

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Rex Field (Applicant)
AND AB Equipment Limited (Respondent)
REPRESENTATIVES Phillip Drummond for the Applicant
Eska Hartdegen for the Respondent
MEMBER OF AUTHORITY Paul Stapp
INVESTIGATION MEETING Palmerston North, 20 September 2006
FURTHER MATTERS Affidavit from Respondent's witness received on 4 (electronic copy) and 9 October 2006 (original) and reply from Applicant's Representative on 5 October 2006
DATE OF DETERMINATION 6 November 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. Mr Rex Field has challenged his dismissal from his employment with AB Equipment Limited (ABE or the Company). ABE says that his dismissal was justified and procedurally fair. It denied the remedies that Mr Field is seeking. The parties attended mediation services provided by the Department of Labour but the employment relationship problem was not resolved.

The facts

2. Mr Field was dismissed from his employment on 13 February 2006. At the time he was employed by ABE as a forklift technician. Earlier he had served in the role of service manager and had some broken service with ABE. He was paid \$914 gross per week and had the use of a service vehicle from home to work and return. He also was a member of the company's superannuation scheme.

Events on 27 January 2006

3. ABE had scheduled the replacement of a charger in a forklift at a Feilding site of a client to be undertaken on 30 January 2006. However, Mr Field decided that, because his vehicle was due for a warrant of fitness check on that day, he would do the work on his way home on 27 January 2006. After he had completed the work he went straight home for his convenience instead of returning to work to complete a time sheet.

Events on 30 January 2006

4. On 30 January 2006 Mr Field recorded in his timesheet that he visited the client's Feilding site on 27 January from 4.30 to 5.30pm.
5. On 30 January, Mr Field and his service manager, Peter Smith, had a verbal altercation. Mr Field says this involved him reporting to Mr Smith that his vehicle would be off the road for the day while the windscreen was replaced because it had a chip in it. Mr Field says that Mr Smith provoked him by saying, "*I suppose you are going to have a shitty day*". Mr Smith denied saying this. Mr Smith says that Mr Field swore at him twice; Mr Field acknowledged that he swore, but says he only swore once and accepts that it was inappropriate.
6. On 31 January Mr Field made a complaint about Mr Smith's conduct on 30 January. On 1 February he put his complaint in writing as requested. Mr Smith also complained about Mr Field. The incident was partially overheard by Mr John Patterson, the branch manager, who decided to take some action.

Events on 9 and 13 February 2006

7. On 9 February, Mr Field received a memorandum dated 8 February 2006 inviting him to a disciplinary meeting to be held on 13 February 2006. The memorandum set out three allegations in broad terms. They were as follows:
 - (1) He allegedly falsified a timesheet.
 - (2) He was aggressive, argumentative and discourteous towards another worker.
 - (3) He was disruptive, negative, aggressive and argumentative towards colleagues.
8. Prior to the meeting, Mr Field was not given any details or specifics about these three allegations. The employer was principally relying upon the first matter to constitute serious misconduct if it was proven. Also, Mr Field was put on notice that if there was any substance to the matter he could face the possibility of being summarily dismissed.

9. On 13 February, Mr Field was given the particulars of the first allegation. Primarily, the meeting involved a discussion about this first allegation.
10. Mr Field elected not to have a representative because he believed that he was innocent of any allegation and he was endeavouring to find out what the detail of the allegation was. In attendance for the company were Mr Patterson; Angela McAuley, the Company's HR manager, and its lawyer who was present to provide advice.
11. Mr Field denied that he was not present at the client's Feilding site in on 27 January which he had recorded on his timesheet on 30 January. During the meeting, there was a discussion on extracts, which recorded attendances at and departures from the client's Feilding site on 27 and 30 January, and which were produced from the client's gate diary obtained by Mr Patterson (documents 7 and 9 and B of the employer's bundle).
12. Ms McAuley also acknowledged that she had a document dated 3 February 2006 that had been written by Glenis Eade, an employee at the time who says that Mr Field abused, bullied and intimidated her during the course of her employment. She says that Mr Field reduced her to tears at least on two occasions. She says that one of the reasons for leaving her employment at ABE was because of Mr Field's behaviour towards her. She says she was requested to put this in writing for her reasons for leaving by Mr John Sanders, ABE's general manager.
13. In her exit documentation for the company, in a prescribed form, she says she made no mention of any reasons for leaving or any complaint about Mr Field. She conceded in her evidence that from September 2005 she had little to do with Mr Field which was part of an arrangement arrived at with the involvement of Matthew Richards, the regional manager, when Mr Peter Smith, the new service manager, was appointed to his role. Also the evidence was that when she complained earlier to Mr Richards, the matter was dealt with by Mr Richards, and it was agreed that he would deal with Ms Eade instead of Mr Field, until Mr Smith (the new service manager) was appointed. The company's representatives at the meeting on 13 February had a copy of Ms Eade's letter dated 3 February. It was not given to Mr Field.
14. The meeting was adjourned so that Mr Patterson and Ms McAuley could make further enquiries on the information that had been provided by Mr Field. Mr Patterson telephoned the Feilding site to check on the accuracy of its gate diary. He says that he obtained verbal

