IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2019] NZERA 370
3042471

	BETWEEN	IAN BLACK Applicant
	A N D	THE PRIORY IN NEW ZEALAND OF THE MOST VENERABLE ORDER OF THE HOSPITAL OF ST JOHN OF JERUSALEM Respondent

Member of Authority:	Peter van Keulen
Representatives:	Calvin Fisher, advocate for the Applicant Charlotte Parkhill and Ellie Domigan, counsel for the Respondent
Investigation Meeting:	21 and 22 March 2019
Submissions Received:	22 March 2019 and 22 April 2019 from the Applicant 22 March 2019, 27 March 2019 and 30 May 2019 from the Respondent
Date of Determination:	21 June 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ian Black's employer, The Priory in New Zealand of the Most Venerable Order of the Hospital of St John of Jerusalem (St John) dismissed him because of a post he made to a St John's employee and volunteer Facebook page. St John concluded that the post was

unprofessional, a breach of St John's policy on using social media and amounted to serious misconduct in line with its disciplinary policy.

[2] Mr Black says dismissal was an incredibly harsh sanction in light of the post itself, the motivation behind the post, the circumstances of the post and his personal situation including that he had worked for St John for 27 years.

[3] St John says the dismissal was justified, including that it followed a fair and justifiable process and its decision to dismiss, arising out of that process, was one that a fair and reasonable employer could have come to in all of the circumstances.

[4] Mr Black has raised a personal grievance and lodged a claim in the Authority for unjustified dismissal. He seeks reinstatement, reimbursement of lost remuneration and compensation. It is this claim that I have investigated and now turn to determine.

Issues for unjustified dismissal

[5] There are two broad questions to answer for Mr Black's unjustified dismissal claim:

(a) Did St John follow a fair disciplinary process in coming to the conclusion to dismiss?

(b) Was the decision to dismiss substantively justified?

[6] If Mr Black is successful with his unjustified dismissal claim then I will need to consider remedies including reinstatement, reimbursement and compensation. I will also need to consider contribution if I award any monetary remedies to Mr Black.

Did St John follow a fair disciplinary process?

[7] As Mr Black was dismissed the onus is on St John to satisfy me that the dismissal was justified. The first issue on the justification is whether in coming to the decision to dismiss, St John followed a fair process.

[8] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) are relevant to the issue of whether St John conducted a fair disciplinary process. The matters for me to consider are:

(a) Did St John investigate the allegations of serious misconduct sufficiently;

(b) Did St John outline the allegations, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to Mr Black for him to consider and respond to;

(c) Did St John give Mr Black a reasonable opportunity to respond to the allegation of serious misconduct, before it made its decision to dismiss;

(d) Did St John consider properly any explanation given by Mr Black before it made its decision to dismiss;

(e) Did St John give Mr Black an opportunity to respond to its decision to dismiss before it imposed that sanction;

(f) Did St John consider any responses given by Mr Black to St John's decision to dismiss, before it finally decided dismissal was the appropriate sanction;

(g) If there was a failing by St John in any of the steps above, does that render the disciplinary process unfair?

Did St John investigate the alleged misconduct and the relevant circumstances, properly?

[9] In 2017, Mr Black was working in the Marlborough territory and was based out of Blenheim.

[10] On 30 July 2017, Mr Black posted a comment to a St John Blenheim Facebook page in response to a link that had been posted on that Facebook page by another user. That link was to an article about a power stretcher that St John Marlborough were about to receive.

[11] Mr Black's post stated:

> Who ever put that information into the paper needs to be shot with a ball of their own sh*t…..we still gonna have to get patients off the floor, couch, bed, car, truck or any of the millions of situations we find them and then get them on to the stretcher….so it will be FAR from barely lifting a finger.

[12] Larry Rayner, an employee at St John, saw the post and then showed it to David Neal, the St John Territory Manager for Marlborough. Mr Neal reviewed the post and decided to escalate it to his manager, James McMeekin the District Operations Manager.

[13] Whilst Mr Neal thought the comments in the post were directed at him it is clear from his evidence that he decided to tell Mr McMeekin about the post because he was concerned about how it reflected on St John and he thought that it might be a breach of St John policy. Mr Neal did not complain to Mr McMeekin about Mr Black disparaging him or threatening him, which may well have been a conclusion he drew from the post. This is important because it informed how Mr McMeekin dealt with the post.

[14] After speaking to Mr Neal, Mr McMeekin reviewed the Facebook post and then spoke to Katie Carran, HR Advisor at St John. Together with Ms Carran, Mr McMeekin reviewed the Facebook post, which included confirming the circumstances of the Facebook page; understanding from the post itself who had written it, when it was posted and who had viewed it; and assessing the content against St John's standards and expectations, particularly in light of the St John Use of Social Media Policy (the Policy).

[15] As a result of this investigatory work, Mr McMeekin and Ms Carran decided there may have been a potential breach of the Policy by Mr Black and Mr McMeekin should take this further by way a formal investigation with Mr Black.

