

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2023] NZERA 479
3188039

BETWEEN SATISH PAWAR
 Applicant

AND DEN RAY MARINE SERVICES
 LIMITED
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Satish Pawar Applicant in Person
 Martin Crooks for the Respondent

Investigation Meeting: 11 May 2023 at Wellington

Submissions (and other
Information) Received: Up to and including 16 June 2023

Date of Determination: 25 August 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Satish Pawar was employed as a lifeboat service technician at Den Ray Marine Services Limited (Den Ray) at its Wellington branch. Following written complaints from colleagues around aggressive behaviour and an allegation of a lack of care in the servicing of a set of life jackets, Mr Pawar was asked to attend a meeting on 28 October 2021 to discuss the issues. Further meetings followed on 4 November and again on 15 November.

[2] Mr Pawar was called to a meeting on 17 November where he was dismissed on four weeks’ notice. Mr Pawar says that his dismissal was both procedurally and substantively unfair and accordingly was unjustified.

[3] He seeks:

- (a) Compensation of \$20,000 under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act);
- (b) Lost wages until he secured employment on 8 February 2022; and
- (c) Costs.

[4] Den Ray denies that the decision to dismiss resulted in an unjustified dismissal. It says the decision was taken to dismiss Mr Pawar on the grounds of a broken employment relationship and was not a decision taken lightly.

The Authority's investigation

[5] The Authority received evidence from Mr Pawar, Martin Crooks, Sharan Dsouza, John Peake, and Simon O'Dea for the respondent. All witnesses gave evidence either by oath or affirmation. Each were asked questions by the Authority and in turn, Mr Pawar asked questions of the respondent's witnesses and Mr Crooks questioned Mr Pawar.

[6] As is permitted by s 174(e) of the Act, this determination states findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues and background

[7] The following issues were identified as requiring determination by the Authority, namely:

- (a) What happened on 19 October and what were the grounds relied on by Den Ray to justify the dismissal?
- (b) Was Mr Pawar dismissed following a fair disciplinary process or were there failings which resulted in Mr Pawar's dismissal being unjustified?
- (c) If Mr Pawar's dismissal was unjustified, what remedies should he be awarded?
- (d) If Mr Pawar's dismissal was unjustified, to what extent did he contribute to the situation giving rise to his dismissal?

Background

Mr Pawar's servicing of a set of life jackets

[8] On 19 October 2021, Mr Pawar was at the Den Ray Wellington service station working on servicing a set of life jackets. Mr O'Dea was the person who had allocated this task to Mr Pawar. Mr O'Dea observed Mr Pawar starting to disassemble the jackets and inflate them for the one hour pressure holding test. Once the jackets were inflated, Mr Pawar left the workshop and after he had left, Mr O'Dea noticed that two of the jackets had lost significant pressure. He discussed the matter with Mr Peake and in Mr Pawar's absence, both agreed that the jackets would need further attention and may even need to be condemned and replaced. Mr O'Dea spoke to Mr Peake and there was a discussion about Mr Pawar's recent outbursts at work which I will deal with later in this determination. Mr Peake and Mr O'Dea agreed to allow Mr Pawar to finish his servicing of the jackets but they would keep an eye on the two that had failed. They did not pass this information on to Mr Pawar, although they knew that a couple of the jackets would need attention.

[9] Mr Pawar did not return to this task for some two days and re-assembled the jackets, folding them to be sent back to the customer. He also issued a certificate for the jackets. Mr O'Dea asked Mr Pawar whether it would be okay to retest the two jackets in question. They were then inflated and it became obvious that neither was going to hold air. As indicated above, Mr O'Dea did not tell Mr Pawar that he already knew the jackets would fail the test. Mr O'Dea then emailed Mr Crooks the General Manager, and advised him of what had happened. This led to Mr Crooks deciding that he would need to investigate the matter.

Allegation of aggressive behaviour

[10] By 22 October 2021 he had received email complaints which also included allegations of aggressive behaviour on behalf of Mr Pawar. Sharan Dsouza had complained that Mr Pawar had become verbally aggressive towards him and said there had been some history. Mr Dsouza stated he had known Mr Pawar since 2010 when they had been working together in Dubai. He said he had been having panic attacks after Mr Pawar's aggressive behaviour and for this reason, Mr Dsouza put his complaint in writing. Mr Pawar had left to drop off four cylinders on 22 October 2021 leaving at approximately 11.45 am and returning about 3.00 pm. When he returned, Mr Dsouza asked him where he had been for so long. According to Mr Dsouza, Mr Pawar had replied aggressively why did he want to know. The following day when

Mr Pawar said he was going for a haircut, he aggressively said to Mr Dsouza that he was informing him because of his questioning the day before.