confirmation of the accuracy of the diary but he conceded this did not prove the veracity of the advice he was given.

15. During the adjournment and upon advice, Ms McAuley telephoned the general manager, John Sanders, with a recommendation made by Mr Patterson to dismiss Mr Field for serious misconduct in regard to the three allegations. There is no record of the detail of the conversation between Ms McAuley and Mr Sanders. Nothing was produced despite it being reasonable for all relevant documents to be put in for the Authority's investigation if they exist. Apparently Mr Sanders consulted the chief executive, Steve Antunovich. No direct evidence was submitted or given to the Authority on this consultation.
16. Mr Patterson says that he did not believe that Mr Field had been at the client's Feilding site between 4.30 and 5.30pm on 27 January 2006. He says that he considered Mr Field was lying. In addition, he says that he personally overheard the incident between Mr Field and Peter Smith which happened on 30 January. He came to the conclusion that Peter Smith's account of what had been said between Mr Field and Mr Smith was what had happened. He concluded that Mr Field's behaviour was abusive, threatening and unacceptable and Mr Field's excuse of being provoked by Mr Smith was an unsatisfactory explanation. There is evidence that he may not have heard the entire conversation. He also concluded that Mr Field reduced Glenis Eade to tears and that she deserved to be treated with respect and courtesy. He concluded that Mr Field's behaviour towards her was also "*beyond the pale and unacceptable*".
17. Mr Patterson says he conducted an investigation and check in regard to the client's Feilding log. He says that he concluded Mr Field falsified his timesheet and because it breached the company's policies and rules in regard to serious misconduct and his action undermined and breached any trust the company could have in him, that his action warranted dismissal. He wanted to dismiss the applicant.
18. In his evidence, Mr Patterson says that the only person at ABE who could sign off a dismissal is the chief executive, Steve Antunovich. He received information from Ms McAuley that he had permission to proceed with his decision on the evidence available at the time to dismiss Mr Field. At that point, the decision to dismiss Mr Field had been made without Mr Field being given an opportunity to comment on the outcome of Mr Patterson's further enquiries at the site and the information he had obtained, and that Ms McAuley had a discussion with Mr Sanders and conveyed a recommendation to him to dismiss Mr Field.

19. When the meeting was reconvened, ABE's lawyer summarised the company's view of the allegations and that Mr Field's explanations had not been accepted in regard to his behaviour to Glenis Eade and Peter Smith (Patterson's evidence, para.26). It was also confirmed a check at the site had been made with the personnel at the site's gate and it stood by the accuracy of the log, and that no one from ABE's Palmerston North branch had been to the site on that Friday. ABE's lawyer conveyed to Mr Field that "a decision" had been reached as opposed to the earlier notice given to Mr Field that there could be the possibility of being dismissed. Mr Field was not told what that decision was, although he was asked if he had anything else to say. When there was nothing that the applicant wanted to say, Mr Patterson told the applicant that his employment was terminated and that he had no choice but to dismiss him. Mr Patterson says he did not put to the applicant what the options were that he considered. Upon being dismissed, the applicant left the room, although he did say something about a person called ...*Arthur*...

