Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 53
5356719

	BETWEEN	GEOFF BOOTH Applicant
	AND	HIREQUIP LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Linda Ryder, Counsel for Applicant Ralph D Webster, Advocate for Respondent
Investigation Meeting:	6 March 2012 at Christchurch
Submissions received:	14 March 2012 from Applicant 19 March 2012 from Respondent
Determination:	27 March 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Geoff Booth works for Hirequip Limited as a key account manager based in Christchurch.

[2] In September 2011 Mr Booth received a letter of warning for breaching his employment agreement for conduct involving dishonesty on his part and for an act which seriously damaged the relationship of trust and confidence. This followed a disciplinary investigation into an allegation that sales call information supplied by Mr Booth did not align with work he had completed so as to lead to a breakdown of trust and confidence in Mr Booth's ability to accurately record his sales calls. Mr Booth says that he has been unjustifiably disadvantaged as a result of this warning.

He disputes the fairness of Hirequip's investigation as well as challenging the validity of the conclusions reached about his conduct.

[3] Hirequip says that there was dishonesty on Mr Booth's part entitling it to dismiss him; but rather it issued him a written warning, having given Mr Booth *every opportunity to explain what he was doing and there were discrepencies in his recorded times* …

[4] The principle issues for resolution are whether Hirequip properly investigated its allegations in accordance with its contractual and statutory obligations and whether its decision to issue a written warning was justified in accordance with s.103A of the Employment Relations Act 2000. However, I should first explain why Hirequip raised its allegations initially.

Hirequip's Observations

[5] Peter Ydgren is Hirequip's regional sales manager. Mr Booth reports to Mr Ydgren.

[6] Sometime in 2010 Hirequip conducted some covert surveillance on Mr Booth and other staff in order to compare their observed actions against their reported actions. No action was taken against Mr Booth arising from this surveillance. There is no evidence to establish that the following events are connected to the 2010 surveillance.

[7] On 27 June 2011 there was an incident where Mr Booth left work without permission to collect his child from school. Previously for about a month Hirequip had extended to Mr Booth some flexibility to allow him to cope with a personal matter. In light of that flexibility Mr Ydgren was disappointed with Mr Booth's actions on 27 June 2011. Following a meeting to discuss the issue Mr Ydgren gave Mr Booth a letter of expectation regarding absences from work. That letter is dated 10 August 2011.

[8] I note that I made an order prohibiting the publication of any details of the personal matter referred to above.

[9] On 16 August 2011 there was a significant snowfall in Christchurch. Sales staff such as Mr Booth drive company four wheel drive vehicles. Mr Ydgren assigned Mr Booth to assist at the Johns Road branch. While there, Mr Booth was told by the branch manager that he could go to the Hornby branch to sort out a client issue. That was followed by several other requests or instructions from Hornby branch to attend to various matters. Eventually Mr Booth returned to the Johns Road branch.

[10] The next day the Johns Road branch manager apparently asked Mr Ydgren about Mr Booth's whereabouts on the previous day, having seen him in the morning but not later in the day. By chance Mr Booth arrived shortly after his exchange. Mr Ydgren questioned Mr Booth about his attendance the previous day. Mr Ydgren's evidence is that, during a 30 second exchange while on the move, Mr Booth told him that he had helped a staff member fix some spouting and done various tasks around town. Mr Booth's evidence is that he explained fully where he had been the previous day in response to Mr Ydgren's accusatory tone. Whichever version is correct, Mr Ydgren's suspicions were not allayed. However he did nothing further to investigate those suspicions.

[11] Mr Ydgren's evidence, which I accept, is that he thought that Mr Booth was abusing the flexibility given to him and he felt that Mr Booth had little regard for what Mr Ydgren was telling him to do on a day to day basis. Mr Ydgren spoke to the Auckland based group sales manager who he reports to. With this manager's approval it was decided that Mr Ydgren would conduct covert surveillance on Mr Booth.