[11] It was the complaints about the life jackets and alleged aggressive behaviour that caused Mr Crooks to start his process.

The process followed

[12] On 22 October 2021 Mr Crooks received an email from Mr O’Dea complaining about Mr Pawar in respect of the inflation test he carried out with the life jackets. He said that Mr Pawar had not been using the correct paperwork, nor following the correct procedure for servicing. He said that Mr Pawar had left the site for another job and by 22 October, the testing of the jacket had not been completed. Despite this, he observed that Mr Pawar had passed and packed the jackets for delivery to the customer.

[13] On the same day, Mr Dsouza had also emailed Mr Crooks with what he termed an “official abuse complaint”. Mr Dsouza referred to incidents from the past but also raised a recent complaint where he said that Mr Pawar had left for a task which took him more than three hours to complete. He said he asked him why he had taken so long and received an aggressive reply along the lines of why did he want to know?

[14] The following day Mr Dsouza complained along a similar vein where he said Mr Pawar in an aggressive way, stated he was going for a haircut and was informing him (Mr Dsouza) because he asked him where he was yesterday. Mr Dsouza also outlaid complaints regarding actions of some two months prior.

[15] Mr Dsouza explained that although he could ignore it, this behaviour was causing him mental stress. He was also concerned that Mr Pawar’s time was being charged out fully when he wasn’t in the workshop.

[16] Mr Crooks considered the complaints and established that in his mind there was a case to answer. Mr Pawar was given the complaint emails and through WhatsApp on 28 October, Mr Crooks sought his response. Mr Pawar advised he did not swear but did say he was “triggered” by Mr Dsouza’s questioning. He however said he was not aggressive and to that extent refuted the allegation.

[17] In respect of the life jackets, Mr Pawar advised that he had asked Mr O’Dea for his opinion and that he responded if life jackets stay inflated for an hour, they would pass. He believed therefore that he had absolved himself of further responsibility and in essence refuted any allegation that he was negligent or had passed jackets he shouldn’t have.

[18] Mr Crooks put Mr Pawar’s response back to the complainants. Mr Dsouza confirmed that during the altercation he had felt bad but said he had never felt unsafe. Mr O’Dea said that he believed if he had not pulled the jackets from the batch, they would have been delivered to the customer.

[19] Mr Crooks was not happy with the way that Mr Pawar responded to the complaints. He considered that arguments were started by Mr Pawar when there was a challenge to his whereabouts and in the case of the life jacket servicing, there were problems with his aggressive approach. Because of this, he met again with Mr Pawar on 4 November 2021.

[20] Mr Crooks met with Mr Pawar again on 8 November when Mr Pawar confirmed he rejected both complaints. Mr Crooks asked him whether he believed there were any shortcomings in his process regarding the servicing of the life jackets but Mr Pawar denied that there were any. In respect of the allegation that he acted aggressively in an altercation with Mr Dsouza, he confirmed he had a difficult relationship with Mr Dsouza but questioned Mr O’Dea’s honesty and that because Mr Dsouza and Mr O’Dea had a closer relationship than he did, he felt like he was walking into a trap each day.

Mr Crooks findings

[21] Mr Crooks interviewed staff around the detail of the life jacket servicing and concluded that Mr Pawar had a number of years’ experience with life jackets although they may have been a different brand. He confirmed the fact that Mr Pawar had inflated the jackets around 11.00 am on the Tuesday but did not review the jackets again that day. He noted that the process of inflating to firm without manometers works well if a squeeze test is done after an hour. However after a day, most jackets would fail the subjective test.

[22] Mr Crooks concluded that:

- (a) In respect of the life jacket servicing, Mr Pawar’s testing was not up to standard and without intervention, defective jackets would have been sent to the customer; and

- (b) In respect of the altercation with Mr Dsouza, he found there was a level of aggression which was unacceptable.