[16] Mr McMeekin then sent Mr Black a letter dated 9 August 2017, inviting him to attend a formal meeting to discuss the Facebook post. I will return to this letter later, for now the significance of the letter in terms of the question of whether St John investigated the alleged misconduct properly is that it was a further step in the investigation, a step involving discussion with Mr Black.

[17] In the meeting, which was held on 18 August 2017, Mr Black accepted he had made the Facebook post, he explained the circumstances of the Facebook post including his frustration at the article and he accepted this was a breach of the Policy.

[18] So, at the conclusion of the meeting St John had investigated the Facebook post by reviewing and analysing it and then discussing it with Mr Black. In that discussion Mr Black admitted the behaviour, explained the circumstances and accepted he had breached the Policy.

[19] These admissions are significant to the question of St John's investigation. In *Murphy and Routhan t/a Enzo's Pizza v van Beek* [1] the Employment Court held that it was not unfair or unreasonable for an employer to rely on an admission of misconduct even to the extent that any subsequent steps in a process may be unfair. The Court said at p 620:

> … An employer who has carried out no inquiry as to the possible existence of innocent explanations for the apparently irregular conduct cannot claim to have reasonably reached an honest belief that the employee was guilty of serious misconduct justifying dismissal. However, that requirement does not extend to admitted conduct. …
>
> … The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair enquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy of that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy.

[1] [1998] 2 ERNZ 607

[20] This principle has been applied by the Authority in at least two determinations since the Act has come into force[2]. *Enzo's Pizza* is still good law. If an employee admits that he did the act then this removes the need for further investigation at least in terms of the alleged action.

[21] In this case, that principle applies not only to the finding of serious misconduct but also to some of the relevant circumstances of the misconduct, which Mr Black was able to explain in the meeting.

[22] Given all of this, I am satisfied that St John conducted a proper enquiry into the alleged behaviour including understanding the circumstances that gave rise to the behaviour.

Did St John provide relevant information and explain the allegation and the disciplinary consequences, to Mr Black?

[23] I am satisfied that St John provided all of the relevant information to Mr Black and explained the consequences of the process it was undertaking to Mr Black. The 9 August 2017 letter:

(a) Described the Facebook post.

(b) Expressed St John's concern about the Facebook post, including that it appeared unprofessional and might be a breach of the Policy.

(c) Advised Mr Black that if the allegations (above) were upheld then the behaviour could be found to be serious misconduct or misconduct as set out in St John's disciplinary policy.

(d) Set out the specific terms of the disciplinary policy and the Policy that the behaviour (if upheld) could be found to be in breach of.

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[2] *Reynolds v Mount Cook Airline Limited* [2013] NZERA Christchurch 155; and *Rivers v SCA Hygiene Australasia Limited* [2011] NZERA Auckland 42.

(e) Enclosed copies of the disciplinary policy and the Policy, a screen shot of the Facebook post and a copy of the news article that the Facebook post had been made in response to.

[24] In response to my questions, Mr Black said he understood the allegations made, understood the relevant policies and understood the implications of the process he was involved in.

[25] Mr Black's only real issue with the process adopted by St John is that he was not given the details of the complaint made about his Facebook post. However, this is not an issue for me. What was clear from the 9 August 2017 letter and consistently explained in the 18 August meeting was that the alleged behaviour might be misconduct or serious misconduct if it was in breach of the policies. The process was not about whether someone was offended and had complained but rather whether the conduct was a breach of the policies – so only the behaviour and the policies were relevant.

Did Mr Black have an appropriate opportunity to respond to the allegation of serious misconduct?

[26] St John invited Mr Black to attend the investigation meeting and he did so. I have read the notes of the investigation meeting and am satisfied that Mr Black had an appropriate opportunity to respond to the allegations.

Did St John consider Mr Black's response properly before it made its decision?

[27] Following the investigation meeting, St John did consider what Mr Black said. This involved consideration by Mr McMeekin and Ms Curran including reviewing Facebook use within St John.

[28] Mr McMeekin set out his consideration of Mr Black's responses and his conclusions in a letter dated 23 August 2017.

[29] Based on the letter of 23 August 2017 and Mr McMeekin's evidence I am satisfied that St John did consider Mr Black's responses properly before it made its decision.

Did St John give Mr Black an opportunity to respond to its decision to dismiss before it imposed that sanction?

[30] The letter of 23 August 2017 set out Mr McMeekin's conclusion on the behaviour and possible sanction. This was very clear and the conclusions were properly explained including, significantly, the preliminary decision to terminate Mr Black's employment for serious misconduct. Mr Black was invited to respond to this before a final decision was made.

[31] Mr Black did respond as requested and presented a letter dated 29 August 2017 setting out his views on the conclusions reached and the proposed sanction. This letter included testimonials from colleagues.

Did St John consider any responses given by Mr Black to St John's decision to dismiss, before it finally decided dismissal was the appropriate sanction?

[32] Mr McMeekin did consider Mr Black's responses as set out in his letter of 29 August 2017 and he reviewed the attached testimonials. Mr McMeekin responded to this in a letter dated 4 September 2017.

[33] I am satisfied that Mr McMeekin properly considered Mr Black's letter and the testimonials before he decided to confirm the decision to dismiss Mr Black.