[12] The surveillance occurred on Friday 19 August 2011. Mr Ydgren borrowed a family member's vehicle so as not to be recognisable and stationed himself outside the Selwyn District Council premises in or near Rolleston arriving there at 7.14 am. From checking a map Mr Ydgren believed that Mr Booth had to pass that point enroute from his home to work. Mr Ydgren rang Mr Booth at 7.23 am to discuss a work issue and sent a group meeting request to his staff (including Mr Booth) at 7.27 am. Mr Ydgren first saw Mr Booth at 7.35 am. He then followed Mr Booth through the day until shortly after 3.00 pm, recording Mr Booth's activities and times.

I should note that Mr Booth arrived at work at 8.00 am, his usual starting time. He spent the whole day attending to Hirequip business.

[13] The group meeting request concerned a sales team meeting at the Avonhead Tavern at 4.15 pm on Friday 19 August 2011. At that meeting Mr Ydgren circulated blank call sheets and asked the sales staff to fill in the call sheets and return them on Monday. The call sheets were templates from Hirequip's software programme used for monitoring sales activities.

[14] Mr Booth completed the paper record on Monday morning and handed it into Mr Ydgren. Mr Ydgren reviewed it and identified *multiple discrepancies* between Mr Booth's report and his own surveillance record. Mr Ydgren's evidence is that he spoke to his manager about these discrepancies and sought some advice from an employment law consultant.

[15] There were interactions between Mr Ydgren and Mr Booth later on the Monday and the next day where Mr Ydgren made sarcastic comments about Mr Booth. Several other staff commented to Mr Booth about the tone of the comments. At the time however Mr Booth and others did not know about the surveillance or the *multiple discrepancies*.

Hirequip meetings with Mr Booth

[16] Mr Ydgren sent Mr Booth an email on 24 August 2011 asking him to *pop into the Portacom at 12 midday today for a catch up.*

[17] At this meeting Mr Ydgren started by asking Mr Booth to check that his call sheets were *true and correct*. Mr Booth checked the sheet and confirmed that it was. Mr Ydgren then gave Mr Booth a typed sheet headed up *Daily Activity Friday 19th August*. The sheet showed a timed list of activities starting with *7.35am Left home – dropped son in Rolleston*. Mr Booth took that to mean that Mr Ydgren had observed him leave his house at 7.35 am, followed him to his son's school, then onto work and throughout the day until their Avonhead Tavern meeting. Mr Booth said this was illegal and that he wanted a representative. Mr Ydgren said it was not illegal and that the meeting was a *please explain* meeting where Mr Booth had the opportunity to

provide his side of the story. In response Mr Booth did explain that one of the visits recorded on his call sheet for 19 August 2011 had in fact occurred on the previous day but was recorded for 19 August 2011 by mistake. Nothing else of significance was said. At the end of the discussion Mr Ydgren told Mr Booth that he would be contacted should any further information or steps be required.

[18] Later on 24 August 2011 Mr Booth received a letter from Mr Ydgren as follows:

> *Dear Geoff,*
> *Following our meeting today the 24th of August, regarding the recording of your sales activity on Friday the 19th of August, I would like to meet with you in a formal setting to discuss the issue.*
> *As discussed, I am concerned that the Sales Call information you have supplied does not align with the work you completed.*
> *This subsequently has led to a breakdown of trust and confidence in your ability to complete your required duties especially pertaining to the accuracy of your Sales Call reporting.*
> *Following your explanation at our meeting the issue is at, what I would deem, a lower level of seriousness than what it initially appeared. Despite this there are still discrepancies in your recording that do need to be addressed. If at the completion of the meeting it is decided that the claims have been substantiated the applicable course of action will be taken which could lead to you receiving a formal written warning.*
> *You are encouraged to bring a support person to our meeting.*
> …

[19] There was some correspondence between Mr Booth's lawyer and Hirequip which I will refrain from setting out in full. To summarise, the lawyer asserted that there had been covert surveillance of Mr Booth from his home address prior to 7.30 am until 4.30 pm making Mr Booth and his family feel violated and victimised and undermining his trust in Mr Ydgren; that Mr Ydgren had a pre-determined view of the matter and that the 24 August 2011 meeting had been an unfair attempt to catch Mr Booth out; and requested a response to various questions and the provision of relevant information prior to the disciplinary meeting. The lawyer also sought an undertaking that there would be no further surveillance on Mr Booth and his family. Mr Ydgren responded by proving some information, refuting the claims of victimisation, unfairness and pre-determination and saying *Although these may be viewed as relatively small errors, owing to the regularity if the discrepancies, one can only deduce that the behaviour evaluated on Friday the 19th is indicative of Geoff's behaviours at all other times during his employment.* Mr Ydgren gave the following explanation for what he described as the *covert evaluation*:

> *The decision to conduct our evaluation was made following doubt being cast on Geoff's whereabouts during working hours. The initial incident resulted in Geoff being issued a "Letter of Expectation" regarding his absence from work. A further incident occurred on Tuesday the 16th when the Sales team were requested to operate from our branches given the inclement weather. Following a phone call and subsequent email Geoff did not comply with this request, instead opting to complete other tasks. These two events within such a short period of time highlighted the fact that I was unaware of what Geoff was actually doing each day given the regularity in which he was becoming absent from his sales duties. Owing to the nature of this doubt a covert evaluation was the only viable option to gain a true reflection of his movements.*

[20] The disciplinary meeting occurred on 5 September 2011. There was particular focus on four call records. It is not necessary at present to give details of Mr Booth's response other than to generalise it as honest mistake regarding the incorrect date of one call and lack of precision regarding the other three records due to the record being made from memory on the Monday following the Friday and a lack of certainty as to what and how to record information. I should say that it was accepted from the outset that Mr Booth's activities on Friday 19 August 2011 were work related. After Mr Booth's representative spoke there was an adjournment. Hirequip then announced its decision that Mr Booth would receive a letter of warning. Hirequip stated that three recent incidents justified the surveillance, that the company's policies and procedures were clear, that Mr Ydgren had not received honest answers during the 24 August meeting, and that Hirequip had decided that Mr Booth was guilty of false time keeping amounting to dishonesty.

[21] Mr Booth was given a letter dated 7 September 2011 from Mr Ydgren confirming the written warning that would remain in place until 5 March 2012. In particular the letter refers to Hirequip's expectation that call information would be accurately recorded and that given the inaccurate recording on 19 August 2011 Mr Booth had been found to be in breach of his employment agreement, specifically clauses 21.3(a) and 21.3(n).

[22] Mr Booth was disadvantaged by Hirequip's actions. The warning made his employment less secure. Previous disciplinary action is expressly mentioned in clause 24 as a relevant consideration in any subsequent disciplinary action. Hirequip must therefore be able to justify this action in accordance with the law.

Justification

[23] Whether Hirequip's action in warning Mr Booth was justifiable must be determined, on an objective basis, by considering 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.

[24] In applying this test I must consider whether, having regard to the employer's resources, the employer sufficiently investigated the allegations before deciding to warn Mr Booth; whether Hirequip raised its concerns with Mr Booth before warning him; whether Hirequip gave Mr Booth a reasonable opportunity to respond to its concerns before warning him; whether Hirequip genuinely considered Mr Booth's explanations before warning him. I may also consider any other appropriate factors. Finally I must not determine Hirequip's decision to warn Mr Booth unjustifiable soley because of defects in the process followed by Hirequip if those defects were minor and did not result in Mr Booth being treated unfairly.

[25] I am assisted in this task by the judgment of the Full Court in *Angus v Ports of Auckland Limited* [2011] NZEmpC 160.