[23] When this part of Mr Crooks evidence was discussed during the investigation meeting, he confirmed he advised Mr Pawar that a potential consequence of his action could include a formal warning. He said it was not in his mind to dismiss Mr Pawar and did not believe that either of the allegations constituted grounds for dismissal. He thought however, they may provide grounds for a formal warning. However, he says that Mr Pawar's response was to again question the definition of aggression and added that Indian culture was similar to South African culture and what might look like an angry loud argument can be less than that. This explanation did not go down well with Mr Crooks who felt that Mr Pawar was underplaying the seriousness of the allegations he had found proved. He also thought there was a serious level of negligence and lack of care in respect of the two failed jackets that Mr Pawar had originally passed.

[24] Mr Crooks then decided that the issue in respect of the life jackets was serious misconduct and a neglect of Mr Pawar's duty of care. He felt the attempt to pass responsibility onto a co-worker by mispresenting their comments was unconscionable. He put aside Mr Dsouza's personal grievance complaint in respect of the altercation as now being less material. He then found that there had been a theme of dishonesty and lack of accountability even though there were witnesses and the evidence of Mr Pawar's own service records. He felt there had been an increasing disengagement by Mr Pawar resulting in a lack of care about his workmanship.

[25] Mr Crooks then found that he could no longer trust Mr Pawar or his work. He said this was especially so in a remotely managed role. He found that the damage to the employment relationship was irreparable and accordingly, that informed his decision to dismiss Mr Pawar on four weeks' notice, with his final day being on 14 December 2021. Mr Pawar was not permitted to attend work during that period and was required to surrender all company property, keys and credit cards immediately.

[26] Mr Pawar gave evidence as to the financial and emotional effects the dismissal had on him. He said he did not find alternative employment until 8 February 2022 and accordingly had lost wages of some \$9,000 as set out in his Statement of Problem. He gave evidence of feeling stunned and struggling to process his dismissal. He suffered anxiety and depression wondering how he would support his family. He said he was no longer working in an area he

enjoyed and was not using the 10 years of experience he had built up. He said he had lost all confidence and the dismissal left him feeling lost and unmotivated.

Analysis and discussion

[27] The reasons why Mr Crooks decided to dismiss Mr Pawar are essentially contained in the dismissal letter dated 17 November 2021. In respect of the altercation with Mr Dsouza, when the parties met on Monday 15 November 2021, Mr Pawar was told that the level of aggression he exhibited was unacceptable and that a potential consequence could include a formal warning.

[28] In respect of the life jacket servicing, Mr Crooks advised that he had found a serious level of negligence and lack of due care had occurred. He advised that he felt this matter was serious misconduct with a potential for dismissal. Despite his finding regarding the altercation, Mr Crooks advised he was putting that aside as being less material.

[29] In respect of the life jackets, Mr Crooks made further findings that Mr Pawar's attempts to pass on responsibility to a co-worker was unconscionable. He further found that there had been a theme of dishonesty and lack of accountability, even in the face of corroboration of this event by multiple witnesses and that there had been an increasing disengagement by Mr Pawar which had resulted in this lack of care. Finally, he found that the consequences of the life jacket failing in an emergency could likely result in a fatality. If that had occurred, the potential impact of an investigation into the servicing of a lifesaving appliance would be both financially and reputationally damaging to the business. Mr Crooks went on to say that it was the combination of these issues that led him to recognise that he could no longer trust Mr Pawar or his work and that this was untenable. He advised that the damage to the employment relationship was irreparable.

[30] Both in the dismissal letter, and in the evidence he gave before the Authority, Mr Crooks was forthright on what he believed justified the termination of Mr Pawar's employment.

[31] The test of justification is provided for in s 103A of the Act. The section provides:

103A Test of Justification

- (1) For the purposes of section 103A and B, the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in sub-section (2).
- (2) The test is 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 or action occurred.

[32] In applying that test, s 103A(3) requires consideration of a number of matters. That section provides:

- (3) In applying the test in sub-section (2), the Authority or the court must consider:
 - (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
 - (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
 - (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
 - (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[33] In applying the s 103A test against Den Ray's process, it is apparent that some flaws in that process are evident. First, in looking at substantive justification in respect of any findings regarding the life jackets, it needs to be noted that Den Ray re-checked the life jackets after Mr Pawar had left the building. At this point they knew the life jackets had failed the test. Rather than questioning Mr Pawar as to why he had passed them, Den Ray said nothing but waited for Mr Pawar to return to see what he did with them. There is a certain level of entrapment in respect of that process. This is especially so when Den Ray relies on the threat to its reputation and indeed the danger potentially caused to a customer who had a defective life jacket. In reality this was not going to occur as Den Ray already knew of the problems with the life jackets and should have been more open and transparent in its discussion with Mr Pawar. It should not have waited to see how Mr Pawar dealt with the life jackets on his return, it should have immediately raised the issue with him and sought an explanation at that time.