Events after the dismissal

20. Mr Field made contact with Mr Ian Newman a person who he had known for a number of years to discuss what had happened. Mr Field and Mr Newman shortly after the dismissal went back to the client's site in Feilding and made contact with a Mr McCaskill, the gatekeeper, and a Mr Hanson, the relieving gatekeeper. They both then remembered Mr Field and that Mr Field had in fact attended the client's site on Friday, 27 January 2006. Mr Patterson says that Mr McCaskill told him that he had heard that the Applicant had been dismissed and that he was not sure whether he had not been mistaken at the time and that the applicant may have been at the site that Friday. Mr McCaskill and Mr Hanson have both provided statements of their recollection of Mr Field being at the site on Friday, 27 January. It was not until these proceedings were commenced and statements were being prepared that both Messrs McCaskill and Hanson committed their recollection to writing. During the course of the meeting on 13 February, Mr Field made no mention of recalling speaking to either Mr Hanson or Mr McCaskill. Indeed, the company relied upon deciding against Mr Field's credibility and his reliability because he changed his story and provided different explanations during the meeting when he tried to explain what he was doing on 27 January. Mr Field says that he did not know the time or the date of the allegations that were being made and that he was unsure, unclear and uncertain of his circumstances because he frequently attended the site to carry out his duties in servicing equipment on that site.

21. The 27 January 2006 gate diary extract shows that there was a representative (or representatives) from ABE who attended the client's site at 15.28pm. Subsequently, it was discovered that it was the Wellington branch manager, Robbie Burns, who was at least one of the people who attended that site at that time to deliver a forklift. During the meeting of 13 February, ABE says none of its employees had been at the site earlier in the day and therefore it must have been the applicant. This situation highlights the inadequacy of the company's investigation at the time and that its reliance upon information from the site was inadequate and it was not properly verified.
22. The respondent's witnesses, Messrs Patterson and Smith, now say that since Mr Field has left the company, less time has been spent at the client's site and the time is reduced with not so many breakdowns per week. Mr Patterson says that since Mr Field left ABE, the amount of work done at the site is substantially less. It is accepted that Mr Field frequently did the work and it is suspected by them that Mr Field was claiming more time than he actually worked and that their suspicions were correct. This is merely a suspicion. There has been absolutely no evidence produced of this allegation and nor was this allegation raised at the time of ABE's disciplinary meeting on 13 February.
23. ABE relied on Mr Field's differing explanations in regard to the allegation to prove it could come to a reasonably held belief at the time:
 - That the site had missed him going in.
 - That Mr Field went to get his diary and upon looking at it he found there was no record of him going to the site on the Friday.
 - That Mr Field questioned who it was who said it was him in the visitor's log that Friday and denied it was him at the other job around 3pm.
 - That the applicant said that he was not at the site at all on the Friday and then insisted he had been there between 4.30 and 5.30pm.
 - That Ms McAuley says that Mr Field said somebody else had stopped him at the site that was having a problem with an inching control. Mr Hanson now says he had a discussion with Mr Field about the inching break on 27 January at the site.

The dismissal letter

24. This letter confirms that Mr Field was dismissed from ABE for serious misconduct on 13 February 2006. The primary reason relied upon the first allegation of serious misconduct for falsifying his timesheet by claiming to be at the site between 4.30 and 5.30pm on Friday, 27 January. ABE concluded in that letter that the log from the site's gate Mr Field was there around 1500 hours on the Friday when timesheets clearly showed that Mr Field was working on another job at the time.
25. ABE also relied upon Mr Field's responses to the allegation that he was lying:
- That Mr Field had advised that he had gone to the site twice on the Friday, once as recorded in the site log and then later at 4.30pm.
 - That he did not go to the site at all on that day.
 - That in fact he went to site at 4.30pm and that the entry in its log was an error and that someone else from ABE had gone there earlier.
26. ABE relied upon its checks which revealed that no other employee from the branch had visited the site although later it was established that another ABE branch manager had been there. It relied on the accuracy of the information being provided by Karl Thin and Wayne Short at the Fielding site that the gatehouse logs were accurate without any other verification and what they were relying upon. In addition, Mr Patterson was relying upon his visit and discussion with the gatehouse keeper, Mr McCaskill who, Mr Patterson says, at that time, said that he had seen no one from ABE on 27 January.
27. The secondary issues that were considered were that Mr Field verbally abused Glenis Eade and bullied and intimidated her, and that Mr Field had an argument with the service manager, Peter Smith, in which Mr Field was abusive and swearing, slammed the van door, admitted his behaviour and relied upon being provoked by Mr Smith: which ABE did not accept.
28. The dismissal letter was signed off by Steve Antunovich (the chief executive).

The Authority's investigation meeting

29. The Authority heard from the Applicant and Messrs McCaskill and Hanson (both from the site). Witnesses supporting the Company were Karl Thin and Wayne Short from the site. Glenis Eade, Angela McAuley, Peter Smith and John Patterson provided evidence to support

ABE's position. Following their evidence, Counsel for the Applicant Mr Drummond informed the Authority that Matthew Richards' evidence would not be required. Mr Patterson confirmed to the Authority that Mr Richards was not interviewed as part of the investigation process and had no involvement in it. I decided it would not be necessary for me to interview him either.

30. At the conclusion of the investigation meeting, Mr Drummond suggested there was no need to make closing submissions except for some brief comments. Ms Eska Hartdegen, Counsel for the Respondent did not disagree with this approach and she replied to Mr Drummond's comments.
31. It was agreed Mr Richards could submit his evidence in an affidavit if he wished and Messrs Patterson's and Field's right to reply further was reserved. There was also an objection laid about Mr Richards' hearsay evidence. Also, it was decided that costs would be reserved. It was also decided that if the Authority made any determination on the superannuation remedy that it be reserved for the parties to endeavour to calculate or obtain actuarial advice. I agreed.

Determination

32. A fair and reasonable employer would not have come to an honestly held belief that Mr Field had falsified his timesheet when ABE relied upon word of mouth that the gate diary from the Feilding site was accurate and Mr Patterson conceded that the advice he got did not prove the veracity of the accuracy of the gate diary. Further ABE's conclusions have been exposed as inadequate by the evidence of Messrs McCaskill and Hanson who say they saw Mr Field and spoke to him on 27 January 2006, and that there is now a credibility issue about what Mr McCaskill said at the time to Mr Patterson. Also no one spoke to Mr Hanson who has now come forward. There does not appear to have been any follow up on Mr Field's claim that he spoke to someone about the inching break, and now it appears from Mr Hanson's evidence that the discussion did take place on 27 January between him and Mr Field at the site. Other considerations are that the extracts were not accurate in regard to at least one entry, that ABE's enquiries failed to show that at least one other ABE employee attended the site earlier during the day on 27 January. Mr Field's comment about ...*Arthur*... at the end of the meeting on 13 February is a signal that he was trying to determine the events to assist resolve the problem and that he was uncertain about his situation. Therefore ABE unreasonably concluded that it was Mr Field they believed had lied to them. ABE's investigation appears flawed and wholly

inadequate, I hold. The unsubstantiated allegations about him putting in more time at McCains than was necessary have not assisted ABE in its defence.

33. ABE's conclusion is further affected by not giving Mr Field the detail of the allegation in advance and I accept it could have been that he was more than likely confused by the timing associated with the allegation because he attended the Feilding site frequently to work. In the circumstances a fair and reasonable employer would have given Mr Field the opportunity to know what the detail of the allegation was in advance to enable him to make his own enquiries and get his own evidence to provide an explanation given the seriousness of the allegation. He could have only done so with details in advance or should have been given a proper opportunity to adjourn the meeting. This is especially so since ABE conducted its own enquiries at the time and did not tell Mr Field the result, required Mr Field to return to work, left him with insufficient knowledge of his rights to get further evidence and it involved its lawyer without Mr Field having a proper opportunity to get his own assistance as he did the next day that might have helped given the information he did later obtain from Messrs McCaskill and Hanson. Also, the manner in which Mr Patterson obtained his information without verification from the Feilding site, especially from Mr McCaskill, left him exposed to a latter conflict over what was said at the time.
34. ABE has relied upon all three allegations in dismissing Mr Field for serious misconduct, according to Ms McAuley and the dismissal letter. There has even emerged a conflict as to who made the decision to dismiss Mr Fielding, and Mr Patterson put a different emphasis on the reasons and considerations being relied upon for the dismissal. On their own the latter two allegations would not amount to serious misconduct. In fact a fair and reasonable employer could not justify them when Mr Field was not given Ms Eade's 3 February memorandum, and she says that she did not have much to do with him when Mr Smith came on board; the timing of which was from September 2005. Further there is evidence of that matter being dealt with earlier between Messrs Richards and Field and Ms Eade.
35. On the third allegation Mr Patterson says he overheard the conversation at the time and that is now in dispute. He could not now claim to be an independent witness because he later made the recommendation to dismiss Mr Fielding relying upon overhearing at least part of the conversation.
36. As a matter of law because of the seriousness of the allegations ABE has to prove with a sufficiently high degree of proof that serious misconduct occurred (applying *Honda N Z Limited v NZ (with exceptions) Shipwrights Union* 3 NZILR 23 (CA)). For the above reasons

I have not been satisfied that ABE as a fair and reasonable employer would have come to its conclusion in all the circumstances (applying *Air New Zealand v Hudson* Judge C M Shaw dated 30 May 2006 AC 30/06 (unreported)).

37. Procedurally the Company failed to tell Mr Field the details of the allegation put to him for him to sufficiently reply when it was probable he could have been confused because he frequently attended the site to work. Further, Mr Field was not informed that Mr Patterson would make a recommendation to Mr Sanders and could not support what information was given to Mr Sanders, including if Mr Field's side of the story was included. Also, the dismissal was based on three allegations, two of which could not support serious misconduct, given one of them had been dealt with, a document relied upon was not given to Mr Field and Mr Patterson was not independent when he says he witnessed the disputed incident between Messrs Smith and Field and then being involved in the recommendation and decision to dismiss Mr Field, and Mr Patterson was involved in reaching an adverse conclusion about Mr Field's conduct. Finally there was a dispute that emerged between Ms McAuley and Mr Patterson about who the decision maker was, and the role of Messrs Sanders and Mr Antunovich, who were not made available to Mr Field. This should have been properly clarified with Mr Field; especially since he was not represented (even if it was his choice to continue without a representative) (on procedure see *Air New Zealand v Hudson* Judge C M Shaw dated 30 May 2006 AC 30/06 (unreported)).
38. I hold that Mr Field has a personal grievance and that he was unjustifiably dismissed. His remedies include lost wages, compensation, and costs.

Contributory Fault

39. I hold that he has not contributed to the situation because Messrs McCaskill and Hanson satisfied me that Mr Field was probably at the site on 27 January. Their evidence was consistent and during questioning they did not prove to be unreliable witnesses. The fact that they have come forward belatedly to put forward their evidence does not mean they are lying or mistaken, I hold. The allegation about Mr Field bullying and intimidating Ms Eade was not substantiated when Ms Eade told me that she did not have much to do with Mr Field when Mr Smith came on board around September 2005, and that her earlier complaint had been dealt with. In addition the fact that there was an unpleasant workplace environment is not sufficient to blame Mr Field in an attempt for the employer to limit a liability on the grievance when it has resorted to relying upon a ground that did not support serious misconduct and belatedly the employer has tried to use it as a consideration for dismissing him. The

altercation between Mr Field and Mr Smith would not justify dismissal on its own. Mr Field cannot be blamed for the employer's reliance upon it to dismiss him. Since it did rely upon it and did not give out a lesser penalty, Mr Field's action of swearing and being in an argument that might have had some provocation, does not amount to contributory conduct, I hold.

Remedies

40. Mr Field's financial loss amounts to \$18,929.86 from 13 February to 14 August. He has attempted to sufficiently mitigate his losses and his earnings since his dismissal have been deducted. I order AB Equipment Limited to pay him this sum.
41. Mr Field's evidence has established that he was affected by his dismissal and was humiliated, had injured feelings and lost dignity. I order AB Equipment Limited to pay him \$12,000.
42. The claim for compensation for lost benefits was withdrawn during the Authority's investigation meeting.
43. The claim for superannuation has been reserved as requested. Leave is granted to return to the Authority if necessary to consider any remedy under this claim.
44. Costs are reserved.

P R Stapp
Member of Employment Relations Authority