Conclusion on process

[34] Given all of the above, I am satisfied that St John carried out a fair disciplinary process.

Was St John's decision substantively justified?

[35] The matter I must consider on the question of substantive justification is whether dismissal was a decision a fair and reasonable employer could have come to in light of:

(a) The gravity of the misconduct; and

(b) The circumstances of the misconduct and/or any mitigating factors.

Was the decision to dismiss justified in light of the severity of the misconduct?

[36] St John's conclusion regarding Mr Black's Facebook post was that it was a breach of the Policy in that the use of social media by Mr Black went against the values of St John and exposed St John to harm to its reputation or image. Further, the use included derogatory and offensive remarks directed at others.

[37] This behaviour was serious misconduct under the disciplinary policy because it was a breach of the Policy. Further, because it was aggressive and used offensive and abusive language it was also a matter for other disciplinary action. Both of these being specifically referred to in the disciplinary policy in this context.

[38] When deciding on sanction St John considered these conclusions for which dismissal was a suggested sanction and that Mr Black was on a 12 month final written warning regarding threatening and intimidating behaviour.

[39] In light of this, St John considered immediate dismissal was appropriate. This follows because the behaviour was serious misconduct for which summary dismissal was an appropriate and recognised sanction. And because the behaviour was also of a type for which disciplinary action was appropriate, with that disciplinary action informed by the current 12 month final warning.

[40] It is not my place to consider whether St John's decision was correct based on my views of the severity of the conduct or whether it amounted to a breach of the policies as

concluded. Rather my role is to assess if the decisions made by St John where ones that a fair and reasonable employer could have come to in all of the circumstances.[3]

[41] So, could a fair and reasonable employer have concluded that Mr Black's behaviour was a breach of the Policy – yes, a fair and reasonable employer could have concluded the Facebook post went against St John's values and was potentially harmful to St John's reputation. Could a fair and reasonable employer conclude that the Facebook post included derogatory and offensive remarks directed at others – yes.

[42] Having come to these conclusions, could a fair and reasonable employer conclude that immediate dismissal was appropriate. The answer is also yes. First, a breach of the Policy justifies immediate dismissal; the disciplinary policy sets this out. Second, derogatory and offensive remarks directed at others justify disciplinary action and being on a final written warning meant further conduct of a similar nature would result in termination. Third, given the concerns over on-line bullying and the need to protect third parties from on-line abuse and threats, the limited control over how on-line comments are interpreted and responded to and because dissemination of any on-line post can be exponential, Mr Black's conduct could be seen as severe and this justified immediate dismissal.

Was the decision to dismiss justified in light of the circumstances of the misconduct including any mitigating factors?

[43] In *Fuiava v Air New Zealand Ltd* [4] the Employment Court held that s 103A of the Act did not limit the test of justifiability to determining whether the misconduct was sufficiently serious to warrant a dismissal. The Court said that under s 103A of the Act it should consider the harshness of the decision to dismiss: this is contrary to the decision of the Court of Appeal in *Northern Distributers Union v BP Oil NZ Ltd* [5] that had been decided prior to the Act. This was because the test in s 103A of the Act required an assessment of what a fair and reasonable

[3] Section 103A of the Employment Relations Act 2000.
[4] [2006] ERNZ 806.
[5] [1992] 3 ERNZ 483.

employer would have done in all the circumstances (as the test was in 2006). The Court said "[t]he circumstances may include whether the hypothetical fair and reasonable employer would have been persuaded by mitigating factors to impose a penalty that was less than a dismissal."[6]

[44] Applying *Fuiava* I must consider whether the circumstances of the misconduct, including any mitigating factors, are such that the decision to dismiss is not one that a fair and reasonable employer could have come to.

[45] The mitigating circumstances for Mr Black included his long service with St John, that the Facebook post was motivated by a desire to stand up for St John and its workers and that he had some residual frustrations with the operation of St John. Against this backdrop the Facebook post was a spur of the moment decision and a reactionary response to what Mr Black saw as a misinformed and unhelpful view of the work undertaken by him and his colleagues.

[46] I am not satisfied that these mitigating circumstances are such that a fair and reasonable employer could not have concluded that dismissal was appropriate. This is so because there are other circumstances that counter them:

(a) St John had been working on its culture and how its workers interacted with each other, its patients and stakeholders, culminating in it establishing five core values that are an integral part of policies, job descriptions, training and performance assessments. Mr Black's behaviour was contrary to many of these values, values that he was aware of and was meant to implement on a daily basis.

(b) As part of Mr Black's final warning there was an agreement between him and Mr Neal that if Mr Black had an issue with colleagues or a work related matter he would discuss it with Mr Neal rather than dealing with it himself.

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[6] *BP Oil* at [70].

[47] Mr Black's mitigating circumstances cut across these two key factors. In some respects these two factors make Mr Black's explanation even less acceptable - he should have known better than to act as he did despite the fact that he says that he acted with correct and proper motivation and how he responded was informed by frustration and some anger at what he read.

Conclusion

[48] St John's dismissal of Mr Black was justified and Mr Black's claim is dismissed.

Costs

[49] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[50] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority