

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 8
3085693

BETWEEN DAMIEN HOWARTH
 Applicant

AND B J C ELEMENTS LIMITED
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Graeme Ogilvie, advocate for the Applicant
 Kean O’Neill (director) for the Respondent

Investigation Meeting: 12 October 2020 at Wellington

Submissions [and further 12 October 2020 from the Applicant
Information] Received: 12 October 2020 from the Respondent

Date of Determination: 13 January 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Damien Howarth was employed by B J C Elements Limited (BJC) for approximately two years. His terms and conditions of employment were contained in an individual employment agreement (IEA) signed by Mr Howarth on 23 February 2018. Annexed to the IEA was a job description and a document entitled “Standing Orders”.

[2] On 3 September 2019 Mr Howarth returned to work after being away on sick leave. When he returned to work he was approached by Kean O’Neill, the managing director of the business, who queried why he hadn’t been at work. Mr Howarth explained his need to take sick leave had been caused by hay fever, and when Mr O’Neill suggested that he take some antihistamine, matters became heated and Mr Howarth raised his voice and argued with Mr O’Neill. This resulted in Mr Howarth receiving a letter dated 3 September 2019 (but received on 4 September 2019) calling

him to a disciplinary meeting on Thursday 5 September 2019 to discuss three accusations of serious misconduct, namely:

- (a) Unauthorised absence from work;
- (b) Refusal to perform assigned work; and
- (c) Refusal to carry out a lawful and reasonable request.

[3] Following that meeting Mr Howarth was dismissed from his employment. Mr Howarth says that the dismissal was procedurally and substantively unjustified and accordingly he was unjustifiably dismissed. He seeks:

- (a) Lost wages;
- (b) \$20,000 compensation for hurt and humiliation;
- (c) Payment of any unpaid wages and holiday pay, plus costs.

[4] BJC acknowledges that Mr Howarth was dismissed but defends the dismissal saying it was justified. Further, BJC says that even if the dismissal was unjustified because of some procedural flaw, then Mr Howarth's contribution to the matters which gave rise to his personal grievance was so significant that any remedies awarded should be significantly reduced.

Background

[5] The Authority heard from two witnesses, Mr Howarth and Mr O'Neill. It also had in front of it the employment agreement relied on in part to justify the dismissal together with BJC's letter of 3 September 2019 which in part was relied upon by Mr Howarth to demonstrate flaws in the process and by Mr O'Neill to justify aspects of the dismissal.

[6] The evidence of both Mr Howarth and Mr O'Neill had a number of similarities and in essence there was significant agreement between the parties as to what was said to have occurred and what led to the dismissal.

[7] On 3 September 2019 having been away from work on sick leave, Mr Howarth returned to the workplace. He had properly notified the supervisor regarding his proposed absence but was approached by Mr O'Neill who asked him why he hadn't been at work. Mr Howarth explained to Mr O'Neill that he suffered badly from hay fever and on this occasion it was this that had caused the absence. Mr O'Neill responded by saying he had some hay fever medication in his office as everyone suffered from it and in Mr Howarth's view seemed to belittle his symptoms. Mr Howarth said, when giving evidence, that he took umbrage with the fact that Mr O'Neill was offering him

medication and felt this was quite improper. Accordingly, he became quite annoyed, raised his voice and told Mr O'Neill to go away. There is no doubt there was an altercation.

[8] Mr O'Neill became concerned this was happening in front of other staff so asked Mr Howarth to accompany him to the office. Mr Howarth refused to go. He was asked again to accompany Mr O'Neill to the office, this time more forcefully. Mr Howarth again refused to go. Mr O'Neill says he was trying to defuse the situation by moving the discussion to a private place. It was then he said to Mr Howarth that if he didn't accompany him to the office, Mr Howarth was at risk of losing his job. This last statement seemed to have the desired effect and Mr Howarth followed Mr O'Neill into the office.

[9] Both parties agreed that in the office the parties discussed the incident. Mr O'Neill made it plain that he was dissatisfied with Mr Howarth's behaviour in raising his voice and arguing as he had. Mr O'Neill said that he was concerned regarding Mr Howarth's pattern of absences and he referred to previous incidents on 5 August 2019 when explanations offered were not accepted. However, it became clear that Mr O'Neill's concerns, and the events which led to the dismissal, revolved around Mr Howarth's behaviour on 3 September 2019 in yelling at his employer, refusing to accompany him to the office at least initially, but then also later refusing to carry out additional duties.

[10] Mr O'Neill says that following the meeting of 3 September 2019, he met with the production manager who advised him that Mr Howarth was not working at all. He then drafted the letter of 3 September 2019 and gave it to Mr Howarth on 4 September 2019. It became clear during the investigation that Mr Howarth's position was relatively straight forward. His reasons for not following Mr O'Neill into the office initially were because he believed he was going to be dismissed anyway. He said he told this to Mr O'Neill not only on 3 September 2019 but also at the beginning of the meeting on Thursday 5 September 2019.

[11] Mr O'Neill's evidence was that Mr Howarth had nothing to say at the meeting on 5 September 2019 other than confirming he wanted the meeting to go ahead and did not need a representative present. Mr O'Neill says Mr Howarth was abusive and vitriolic, shouting at Mr O'Neill that he wanted him to fire him and he would then sue him. Mr O'Neill said this behaviour was too much for him and accordingly Mr Howarth was dismissed. In doing so, Mr O'Neill said he relied on clause 7.2 of the IEA which provided for immediate dismissal for serious misconduct. He also relied on section 2 of the Standing Orders which provided examples of serious misconduct. In that regard, Mr O'Neill's concern was the refusal to perform assigned work. He paid Mr Howarth ten working days' notice (two weeks).

Analysis

[12] A lot of what was going through Mr O'Neill's mind can be gleaned from the 3 September 2019 letter. The difficulty BJC faces in justifying the dismissal is that letter does reveal some flaws in the process:

- (a) The letter records that after Mr Howarth returned to the workstation, the production manager informed Mr O'Neill that he was refusing to do any work at all. The only investigation conducted was by Mr O'Neill who then approached Mr Howarth who accepted he wasn't working saying, "*Why should I work – you are going to sack me on Thursday anyway*".
- (b) The letter set out three instances of alleged serious misconduct but gave only two outcomes, namely:
 1. A one and only written warning followed by a 12 month probation period which renders you liable for instant dismissal if further breaches of Standing Orders occur in this period; or
 2. immediate termination of your employment here at BJC.

[13] Accordingly, the letter in essence confirms the evidence Mr O'Neill gave, namely that from his perspective, by the time he had sent out the 3 September 2019 letter but before the meeting on 5 September 2019, Mr Howarth was only going to be heard from in regards to penalty. In other words, Mr O'Neill had already made up his mind as to what had happened and no further explanation was to be received.

[14] There were some differences between the perception of the parties. For instance, Mr Howarth says he never said he wanted Mr O'Neill to fire him so that he could sue him. He said he had financial responsibilities for his family and actually has struggled to manage since he was out of work. He was very upset following the initial meeting with Mr O'Neill and being told his job was in grave danger was very troubling. He felt this was said in a very abusive and threatening manner. He says it wasn't so much a refusal to do work, rather he was too emotionally distressed to start work. Mr Howarth complains that there was no real discussion regarding the three allegations of serious misconduct and he felt there should be. Mr Howarth gave evidence regarding the effect of the dismissal on him both financially and emotionally. He states that when he was dismissed he became anxious and distressed and would spend hours a day and during sleepless nights thinking about what he had been through. He noted it was the first time in his life he had been dismissed and he felt the two reasons relied on, i.e. refusing to work and refusal to carry out an instruction, could be explained but that he wasn't listened to.

[15] Mr Howarth gave evidence that he had lost \$760 per week (gross) for at least a period of three months.

Sufficiency of investigation

[16] Pursuant to section 174E of the Employment Relations Act 2000 (the Act) I make findings of fact and law and outline conclusions but I do not record all evidence and submissions received.

[17] The 3 September 2019 letter makes it clear that BJC had already made a decision regarding serious misconduct prior to the meeting of 5 September 2019. Before dismissal, one would have expected BJC to undertake a more careful investigation before reaching conclusions. I understand BJC's perspective, namely that Mr O'Neill had witnessed the behaviour that was being investigated and therefore felt in the position to reach conclusions. More however is expected of a fair and reasonable employer. Mr O'Neill needed to sit back and properly investigate any explanations Mr Howarth wished to put in explaining his behaviour. It is clear that this did not happen on 3 September 2019. The investigation therefore fell woefully short of being procedurally fair. I have taken into account the limited resources BJC has, however, the defects in the process were not minor. This is especially so when one reason for the dismissal was the report by the supervisor that Mr Howarth was refusing to work.

