

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Sanjiv Brambhatt (Applicant)  
**AND** Fisher & Paykel Appliances Limited (Respondent)  
**REPRESENTATIVES** Lorraine Lipman, Counsel for Applicant  
Shan Wilson, Counsel for Respondent  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 4 August 2005  
**DATE OF DETERMINATION** 15 August 2005

**DETERMINATION OF THE AUTHORITY**

Mr Sanjiv Brambhatt, the applicant, says that he was unjustifiably dismissed by the respondent, Fisher & Paykel Limited. The respondent admits dismissing the applicant but says the dismissal was justified.

Mr Brambhatt was employed in the electronics division as a Production Technician. He worked in the service area repairing appliances from the field or repairing failures on the 525 line, which is the dishwasher line.

Mr Colin Gilchrist, the Manager, Engineering Functions, was at the time of the dismissal the Operations Manager, Electronics. He has been with the company for over 30 years. He said that employees in the electronics division had access to confidential and sensitive information such as circuit diagrams, test procedures, control modules and test results and the company needed to protect this information and its technological developments from competitors.

**First Photo Incident**

In April 2004 an operator on the 525 line told Mr Gilchrist that another employee had seen Mr Brambhatt using a mobile phone to take photos of company equipment. He spoke to Ms Wade, the employee who had witnessed the photography, and she told him that Mr Brambhatt had taken photos of test cabinets, had removed the cover of the BIT station and taken photos of the interior of the machine. A BIT station is a machine which tests the electronics on Fisher & Paykel's dish drawers. Ms Wade said she had told Mr Brambhatt that he was not allowed to do that as the company did not allow photos to be taken in the factory. Mr Brambhatt had laughed her off and told her to mind her own business and to keep out of it. She told Mr Brambhatt he could get the sack but he fobbed her off. Because Ms Wade was concerned about it she asked another employee to check with the supervisor.

Mr Gilchrist then went to speak to Mr Brambhatt. Mr Gilchrist said Mr Brambhatt told him he did not know that photos could not be taken and that it was his hobby to take photos of electrical wiring and cabinets. He asked Mr Gilchrist what was wrong with taking photos. He told him the information might be valuable to competitors. Mr Brambhatt then offered to delete the photos and did so.

Mr Brambhatt was very fortunate in that Mr Gilchrist gave him the benefit of the doubt, told Mr Brambhatt that taking photos was a serious breach of company policy and could constitute serious misconduct and that if he did it again he would be dismissed. Mr Brambhatt apologised and Mr Gilchrist felt it was simply a lack of judgement and would not recur.

Mr Gilchrist and Mr Brambhatt both subsequently spoke to Mr Brent Dallas, the Area Manager, Electronics, who was Mr Brambhatt's direct manager. Mr Dallas said he had also emphasised to Mr Brambhatt that taking photos was against company policy.

### Second Photo Incident

However, on 27 May 2004 Ms Mary Tutai, the Team Leader in the Smart Drive line, told Mr Gilchrist that Mr Brambhatt had been seen by Ms Feagaiga taking photos of company equipment when she had been working overtime on Saturday 22 May. She usually worked in spare parts which was located away from the area in which Mr Brambhatt worked. On that Saturday Mr Brambhatt had also been working overtime.

Mr Gilchrist spoke to Ms Feagaiga who said she had seen Mr Brambhatt taking photos of a machine which was a functional tester for Fisher & Paykel's fridges. Like the BIT station this was machinery which related to electronics testing and was technology unique to Fisher & Paykel.

Mr Gilchrist asked Ms Feagaiga if she would write down what she saw as he wanted to ensure she would stand by her word. Her statement confirmed what she had told Mr Gilchrist.

Mr Gilchrist called Mr Kim Parkes, the Human Resources Manager for the East Tamaki site and then they spoke to Mr Dallas. They discussed what Ms Feagaiga had said and her credibility. Mr Dallas said Ms Feagaiga did not work with Mr Brambhatt or have any personal involvement with him and could see no reason why she should fabricate anything.

The three men also considered it relevant that Ms Feagaiga had not been aware of the previous photography incident and had only become aware of it when she mentioned it to Mr Rohit Singh at morning tea. That was what led Ms Feagaiga to becoming sufficiently concerned about it to see Ms Tutai, who confirmed that there had been a previous incident.

Mr Gilchrist said he could not understand why Mr Brambhatt would do it again after being warned and was concerned that the incident had taken place on a Saturday morning when there were fewer people around.

### Disciplinary Meeting

The three formed the preliminary view that Ms Feagaiga was telling the truth and that unless Mr Brambhatt had a good explanation there would be no choice but to terminate his employment.

Mr Brambhatt was brought into a meeting room. It was felt that the matter needed to be resolved urgently.

Mr Parkes ran the meeting which lasted about half an hour. Mr Parkes told Mr Brambhatt that it was a serious matter and invited him to get a representative. Mr Parkes twice told Mr Brambhatt he could have representation if he wished and even though Mr Brambhatt was not a union member offered to arrange a union representative for him. Mr Brambhatt denied that he had been offered representation Mr Brambhatt declined. Mr Parkes said they wanted to discuss an allegation that he had been seen taking photos and told Mr Brambhatt about the alleged incident on the Saturday. Mr Brambhatt denied it. Mr Parkes asked if Mr Brambhatt could refer then to any workers who might have been witnesses to confirm what he had said. Mr Brambhatt could not. Mr Parkes asked if there was anything else he wanted to say.

Mr Brambhatt said there were a number of people who had it in for him, disliked him and made up stories about him. He specifically referred to two women working on his line and said they hated him and were telling stories. Mr Gilchrist said neither of them had made the allegation.

Having not received any satisfactory explanation and have decided that Ms Feagaiga had no reason not to tell the truth the company determined to dismiss Mr Brambhatt.

During the hearing Mr Brambhatt made a number of new allegations and there were also allegations in his written brief that were new to the company. I am satisfied that the claims in both the brief and the oral evidence were not only new but also untrue. Mr Brambhatt changed his story on a number of occasions and when there was a conflict in the evidence I prefer the evidence of the three company witnesses.

#### Was the Dismissal Justified?

Mr Brambhatt was dismissed for serious misconduct, the taking of unauthorised photos of company equipment. The respondent maintains that it had good grounds to conclude, on the balance of probabilities, that he had taken the photos.

Ms Lipman maintained that there had not been a full and fair investigation, that the company believed one employee over another without any further clarification and that the people who worked on the line should have been questioned. I am satisfied that Mr Brambhatt was given the opportunity to identify any people he wanted to be spoken to and did not do so. Ms Lipman also submitted he should have been given the opportunity to find a representative of his choice. I am satisfied that he declined the opportunity for representation and I am also satisfied that if he had asked for an adjournment to obtain representation it would have been granted. Mr Gilchrist said in those circumstances Mr Brambhatt would have been suspended according to his employment agreement. I do not accept the submission that the respondent had made up its mind before the meeting. It had certainly formed a preliminary view which it was entitled to do. Ms Lipman also said no consideration was given to the possibility of looking at Mr Brambhatt's phone account. This could have proved nothing as photos taken and not sent do not incur a charge and photos sent incur a standard charge and their content cannot be identified.

Ms Lipman raised the fact the employment contract specified that where an employee declined union representation at a disciplinary meeting this fact had to be recorded in writing and that this was not what had happened in Mr Brambhatt's situation. Mr Brambhatt was not a union member and had originally been employed under the conditions of the relevant collective. That provision was clearly designed to benefit union members and to take cognisance of the relationship the union had with the employer.

Where there are two conflicting versions of events the employer is entitled to decide which version it believes. The employer had reasonable grounds to believe that serious misconduct had occurred

and did actually believe that such conduct had occurred: Lincoln v Anchor Products Ltd [1999] 2 ERNZ 232. There had been a previous incident and the company could see no reason, nor was any proffered by Mr Brambhatt, as to why Ms Feagaiga would lie.

Mr Brambhatt was justifiably dismissed and does not have a personal grievance.

#### Costs

Costs were reserved. If the parties are unable to reach agreement on the matter of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant should then file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of Employment Relations Authority