserts (incorrectly) that a supervisor checking Mr Smith's work found the incorrect connection and had the subsequent discussion by text message.

[15] Mr Smith attended the scheduled meeting on 6 September.

[16] Following an adjournment to consider Mr Smith's responses the Regional Manager, Mr Earle Bingham determined that the failure to wire the connection correctly constituted serious misconduct and Mr Smith would be dismissed. He

drafted a letter which he then read out in the reconvened meeting later that day. Mr Bingham also determined that the performance concerns would result in a formal warning being issued.

[17] In his letter Mr Bingham explains that the reasons for the dismissal were that Mr Smith had failed to follow a lawful and reasonable instruction, failed to observe safety rules and acted in a way which seriously affected quality, safety or the company's public image.

[18] Mr Smith has raised issues with respect to the process used by ETCO which he says was defective. In particular he says ETCO did not carry out its own investigation of the matters advised to it by the "host" company and predetermined that his conduct amounted to serious misconduct.

[19] Under s 103A of the Act I must objectively determine whether ETCO's actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[20] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, ETCO sufficiently investigated the issues, raised its concerns with Mr Smith, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to making the decision to dismiss him.

[21] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Smith being treated unfairly.¹ A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

ETCO's investigation

[22] It was common ground that Mr Smith had previously signed off that he knew how to wire the connection correctly and had been trained how to wire the connection many times during a number of courses and classes over the preceding three years.

¹ Employment Relations Act 2000 (the Act), s 103A(5).

[23] The employment agreement sets out the factors that may be taken into account when making disciplinary decisions. Those factors include the severity of the violation, the quality of the employee's work, the employee's attitude, the employee's prior disciplinary record and any other factor deemed appropriate.

[24] ETCO says it took into account Mr Smith's in-depth knowledge of how to wire the connection, his poor work and study history, the expectations that third year apprentices are able to work unsupervised, and the potential of the loose connection to cause a fire.

[25] ETCO says Mr Smith's failure to adhere to the AS/NZS standards was a failure to follow a lawful and reasonable instruction and a failure to follow safety rules.

[26] I have identified a number of defects in the investigation undertaken by ETCO. By way of example, at the investigation meeting Mr Bingham was unable to tell me what date the wiring incident took place. Mr Smith produced the text messages which showed the event took place on 17 August 2018.

[27] The text messages also show that it was not a Supervisor who found the error but the third year apprentice working alongside Mr Smith. The text messages do confirm that Mr Smith's only excuse was that he was being lazy in not making the connection correctly and indicated that other connections completed by Mr Smith may also have been done incorrectly.

[28] At the investigation meeting Mr Bingham told me he had asked Mr Smith for a copy of the text messages in the disciplinary meeting on 6 September. The notes do not record this request being made, and Mr Smith denies he was asked for it. In any event, ETCO could have asked for a copy of the text messages from the host company. It did not.

[29] Mr Bingham told me Mr Wayne Shannon had spoken to the company about the incident. Mr Shannon was not called to give evidence and Mr Bingham was unable to produce any notes that had been made of the discussions he says Mr Shannon had with the host company. Mr Smith was not provided with any copies of any notes that may have been taken by Mr Shannon during the disciplinary process.

[30] During the disciplinary meeting Mr Smith raised concerns about the conduct of the other apprentice as leading to him feeling stressed at the time the incident occurred. No further investigation was undertaken to check this aspect of Mr Smith's explanation. This is because ETCO was under the misapprehension that the wiring incident had occurred one or two days earlier and was aware the apprentice was on leave at that time. A fuller enquiry including receiving a copy of the text messages would have shown that the apprentice was working at the time of the incident.

[31] At the investigation meeting Mr Smith told me he raised the issues he was having with the apprentice with Mr Shannon in June. He told me that his conversation ended with Mr Smith acknowledging to Mr Shannon that everything was good.

Pre-determination

[32] Mr Smith points to the letter dated 5 September inviting him to the disciplinary meeting to support his complaint that ETCO had pre-determined that his conduct was serious misconduct. In particular the following statement by ETCO:

A serious misconduct issue has been brought to our attention. This is in breach of the serious misconduct points 1,5 and 8.

[33] Mr Smith says through its statement to him ETCO had determined serious misconduct had occurred and the only outstanding issue was the outcome, that is, whether he should be dismissed.

[34] I find at the time the letter was written ETCO had determined serious misconduct had occurred. ETCO had effectively fettered its own discretion and any consideration that the conduct was less serious was unlikely.

Conclusion

[35] For the following reasons the decision to dismiss Mr Smith was not a decision an employer acting fairly and reasonably in all of the circumstances of this case could make.

[36] The defects in the process were not minor and resulted in Mr Smith being treated unfairly. The lack of a proper investigation into the wiring incident meant that

no consideration was made of the lapse in time between 17 August when the incident occurred and 4 September when ETCO received information about it. During that time Mr Smith continued to work for the host company without incident. If the matter was as serious as ETCO now allege, the host company would have taken immediate steps to have Mr Smith removed.

[37] Mr Smith says ETCO's failure to fully investigate the allegations resulted in there being no evidence produced that he had failed to follow any instructions given to him, that there was any safety risk or any serious damage to the employer's public image.

[38] ETCO does not rely on a specific instruction being given to Mr Smith regarding the wiring of the connection. It relies on the requirements for electrical connections set out in the New Zealand standards. ETCO says Mr Smith acknowledged at the 6 September meeting he knew how to correctly wire the connection and confirmed his excuse relayed by text that he had been lazy in not carrying out the task correctly.

[39] The reliance by ETCO that Mr Smith had failed to observe safety rules as serious misconduct required there to have been a resulting injury or damage to company property. Neither of which occurred. The employment agreement provides for a breach of safety rules to constitute misconduct for which the appropriate sanction is a warning.

[40] Further, ETCO relied on a finding that Mr Smith's actions had seriously affected the company's public image. There was no evidence to support this assertion and none was provided to Mr Smith during the disciplinary meeting. At the investigation meeting evidence was given that Mr Smith's actions caused difficulties with the host company and a number of discussions had to take place with assurances given by ETCO before it was able to place further apprentices with the host company.

[41] Mr Smith has established a personal grievance. At this point I would normally move to consider the question of remedies. However, there is no dispute that Mr Smith failed to follow the required wiring standards and that he knew he had failed to do so. Mr Smith's employment record was littered with warnings and discussions about his diligence towards his studies and practical work skills.

[42] In *Xtreme Dining Ltd t/a Think Steel v Dewar* a full bench of the Employment Court considered circumstances whereby the Authority or the Court might conclude that it should not award any remedies to an applicant notwithstanding a successful finding of a personal grievance.² The Court said at paragraph [216]:

We conclude that s 124 does not permit complete removal of a previously established remedy. Rather, when there is misconduct which is so egregious that no remedy should be given, notwithstanding the establishing of a personal grievance, the Authority or Court may take that factor into account in its s 123 assessment in a manner that conforms with 'equity and good conscience'. The absence of a remedy in rare cases, notwithstanding the establishing of a personal grievance may be appropriate. The Court of Appeal reached this conclusion where there is disgraceful misconduct discovered after a dismissal. We consider that the statutory scheme allows for the same outcome in other instances where, for example, there has been outrageous or particularly egregious employee misconduct.

[43] The consequence of Mr Smith being too lazy to follow the wiring standards could have been significant including causing a fire which in an apartment building would have serious ramifications. Given the efforts made by ETCO to remedy his performance failings Mr Smith was clearly on notice that being "lazy" was not going to exonerate him.

[44] During the disciplinary meeting Mr Smith acknowledged that he knew what the consequences of his failure could be and that loose connections such as the one he had completed could cause fires.

[45] In these circumstances, while not condoning the actions of ETCO it would be unconscionable for the Authority to reward Mr Smith's behaviour.

Costs

[46] Costs are reserved and I am of a mind to let costs lie where they fall. The parties are invited to resolve the matter. If they are unable to do Mr Smith shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. ETCO shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

² [2016] NZEmpC 136.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards. I record that the investigation meeting took approximately 3 hours including the issue of this oral determination which equates to a half day investigation meeting.

Vicki Campbell
Member of the Employment Relations Authority