

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 109/09
5126551

BETWEEN SEAN CONNEW
Applicant

AND A & P BALCK
Respondent

Member of Authority: Paul Montgomery

Representatives: Anjela Sharma, Counsel for Applicant
Callum McLean, Counsel for Respondent

Investigation Meeting: 23 March 2009 at Nelson

Submissions received: 6 and 14 April 2009 from Applicant
6 and 14 April 2009 from Respondent

Determination: 21 July 2009

DETERMINATION OF THE AUTHORITY

[1] The applicant, Sean Connew, began work at the respondent's Craigieburn farm in Takaka on or about 3 January 2007 as a farmhand. He claims his dismissal on the morning of 18 April 2008 for theft of the respondent's petrol was unjustified. He also claims he was disadvantaged by his unlawful suspension upon his return from annual leave.

[2] He seeks reimbursement of lost wages, compensation for hurt and humiliation in the sum of \$10,000 and costs, including the Authority filing fee. He also seeks payment for 1 April 2008 as the wage records record he was on leave when in fact he was working.

[3] The respondent says it acted appropriately in advising Sean of a disciplinary inquiry into the matter of the petrol theft, gave him the opportunity to be represented at that meeting, considered his explanation which it did not accept and only then

dismissed him for serious misconduct. Accordingly, the respondent denies the remedies sought by the applicant.

[4] The parties attended mediation but were unable to resolve their differences.

The essential facts

[5] At the time he started working for the Balcks, Sean was 16 years old and had had some experience as a farmhand. Mr Balck says he told Sean on two occasions farm petrol was not to be used in his personal motorbike and was strictly for farm use only. Further, Mr Baulck says the routine was for the farm's bikes to be filled by Mr or Mrs Baulck at the end of each working day and the holding tank locked. Sean disputes this, saying there were a considerable number of exceptions and that each worker was responsible for fuelling the bike they used.

[6] On the evening of Easter Monday, 25 March 2008, Mr Balck says he filled the quad bike which Sean was to use doing work on another block (Hanks). The following day, Sean rode to Hanks, said to be approximately 3 kms away from Craigieburn, completed some of the work there, then returned to refill the bike. Mr Balck assesses this was around a half to two thirds of the quad bike's tank capacity. Sean then returned to Hanks to carry on and complete his tasks.

[7] Mr Balck says he went to Sean's accommodation to discuss this with him and while at the house says he found a fuel can and a length of garden hose. He says he uncapped the can, identified its contents as petrol, and returned home without the can or the hose.

[8] Relevant to this whole case are several matters which had occurred earlier in the relationship. In early February 2008, Sean fractured his hand and was away on ACC for a couple of weeks. Upon his return, his employer expressed his concern about his ability to do the work and suggested he resign. Sean declined.

[9] On Good Friday, 21 March 2008, Sean and one of his co-workers at Craigieburn travelled to Tapawera to inquire about a farmhand vacancy. The respondent became aware of the purpose of the trip from the co-worker and again suggested to Sean that he resign. Sean declined. At this point, Sean telephoned his mother to get her advice and Mrs Connew rang Mr Balck to discuss Sean's concerns and to find out what the problem was. This call was made on 31 April 2008.

[10] A meeting was arranged for 5pm the following day and Mrs Connew travelled from Nelson to attend it with her son. Sean was issued with a formal warning about improving his attitude. There is no mention of the fuel can and the piece of hose let alone any allegation of theft. At this meeting also the respondent suggested Sean resign and again he declined.

[11] The Balcks required Sean to bring his annual leave forward by a few days, and to commence his leave on 2 April 2008, the day after the disciplinary meeting. Prior to his departure, Sean was handed a letter advising him of another disciplinary meeting regarding the alleged petrol theft, to be held on 16 April 2008. Sean returned from leave to start work on 14 April however was suspended on pay until the meeting. The meeting took place at 5pm on 16 April 2008. Sean was accompanied by Mrs Connew and her partner, Andrew Stanfield. Sean was asked for his explanation which he gave. Once he had given his explanation, virtually no discussion ensued and the meeting was closed.

[12] The following morning, Mr Balck and Mr Lund, who had attended the disciplinary meeting, woke Sean and handed him a letter summarily dismissing him.

The investigation meeting

[13] At the investigation meeting, the Authority heard evidence from Sean Connew in person and also from Mrs Annette Connew and Mr Andrew Stanfield and Daniel Alexander. On behalf of the respondent, the Authority heard evidence from Mr Arthur Balck and Mr Dean Lund. Mrs Connew outlined for the Authority some schooling and social difficulties Sean had experienced and had worked his way through.

[14] Mr Balck made, under challenge, several changes to his written statement after taking the oath. Overall, I found Mr Balck's evidence to be unconvincing. No statement or affidavit from Mrs Balck was tendered to the Authority.

The issues

[15] To resolve this employment relationship problem, the Authority needs to make findings on the following issues:

- Was the respondent's investigation capable of giving rise to a finding of serious misconduct; and
- Was the suspension lawful; and
- Was the applicant unjustifiably dismissed; and
- If so, what, if any, remedies are due to him; and
- Did the applicant contribute to the circumstances giving rise to his dismissal; and
- If so, what level of deduction in remedies should be applied?

The test

[16] The test of justification in a matter concerning an unjustified dismissal or action is set out in s.103A of the Employment Relations Act 2000 and its amendments.

For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action 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 would have done in all the circumstances at the time the dismissal or action occurred.

Analysis and discussion

[17] Issues of credibility were raised, predominantly by the respondent, which introduced post-employment incidents with other employers of the applicant. Upon investigation, much of the information relayed on those issues was factually incorrect.

[18] Against the background of several and reasonably persistent attempts to encourage Sean to resign, the Authority was particularly interested in the details of the events of 25 March 2008, especially Mr Balck's evidence relating to his observations and actions that day.

[19] Sean's evidence, supported by Daniel Alexander, was that the pair had siphoned diesel from a friend's ute parked at Sean's accommodation. The ute had a seized engine and the friend had told Sean he could use the parts of the ute if he

wished. Daniel and Sean were lighting a fire in a drum outside the house and used the diesel to start the fire. Daniel's evidence was:

I remember going over to Craigieburn farm to hang out with Sean one weekend after work. Sean and I were mucking around as farm boys do. It was quite a cool evening and we decided to light a fire in a nearby drum for a bit of fun and to keep warm. We decided to siphon the diesel out of Tom's ute so that we had some fuel to light it. We knew that Tom would not mind us doing this. I remember Sean had a red petrol can and an old piece of hose. It took us about 10 to 15 minutes to siphon the diesel out. I remember we did not use all of it and that there was some left in the can which belonged to Sean.

[20] The witness further confirmed that they had prised the cap open to get to the screw cap and confirmed the ute was diesel-powered and it was diesel that was siphoned into the can.

[21] Mr Balck's evidence was he went to Sean's place after seeing Sean refill the quad bike to discuss this matter with him. When asked why he would go to the house for a discussion when he knew Sean was working at Hank's, Mr Balck seemed nonplussed. When asked why, having discovered the can and the length of hose, he did not take them back to the farm as a potentially key piece of evidence, Mr Balck told the Authority the can did not belong to him. When it was pointed out his claim was that the petrol in the can belonged to him, and the can could have been returned after the investigation, he did not provide an answer.

[22] Sean's evidence was:

I was conscious of the fact I had driven the four wheeler some distance already that morning. I noticed that the gauge on the fuel tank was sitting at about between one half to two thirds full. It was a 3 km ride to Hank's farm where I was required to go spraying. About 0930 I drove the four wheeler up to the Balck residence where I proceeded to fill it up. While I was doing this Arthur came out of the implement shed. He said to me, "I just filled this up last night". I remember saying to him that it needed filling. Arthur then said to me, "Buggered if I know Junior". After driving up to Hank's farm and doing the spraying, Arthur turned up and we did some fencing work together. I do not recall him mentioning to me anything else during that time or even afterwards about the fact I had filled the four wheeler bike with petrol or any other matters in relation to petrol usage.

[23] Further, on the morning of the dismissal, Mr Lund and Mr Balck say they looked at the fuel flap on the ute and it was locked. I am sceptical on this point. Had they used the two weeks Sean was on leave to check the whole matrix which

underpinned the respondent's allegation, a check of the ute and confirmation by an independent person that the contents of the can were either diesel or petrol, the basis of the allegation might have been clearly established.

[24] Sean's explanation was that he and Daniel had siphoned diesel from the ute and that he had refilled the quad bike to ensure he had enough fuel to finish the job at Hank's and get back to Craigieburn without running out of fuel. These were not accepted and the applicant was dismissed for theft.

[25] Significantly, the so-called minutes of the 16 April meeting refer to the contents of the can as *fuel* not petrol, not diesel. In a litigation setting, the minutes are of little assistance.

[26] It is of concern when an employer, upon hearing an employee has used his own time on a public holiday to investigate another position, attempts to wring a resignation from the employee. This is precisely what Mrs Balck attempted to do on a number of occasions.

[27] Standing back and viewing the evidence, I find it difficult to resist the conclusion the respondent wanted rid of Sean, encouraging him to resign on a number of occasions, then issuing him with a written warning over his *attitude*. He is then dismissed for theft of petrol when the respondent's evidence of its own actions indicate considerable uncertainty in the course of its investigation.

[28] The failure of the respondent to put its allegations of theft to Sean at the 1 April disciplinary meeting when it says it found its evidence of theft on 25 March is astonishing. There was ample time to apprise Sean of the additional matter to enable him to prepare his response in time for 1 April at 5pm. Quality legal advice would likely have averted most if not all of these flaws. I note in this context Mr McLean was briefed only a few days prior to the Authority's investigation meeting. It is regrettable he was not involved at the outset of the problems between the parties.

Determination

[29] Returning to the issues set out above in this determination, I find:

- The poor quality of the respondent's investigation surrounding the can, its contents and the siphon hose led it to an assumption Sean was

siphoning petrol from the farm quad bike for use in his own bike. A fair and reasonable employer would have called in an independent investigator such as the Police to establish the facts. The employer would then carry out its investigation in an employment setting and apply the principles of natural justice in deciding an outcome.

- The respondent attempted to follow an appropriate procedure which goes to credit. However, its reliance on legally inexperienced people, no matter how genuine, led to significant flaws in the process.
- The right to suspend on pay arises from the employment agreement and as there is no such provision in the employment agreement between the parties, the suspension imposed without discussion was unlawful.
- The summary dismissal was unjustified.
- The applicant did not contribute to the circumstances giving rise to the dismissal. I acknowledge a formal warning was in place and have taken this into account in a remedies setting.
- The applicant is entitled to remedies.

Remedies

Lost remuneration

[30] The applicant obtained further employment nine days following his dismissal, four of which were weekend days. He also claims payment for 1 April 2008 when he worked although time and wage records indicate he was on annual leave. The actual dates of Sean's annual leave were 2 April to 14 April. He is entitled to payment for that day.

[31] I award the applicant one weeks wages based on an annual salary of \$30,000. That is the sum of \$576.92 gross.

[32] I also award the applicant one days pay for 1 April 2008 in the sum of \$115.38 gross.

Compensation

[33] Sean is claiming \$10,000 under this head of hurt and humiliation and injury to his feelings.

[34] In this case, I am of the view this would be at the top of the range the Authority would consider. Sean had worked for the respondent for 15 months, at times working extended hours unpaid as he was a salaried employee. Weighing all the issues, including the warning, and in particular the basis of the dismissal and the opprobrium a dismissal for theft carries, particularly in a rural town, I am of the view appropriate compensation is \$5,000. This sum is to be paid under s.123(1)(c)(i) of the Act and is to be paid without deduction.

Costs

[35] Costs are reserved.

Paul Montgomery
Member of the Employment Relations Authority