[34] Again, in terms of the altercation with Mr Dsouza, although Den Ray advised Mr Pawar this may result in a warning, it then chose not to progress that aspect.

[35] Finally, Den Ray in the evidence given to the Authority, and in the dismissal letter of 17 November 2021, relies on grounds not properly put to Mr Pawar, namely its findings that:

- (a) Mr Pawar misrepresented the comments of a co-worker and that this was unconscionable;
- (b) That there had been a theme of dishonesty and lack of accountability;
- (c) That there had been an increasing disengagement by Mr Pawar which led to a lack of care about his workmanship.

[36] Mr Crooks concluded in the dismissal letter:¹

It is the combination of these issues that have led me to recognise that I can no longer trust you or your work, which is untenable in a remotely managed role that is required of you and the standards required in servicing lifesaving equipment. The damage to our employment relationship is irreparable.

[37] None of the above had been put to Mr Pawar before dismissal. It follows therefore Mr Pawar did not have a reasonable opportunity to respond to those concerns before he was dismissed. Mr Pawar's dismissal was therefore unjustified. Parties to an employment relationship are amongst other things required to be responsive and communicative. Den Ray should have raised any concerns it had in respect of Mr Pawar's checking of the life jackets at the first possible opportunity. Waiting as they did, for Mr Pawar to eventually start packing the defective life jackets for delivery, was unfair.

Conclusion and orders

[38] As I have found that Mr Pawar was unjustifiably dismissed, it follows that Mr Pawar is entitled to a consideration of remedies. Mr Pawar was paid \$31.80 per hour for a 40 hour week and was paid up and until 14 December 2021. He found alternative employment on 8 February 2022 and accordingly has lost \$9,000 of wages as he has claimed.

¹ Dismissal letter dated November 17 2021.

[39] I accept Mr Pawar's evidence in respect to the effect the dismissal had on him and under the circumstances consider an award of \$15,000.00 appropriate as compensation for the humiliation, loss of dignity and injury to feelings Mr Pawar has suffered.

[40] Section 124 of the Act requires me to consider the extent if any to which the actions of Mr Pawar may have contributed towards the situation that gave rise to his personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly. The only alleged contributory conduct which Mr Pawar could be guilty of would be how he initially dealt with the testing of the life jackets. However, I have found that Den Ray already knew the life jackets would fail the test and instead of raising that with Mr Pawar when he returned to work, Den Ray waited to see what Mr Pawar would do. I found that was not the action of a fair and reasonable employer and constitutes a breach which Mr Pawar could not contribute to.

[41] Den Ray then relied on other factors to support the dismissal, namely it assumed that Mr Pawar had misrepresented his co-worker's comments when he defended the allegation regarding his testing of the life jackets. Further, Den Ray had found a theme of dishonesty and lack of accountability along with loss of trust and an allegation the employment relationship had broken down irreparably. None of these findings, relied on to justify the dismissal, were ever put to Mr Pawar and accordingly are procedural breaches he could not contribute to. On that basis Mr Pawar did not contribute to his dismissal, nor did he contribute to Den Ray's process failures. No deduction is warranted.

[42] The following orders are made:

- (a) Den Ray Marine Services Limited is to pay Mr Satish Pawar \$9,000 (less PAYE) on account of lost wages;
- (b) Den Ray Marine Services Limited is to pay Mr Satish Pawar a sum of \$15,000 as compensation for the humiliation, injury to feelings and loss of dignity suffered by Mr Pawar;
- (c) The above payments are to be made within 28 days from the date of this determination.

Costs

[43] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and an Authority determination on costs is needed, Mr Pawar may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of this determination. From the date of service of that memorandum Den Ray would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[44] If the Authority were asked to determine costs, the parties could expect the Authority to apply its usual daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.²

Geoff O'Sullivan
Member of the Employment Relations Authority

² For further information about the factors considered in assessing costs, see:
www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1