[18] There was no proper investigation in respect of that issue although Mr O'Neill did approach Mr Howarth at the workplace to question what was happening. Nonetheless, it is clear that Mr Howarth did not receive a proper opportunity to explain his actions. The only opportunity afforded him, was on 3 September 2019 when he followed Mr O'Neill into the office. This was prior to the occurrence leading to the accusation of refusing to work. The meeting was not investigative in nature nor was it designed to hear any explanations. This is clear, because the 3 September 2019 letter records decisions regarding serious misconduct had already been reached with the only question being which penalty was to be imposed.

[19] Because of the above, I find Mr Howarth's dismissal for serious misconduct, was unjustified.

Remedies

[20] Mr Howarth seeks payment of lost wages and holiday pay together with compensation of \$20,000 for humiliation, loss of dignity and injuries to feelings. Earlier in this determination I have referred to Mr Howarth's evidence in regard to the effect his dismissal had on him. S128 (2) of the Act requires I must order payment of three months lost remuneration or actual loss whichever is

the lesser. Mr Howarth's evidence shows an actual loss greater than three months wages. Having considered all the circumstances, I award the following:

- (a) Lost wages equal to three months of \$9,980.00 (less PAYE); and
- (b) The sum of \$12,000 in terms of s 123(1)(c)(i) of the Act.

Contribution

[21] Section 124 of the Act requires that I must consider to what extent, if any, Mr Howarth's actions contributed to the situation which gave rise to his personal grievance and then assess whether any calculated remedies should be reduced. To assess whether the remedies should be reduced, I have considered the relevant factors summarised by the Employment Court in *Maddigan v Director General of Conservation*¹.

[22] Mr Howarth conceded that he had raised his voice to Mr O'Neill to the extent it was clear Mr O'Neill needed to move him to the office and away from other staff. The justification for him not initially following Mr O'Neill into the office was that MR Howarth believed he was going to be dismissed in any event. This does indicate that Mr Howarth was aware his behaviour was unacceptable and that he had crossed the line. Mr Howard also was open about the fact that he took umbrage at Mr O'Neill's suggestion that he take antihistamines. He felt this was quite improper. Mr Howarth accepts he was angry and verbally aggressive. Behaviour such as this towards Mr O'Neill, is such that it falls within the category of blameworthy behaviour. The evidence from both parties was that Mr O'Neill's question, regarding why Mr Howarth had been away from work, was politely put and not posed in an aggressive or pugnacious way. Accordingly, Mr Howarth's response would have been unexpected by Mr O'Neill.

[23] Overall, I find that Mr Howarth did contribute to the situation giving rise to the personal grievance, but I need to balance this with my finding that his later dismissal was procedurally deficient. Mr Howarth cannot be blamed for deficiencies in the process that robbed him of the opportunity to respond to the issues which led to his dismissal.

[24] I find the aggressive behaviour and lack of cooperation displayed by Mr Howarth, warrant a reduction of 30 percent in the remedies granted to Mr Howarth.

¹ *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [71] and [76].

Outcome*Orders*

[25] I find that:

- (a) Mr Howarth was unjustifiably dismissed;
- (b) BJC Elements Limited must pay Mr Howarth:
 - (i) The sum of \$8,400 compensation pursuant to s 123(1)(c)(i) of the Act.²
 - (ii) Lost salary of \$6,916.³ (less PAYE)

Costs

[26] Costs are at the discretion of the Authority and here Mr Howarth was successful in his claim for unjustified dismissal. The Authority normally operates a tariff approach to costs and the investigation meeting took approximately half a day in which case costs would normally be \$2,250.00. The parties are encouraged to make an agreement on costs that needs to take into account that the Authority, whilst having a discretion to assess costs, must be persuaded that the circumstances exist to depart from the normal application of scale costs. If no agreement is reached, Mr Howarth has 14 days following the date of this determination to make a written submission on costs and BJC has a further 14 days to provide a response. I will then determine what costs are appropriate.

Geoff O'Sullivan
Member of the Employment Relations Authority

² \$12,000 less 30 percent

³ Three months' salary less 30 percent