[26] There is a written employment agreement dated 2 January 2008. Clause 21.3 mentioned above states:

> *21.3 Nothing in this Agreement will prevent your summary dismissal for serious misconduct. Serious misconduct includes;*
> *a. Any conduct involving dishonesty on your part whether at or outside the workplace.*
> …
> *n. Any act which seriously damages the relationship of trust, and confidence between us.*

[27] Clause 24 contains comprehensive disciplinary procedures as follows:

> *24.1 For the purposes of this clause 24, "Disciplinary Action" includes any action taken by us in response to alleged misconduct by you.*
> *24.2 We will investigate any allegations of misconduct or poor work performance and will make every effort to ensure that all relevant facts have been obtained and all reasonable explanations for the alleged misconduct or poor performance have been canvassed before we take any action.*
> *24.3 We will advise you of the allegations of misconduct or poor performance and any evidence supporting those allegations and will then schedule a meeting to discuss your response.*

24.4 We can suspend you on pay whilst the investigation of any alleged misconduct is taking place.

24.5 We will do our best to ensure that;

a. You are aware of the purpose of the meeting and the possible consequences if the allegations are proven.

b. You have sufficient time to prepare an adequate response to the allegations.

c. You are offered the opportunity to be represented at the meeting, or have a support person present.

24.6 At the meeting we will ask for your comment on the allegations and ask for your version of events.

24.7 Before reaching a decision on what action to take we will take into account your past service, past work history, and any previous disciplinary action.

…

[28] In *Angus* the Court held at [27] that:

> *The new legislation has not affected longstanding considerations such as …the need for employers to comply with relevant contractual provisions …If the Court or the Authority is satisfied that the application of these and other longstanding principles means that a fair and reasonable employer in the circumstances of the parties could not have dismissed or disadvantaged the employee as the employer did, then such dismissals or disadvantages will be unjustified.*

[29] Hirequip did not comply with the contractually binding disciplinary procedure set out above. Mr Ydgren was suspicious about Mr Booth's usage of time before and after their discussion on Wednesday 17 August 2011 which is why he conducted the covert surveillance. An alternative at the time would have been to properly inquire as to Mr Booth's whereabouts on 16 August 2011 and check with the various Hirequip people that Mr Booth assisted during the day. However, Mr Ydgren embarked on the covert surveillance. On the Monday morning he compared his own notes of Mr Booth's activities on Friday 19 August 2011 and Mr Booth's call sheet and noticed *multiple inaccuracies*. Mr Ydgren's evidence (reflecting the 24 August 2011 letter) is that, after the 24 August 2011 meeting, he regarded the matter as at a lower level of seriousness than what it had initially appeared. That means that Mr Ydgren must have considered that dismissal was a potential outcome prior to the meeting on 24 August 2011. In that circumstance there was an onus on Mr Ydgren to comply with clause 24 and particularly with clause 24.3 prior to meeting. In short, prior to that meeting, Mr Ydgren had a well formed allegation against Mr Booth of serious misconduct based on his existing suspicions and the observed *multiple inaccuracies*. Any inquiry connected with that allegation should have complied with the contractually binding disciplinary procedure.

[30] There was a significant element of pre-determination on Mr Ydgren's part. From the outset Mr Ydgren thought that Mr Booth had been dishonest in recording information on his call sheet because the information differed from Mr Ydgren's personal observations. That is why Mr Ydgren's first question during the 24 August meeting was whether the information on the call sheets was *true and correct*. Of course Mr Ydgren thought he knew for certain that the information was not *true and correct* so there was no need for this question. Mr Ydgren's view that there had been some misfeasance by Mr Booth on 16 August 2011 was also why he embarked on the covert surveillance rather than properly investigate Mr Booth's whereabouts on the snow day.

[31] I raised with the parties the apparent similarities between the present situation and the case of *BW Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* [1985] ACJ 956. In that case the employer (Mr Bellis) had secretly observed the hotel's night porter early one morning because he thought the standard of her work had deteriorated. Unobserved he saw her reading rather than working. Later in the morning he asked her to complete a form showing the work performed by her at various times during the shift. She did this and handed the list to Mr Bellis. He pointedly asked if she wished to make any changes but she did not. Mr Bellis then confronted her with his own observations of her reading rather than working. The night porter was dismissed. The Arbitration Court held that *the manner in which [Mr Bellis] used the information left a lot to be desired, to the point of being procedurally unfair*. The Court of Appeal upheld the Arbitration Court's decision.

