

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Brian William Black (Applicant)  
**AND** Carter Holt Harvey Limited (Respondent)  
**REPRESENTATIVES** Stephen Clews, Counsel for Applicant  
Peter Kiely, Counsel for Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 8 December 2005  
**SUBMISSIONS RECEIVED** 20 January 2006  
**DATE OF DETERMINATION** 30 March 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

- [1] Mr Black claims that he was unjustifiably dismissed on 11 August 2003. He asks the Authority to find that he has a personal grievance and award him various remedies, including reinstatement.  
Carter Holt Harvey Limited acknowledges that Mr Black was dismissed but says that the dismissal was justified on the grounds of serious misconduct involving a breach of a safety procedure.

**Background Facts and Evidence**

- [2] Mr Black had been employed by Carter Holt Harvey ("CHH") at its Whakatane pulp and paper mill for more than 30 years, apart from a break in service of approximately 9 months in 1986.
- [3] On the morning of 4 August 2003, Mr Black commenced his work shift at 6:00am. His duties that morning involved the washing of stock lines or water pipes that carry the pulp product to the stock chests. The stock chests are reservoirs or tanks used to dilute the pulp prior to it being pumped on for further processing.
- [4] On that morning, outside contractors came on to the site to repair the fibre glass linings of the stock chests. The evidence of Mr Martin Gray, employed in the role of Engineering Utility for CHH, is that in preparation for the contractors coming to work in the stock chests, he placed Group Hold Cards on the stock valves in the headbox area.
- [5] The purpose of the Group Hold Cards is to alert other people working in the area to the fact

that the plant is being worked on and to prevent the operation or altering of machinery or plant in that area. The hold cards were placed on the stock valves because they control the water flow into the stock chests and the valves must be closed before anyone enters the stock chest area. The evidence of Mr Gray is that if the valves are not closed, then water can flow into the stock chest area creating a significant risk of injury. The further evidence of Mr Gray is that if enough material entered the stock chest while someone was in there; [“it is not exaggerating to say that they could be killed.”

- [6] Mr Gray says that soon after the contractors arrived on site, he was approached by them and was informed that there was 75-100mm of unbleached stock on the floor of the chest. Mr Gray says that as he knew the stock chest was empty at the time that he placed the hold cards, then the only way that the pulp stock could have subsequently come into the chest was for someone to have opened the stock valves after he had placed the hold cards on them.
- [7] Mr Gray then checked with the operators in the headbox area, one of them being Mr Black. The evidence of Mr Gray is that Mr Black told him that he had opened the stock valves because; [“they had to wash the lines out somehow.”
- [8] The evidence of Mr Black is that he opened the wash port located at the end of the Number 1 stock line, a normal procedure when cleaning out stock lines. Mr Black says that upon opening the wash port, cold water came out and down his sleeve and down the front of his raincoat and that water and pulp residues splashed onto his safety glasses. Mr Black says that this had never happened to him to such an extent before and that there should not have been water in that part of the line at the time.
- [9] The further evidence of Mr Black is that he immediately reached forward and opened the first of two valves on the stock line and then he stepped further forward and opened the second of the valves thus allowing the water to run away – into the headbox area where it was subsequently discovered. Mr Black says that he also reached under the stock line and opened the valves on the adjacent stock line and that while these valves were obscured from his view by the Number 1 stock line, he knew from experience where the valves were.
- [10] The evidence of Mr Black is that his reaction in opening the valves was an instinctive one, given that he was working in an area that he was familiar with. Mr Black says that shortly after he opened the valves, Mr Wayne Hansen, Assistant Business Unit Leader with CHH, and Mr Gray arrived on the scene. Upon being questioned by Mr Hansen as to who had opened the valves, Mr Black acknowledged that he had. Mr Black says that upon being instructed to close the valves, he did so and at that point, he saw that the valves were isolated with hold cards. It is the evidence of Mr Black that he had not previously seen the hold cards.

### **The investigation**

- [11] Mr Edward Trickett is the Business Unit Leader for the area that Mr Black worked in. Upon becoming aware of the incident regarding the opening of the valves with the hold cards on them, a meeting was called with Mr Black and he was informed that it was suspected that he had breached the isolations policy of CHH and that a formal investigation would take place. Mr Black was informed that the outcome of the investigation could result in disciplinary action and that he should obtain representation.
- [12] An investigation into the circumstances pertaining to the opening of the valves then took place with meetings involving Mr Black and his Union representative occurring on 5 August, 8 August and 11 August 2003. At the latter meeting Mr Black was dismissed.

### **Reasons for the dismissal**

[13] The evidence of Mr Trickett is that CHH had no choice but to dismiss Mr Black for the following reasons:

- (a) There were serious health and safety considerations to be taken into account given that the manufacturing operations at the plant involve heavy machinery and moving parts. The isolation policy using hold cards is an important component of the company's health and safety procedures and that serious injury or possibly death could result from machinery being operated while it is being repaired or otherwise worked on.
- (b) Despite the contrary assertions of Mr Black during the investigation, CHH concluded that Mr Black would have been aware of the hold cards being in place at the time that he opened the valves. Mr Trickett says that Mr Black's evidence that he did not see the hold cards was found not to be credible.
- (c) Mr Black had received the necessary training and knew that he was not permitted to operate valves that had hold cards on them but despite that knowledge, operated the valves anyway.
- (d) The contractors were due to commence work at any time in the stock chest. If Mr Black had opened the valves while the contractors were in there their safety and possibly their lives could have been at risk.
- (e) The actions of Mr Black were more than just careless. He opened the valves in order to clear an inconvenient build-up of water and pulp in the stock lines without regard for the safety of others. Therefore, his actions fell squarely into the realm of serious misconduct.

### **Mr Black's explanation**

[14] The evidence of Mr Black is that:

- (i) He did not see the hold cards when he opened the valves as he simply reached along the pipe and opened the valves.
- (ii) His eyesight was obscured by the water and residue on his safety glasses and that his eyesight is not good without correctives lenses and this may have also contributed to not seeing the hold cards.
- (iii) The hold cards were incomplete and had their reconnection orders attached to them<sup>1</sup> hence in terms of the hold card policy, the valves were technically able to be operated.

### **Analysis and Conclusions**

[15] It is not the role of the Authority to substitute its decision to dismiss or not for that of CHH. Rather, the role of the Authority is to determine whether the decision to dismiss Mr Black was a fair and reasonable one in the circumstances.

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<sup>1</sup> The correct procedure is for the reconnection order to be held separately from the hold card hence the card cannot be removed without the reconnection order being available at a later time.

- [16] Following what I find to have been a properly conducted and fair and reasonable investigation, CHH made the decision to dismiss Mr Black on the grounds that he had seriously breached the Company's Isolations and Confined Space Policy. The evidence of Mr Trickett is that he found that Mr Black's explanation, that he did not see the hold cards, was not credible. Having heard the evidence of Mr Black, I am bound to say that I concur with that view and find that it was fair and reasonable for CHH to view Mr Black's actions as serious misconduct warranting dismissal.
- [17] I also find that Mr Black had full knowledge of the Isolations and Confined Space Policy, the requirement for this policy, and that he was aware of the serious consequences of breaching the policy.
- [18] Mr Black and his Counsel have pointed to other examples of breaches of the Company policy and the actions of other employees, namely Mr Howie Black and Mr Gray, and say that Mr Black was subjected to disparate treatment. I have examined the evidence pertaining to those two matters. In regard to Mr Howie Black<sup>2</sup>, the Company does not have any record of an accident pertaining to caustic liquid burns incurred as referred to in his evidence. Even if the evidence of Mr Howie Black was to be accepted, I do not accept his general statement that: ["it is a simple matter not to see a card when reaching over or around pipes or when the cards are hanging edge on."]  
I am satisfied that in the circumstances that existed on the day that Mr Brian Black opened the valves, the hold cards were clearly visible and he was aware of their existence - as CHH fairly and reasonably concluded.
- [19] In regard to the incident involving Mr Gray, apart from the fact that this incident occurred after the dismissal of Mr Black, I accept the evidence of CHH that there were mitigating circumstances in existence regarding this matter and that a warning was warranted in those circumstances.
- [20] There is also the matter of the reconnection orders not being retained by Mr Gray upon the attaching of the hold cards. While that would appear to be a less serious breach of the Company's policy and something that should not happen, it does not assist Mr Black as he chose to ignore the cards completely.
- [21] Finally, there is no evidence available to CHH or the Authority relating to the incident alluded to by Mr Black concerning a knife being jammed in a switch by an employee of CHH and hence that matter can not be given any consideration
- [22] I also confirm that I have not found it necessary or appropriate to take into consideration s.103A of the Employment Relations Amendment Act (No 2) 2004, as at the time that Mr Black was dismissed, this legislation had not come into force. But in any event, in my considered view, an application of the legal precedent set down in either of the often applied Court of Appeal decisions; *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 (CA) and *BP Oil NZ Limited v Northern Distribution Union* [1992] 3 ERNZ 483 (CA), to the specific facts relating to the misconduct of Mr Black, would result in the same finding.

## Determination

- [23] On the evidence available to the Authority, I find that Cater Holt Harvey Limited were fairly and reasonably entitled to view the actions of Mr Black on 4 August 2003, as being serious

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<sup>2</sup> The Applicant's brother.

misconduct warranting dismissal and that his dismissal was justified. It follows that I must find that Mr Black does not have a personal grievance and hence the remedies that he seeks from the Authority cannot be granted.

## **Costs**

[24] Costs are reserved. The parties are invited to reach a resolution of this matter. In the event that a resolution is not achieved, submissions may be made to the Authority for an order, within 21 days of the date of this determination.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**