[32] For Hirequip Mr Webster submits that there are crucial differences between the two cases. The second point made by Mr Webster, that the present case concerns a warning and the *Coachman Inn* case concerned a dismissal, is unconvincing. The question in both situations is justification for the employer's decision and the legal test is identical regardless of whether the action was a warning or a dismissal. Mr Webster's first point is the night porter had been trapped into giving inaccurate written answers on her timesheet whereas Mr Booth was asked as a matter of course to complete daily call sheets which were found to be inaccurate.

[33] Here, there is evidence to suggest that sales staff had not previously been asked to complete handwritten sheets or at least had not recently been asked to do so.

However there is also evidence for Hirequip that the request was unconnected with Mr Ydgren's covert surveillance on Mr Booth. I will assume that the request for the written call sheets was not part of Mr Ydgren setting up Mr Booth. The issue then concerns how Mr Ydgren dealt with his knowledge of Mr Booth's work on the Friday. To adopt the words of the Court of Appeal, it would have been *more orthodox and better for [Mr Ydgren] to have confronted [Mr Booth] from the outset with the knowledge that he had kept [him] under observation*. That was especially important because of Mr Ydgren's view that there was dishonesty involved.

[34] There is a submission for Mr Booth that Hirequip failed to *ensure that all relevant facts have been obtained and all reasonable explanations for the alleged misconduct …have been canvassed…* There is merit in the submission. It is clear from the letter of warning that Mr Ydgren's concern about Mr Booth's whereabouts on 16 August 2011 remained unresolved. However, Mr Ydgren never properly investigated this point. At the investigation meeting Mr Booth explained the full sequence of his activities on 16 August 2011. There was nothing in this to warrant any criticism. In fact Mr Booth was nominated for a commendation by a Hornby branch Hirequip employee for *going above and beyond …during recent snow and earthquake*. Mr Ydgren could easily have properly inquired into Mr Booth's activities on 16 August 2011.

[35] There is a submission that Hirequip failed to provide all the evidence it relied on to support Mr Ydgren's decision. Again there is merit in the submission. At the investigation meeting Mr Ydgren produced his handwritten notes made during the covert observation. Previously only a typed version that excluded some material had been provided to Mr Booth. The point is a minor one though as the material observations were set out on the typed sheet. More significantly, Hirequip referred to its policies and procedures as to what constitutes a sales call in the 5 September 2011 disciplinary meeting. Hirequip was asked to provide a copy of that material but did not do so prior to the decision to warn Mr Booth was announced. The material was produced by Hirequip as part of the Authority's investigation. There are a number of points made by Mr Booth about the ambiguity and application of the written policies and procedures which were not made at the 5 September 2011 disciplinary meeting because he had not been given the material for comment at that time.

[36] In large measure the contractual provisions set out above match the statutory considerations set out at s.103A(3)(a) – (d) of the Employment Relations Act 2000. For the reasons expressed above I find that Hirequip did not adequately raise its concerns with Mr Booth prior to the decision to warn him; Hirequip did not give Mr Booth a reasonable opportunity to respond to its concerns before warning him; and Hirequip did not genuinely consider Mr Booth's explanations before deciding to warn him. I say more about s.103A(3)(a) of the Act. Hirequip is a substantial business with access to resources enabling it to fully investigate allegations such as those made against Mr Booth. Hirequip committed to doing just that in its employment agreement. Mr Ydgren was able to devote a substantial part of a day to following Mr Booth. Mr Ydgren had access to his own manager and an employment law consultant before first meeting with Mr Booth. I find that Hirequip did not sufficiently investigate the allegations before deciding to warn Mr Booth.

[37] The breaches resulted in a substantial unfairness to Mr Booth. The inaccuracies in his call sheet recording could have been the result of simple mistake, lapse of memory and/or unclear expectations as was his explanation. Properly considered Mr Booth's explanation might have been sufficient for a fair and reasonable employer in the circumstances. However, from the outset Mr Ydgren concluded that there had been some level of dishonesty involved. In circumstances of alleged dishonesty by an employee no fair and reasonable employer could breach the contractual and statutory obligations referred to above.

[38] For the foregoing reasons I find that Mr Booth has a personal grievance of unjustified disadvantage arising from the warning.

Remedies

[39] It is not suggested by Hirequip's representative that Mr Booth contributed in a blameworthy way to the circumstances giving rise to his personal grievance.

[40] I am asked to order that the written warning be withdrawn. That is effectively an order to reinstate Mr Booth or place him in a position no less advantageous. The only opposition to the claimed remedy was based on Hirequip's view of justification which I have rejected. I find that it is both practicable and reasonable to order

reinstatement or placement and accordingly do so. Mr Booth must be treated for all purposes as if he never received the written warning dated 7 September 2011.

[41] There is a claim for compensation of $20,000.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[42] Mr Booth and Mrs Booth have given cogent evidence about the distress caused to him by this grievance. He feels that he is not trusted at work and at risk of losing his employment. Stress manifested itself in Mr Booth experiencing chest pains. Mr Booth believed until the day of the investigation meeting that Mr Ydgren watched him at his house on 19 August 2011. It then emerged that Mr Ydgren had parked some distance away and waited for Mr Booth to drive by before he started to follow him. Mr Ydgren could have clarified this aspect of the surveillance in response to Mr Booth's lawyer's letter dated 25 August 2011 which asserted:

> *On Friday 19 August 2011, you undertook covert surveillance of our client from his home address prior to 7.30am, until the end of the day at 4.30pm. My client was not aware that he was being followed and that his activities were being logged by you throughout that period.*

[43] In response Mr Ydgren commented *Agreed* with respect to this paragraph.

[44] Hirequip must bear responsibility for the distress caused by Mr Booth's mistaken belief such as feeling violated, a sense of injustice, sleeplessness and lack of appetite. However, to some extent the claim appears to be based on the effects suffered by Mrs Booth and other family members. Such effects are only relevant to the extent that their concerns had an effect on Mr Booth which, I find, they did.

[45] I am referred to and accept as relevant *Trotter v Telecom Corporation of New Zealand* [1993] 2 ERNZ 659 as to the general principles when assessing compensation.

[46] On my assessment the proven harm to Mr Booth can be remedied by an award of compensation of $7,500.00.

Special damages

[47] Mr Booth instructed counsel to represent him prior to the issue of the warning. I am asked to treat as a breach of contract all the various failures by Hirequip so as to entitle Mr Booth to an award of special damages being the cost of his legal representation outside of these proceedings. I raised with counsel my own decision in *Moxon v Pathways Health Ltd t/a Pathways* [2011] NZERA Christchurch 151 and another Authority decision *X v Secretary for Justice* [2011] NZERA Christchurch 177 where the Authority declined to award special damages in personal grievance proceedings. In response counsel made submissions that the present matter has been advanced as a breach of contract action as well as a personal grievance and that the Authority has jurisdiction to award special damages arising from the breaches of contract.

[48] There is nothing in counsel's submissions to cause me to depart from the views expressed in *Moxon* and *X*. The present matter is in substance a personal grievance claim like many others and all costs of representation are properly dealt with in line with the Authority's statutory costs jurisdiction.

Summary and orders

[49] Mr Booth has a personal grievance as defined by s.103(1)(b) of the Employment Relations Act 2000. The personal grievance covers all the claimed breaches of his employment agreement and his remedies will be assessed under the statutory code dealing with personal grievances.

[50] Hirequip must reinstate Mr Booth by regarding him as never having received the written warning dated 7 September 2011.

[51] Hirequip must pay compensation to Mr Booth of $7,500.00 pursuant to s.123(1)(c)(i) of the Employment Relations Act 2000.

[52] Costs are reserved. Any claim for costs can be made by lodging and serving a memorandum within 28 days. The other party may lodge and serve a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority