

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 84/09
5122952

BETWEEN

TROY HENRY
Applicant

AND

LYTTELTON ENGINEERING
LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Phil Yarrall, Advocate for Applicant
Grant Harsent, Advocate for Respondent

Investigation Meeting: 5 March and 12 June 2009 at Christchurch

Determination: 19 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Henry) alleges that he was unjustifiably dismissed on 28 March 2008.

[2] The respondent (Lyttelton Engineering) resists Mr Henry's claim on the footing that the dismissal was substantively justified, procedurally fair and was the decision that a fair and reasonable employer would make in all the circumstances.

[3] Mr Henry had been employed by Lyttelton Engineering since May 2005 as a storeman.

[4] Lyttelton Engineering believed there may have been drug dealing in the workplace. On 12 March 2008, Mr Lewarne, a senior manager with Lyttelton Engineering, observed behaviour on returning to the workplace about lunchtime which he considered was consistent with drug dealing. As a consequence of that incident, and rumours circulating in the workplace about drug dealing, Lyttelton

Engineering determined to redirect its security cameras so as to focus on the area where the illicit activity was allegedly happening.

[5] Certain footage of suspicious transactions was recorded on Monday, 17 March 2008. The participants in that suspicious transaction were identified. One of them was Mr Henry. Mr Henry was interviewed by Lyttelton Engineering and indicated that the transaction on view was him lending money to a co-worker, not selling a co-worker drugs.

[6] After giving that explanation, Mr Henry was suspended from his employment to enable Lyttelton Engineering to conduct further inquiries.

[7] There were two subsequent meetings between the parties, on the third of which Mr Henry was dismissed summarily from his employment on the basis of Lyttelton Engineering's conviction that he had been selling drugs in the workplace.

[8] A personal grievance was subsequently raised on behalf of Mr Henry by his union, the Manufacturing and Construction Workers' Union.

Issues

[9] The Authority's focus must be on a review of the employer's investigation. Mr Henry was dismissed for dealing in drugs in the workplace. Mr Henry proffered an innocent explanation for the events observed on the security camera footage, but that innocent explanation was rejected by Lyttelton Engineering. It follows that the substantive basis for the dismissal rests on Lyttelton Engineering's conviction that Mr Henry's explanation is untruthful and that he was in fact dealing in drugs at the relevant time.

[10] There were three protagonists in the transaction which Lyttelton Engineering relies upon. The first was Mr Henry himself, the second was the young man who Mr Henry engaged with (Mr Tim Benven), and the third was another young work colleague who observed the transaction, Mr Tyler Carter.

[11] It will be helpful to look at the exchanges between each of these individuals and Lyttelton Engineering.

Mr Henry's explanations

[12] Mr Henry was first confronted with the allegation at a meeting on 26 March 2008, nine days after the incident was observed on the security camera footage. The explanation for the delay is, I find, not sinister. Lyttelton Engineering took a measured approach, took advice on a correct interpretation of the security camera footage, sought advice about whether the matter was properly an employment matter or a Police matter and then, after a management meeting (and the passage of the Easter weekend that year), decided to meet with Mr Henry and seek his explanation.

[13] That meeting took place on 26 March 2008. Present were three representatives of Lyttelton Engineering together with Mr Henry and Mr Peter Pimm, the shop steward.

[14] Mr Henry was shown video footage of a carpark adjoining Lyttelton Engineering's premises which showed him going to his vehicle, being met there by Mr Benvin and then the latter departing carrying a small plastic bag. I have seen the video footage myself, and I am satisfied that the description I have just recited is in fact what the video shows. The issue is what was in the bag.

[15] Mr Henry maintained at the initial meeting and throughout his discussions with Lyttelton Engineering and in his evidence before the Authority that the bag contained money. He said that on the particular occasion that was caught by the security camera footage, he had been approached by Mr Benvin earlier that morning because Mr Benvin had found that his EftPos card would not work and he needed money to buy lunch and petrol for his vehicle. Mr Henry said that he was able to help him and Mr Benvin was to see him at his car at lunchtime.

[16] Lyttelton Engineering intimated that it believed the bag given by Mr Henry to Mr Benvin contained drugs, not money. At that first meeting, Mr Henry encouraged Lyttelton Engineering to get the Police involved and offered the opportunity for his locker, car and home to all be searched. That opportunity was not taken up by Lyttelton Engineering, which told Mr Henry that it had already discussed matters with the Police.

[17] There was another meeting between the parties the following day, 27 March 2008. Again, Mr Henry reiterated that the bag contained money and not drugs and Mr Henry provided receipts and other evidence to show that he was in the habit of

lending money to co-workers from time to time. Mr Pimm, who also attended this second meeting, asked Lyttelton Engineering whether it had spoken to Mr Carter, the witness to the transaction, and Lyttelton Engineering indicated that it had yet to do that.

[18] There was a third interview on 28 March 2008, as a consequence of which Mr Henry was dismissed from his employment.

[19] Lyttelton Engineering's evidence is that it was influenced in its engagement with Mr Henry by his behaviour at the first interview where he sweated profusely and appeared nervous and ill at ease. Mr Cockerell, the general manager of Lyttelton Engineering, described Mr Henry's sweating issue at that first meeting with the expression *rivers of sweat*. In response, Mr Henry brought medical evidence which tended to suggest that he had a problem with his metabolism which made him sweat profusely. Mr Henry also said the interview was in a warm room on a sunny day.

[20] Interestingly, the Lyttelton Engineering representatives thought that Mr Henry's demeanour the second day was quite different and Mr Cockerell, for instance, refers to Mr Henry being *on the attack* at the second disciplinary meeting.

[21] The final issue I wish to refer to here is the nature of the bag itself. Mr Lewarne thought that the bag was *clearish*, that is an ordinary plastic bag. Mr Henry told the first disciplinary meeting he attended that the bag was *a yellow plastic bag*. According to Lyttelton Engineering, when it spoke to Mr Benvin, he referred to a *red* bag.

[22] At the investigation meeting, Mr Yarrall produced a used Courier Post bag which is of course both red and yellow. Mr Henry told me that he thought the bag that had been used was a small used Courier Post bag of the type Mr Yarrall produced. Nothing turns on the colour of the bag, but I am inclined to accept that a small used Courier Post bag was probably the bag used for the transaction.

Mr Benvin's engagement with the process

[23] Mr Benvin hardly assisted Lyttelton Engineering's investigation by changing his story at a critical point. On the first occasion that Mr Benvin was spoken to by Lyttelton Engineering (26 March 2008, the same day that Mr Henry was interviewed for the first time), Mr Benvin denied borrowing money from Mr Henry, denied getting

anything from Mr Henry and denied going near Mr Henry's vehicle. Those responses are, of course, quite extraordinary because Lyttelton Engineering says that it explained to Mr Benvin that it had film of him engaging in some way with Mr Henry, so Mr Benvin's response simply does not make sense.

[24] When Mr Benvin was interviewed again the following day (27 March 2008), he changed his story and told Lyttelton Engineering that he had borrowed money from Mr Henry *in a red bag*. Lyttelton Engineering says (and I accept without reservation), that Mr Benvin could offer no explanation for his sudden change of heart. The only possible explanation is that, when initially confronted with an allegation of serious wrongdoing, Mr Benvin may perhaps have panicked and literally denied any association at all rather than address the nature of the relationship with Mr Henry. In other words, it seems to me possible that Mr Benvin was simply caught off guard by the questions and, rather than answer truthfully, denied any connection at all. Plainly, any reflection on that stance would have resulted in him realising that that position was completely untenable because, whatever else is true, there is incontrovertible evidence of him engaging in some way or other with Mr Henry in the carpark on 17 March 2008.

[25] Lyttelton Engineering says that the reason that Mr Benvin changed his position was because he had, in effect, been *got at* by Mr Henry. There is, however, not a shred of evidence to support that view. Mr Henry vehemently denied it (and I believe him), and there is no evidence that Mr Henry even knew how to get hold of Mr Benvin after hours, nor of Mr Benvin knowing how to get hold of Mr Henry for that matter. At the relevant time, Mr Henry was of course suspended from work and so could only have contacted Mr Benvin privately.

[26] Mr Benvin did not give evidence at my investigation meeting despite the enthusiasm of the parties and the Authority to hear from him. At the time of the investigation meeting, his whereabouts were unknown (he having left Lyttelton Engineering service quite soon after Mr Henry was dismissed).

[27] However, immediately after the investigation meeting, Mr Yarrall provided me with a cellphone number to ring Mr Benvin on. I did just that and asked Mr Benvin in effect the same broad questions that the employer had asked him during the course of its investigation.

[28] Mr Benvin told me in unsworn evidence over the telephone that he had borrowed money from Mr Henry on at least two occasions that he could recall, one of those being the incident which resulted in Mr Henry being dismissed, and the other being an episode when Mr Henry loaned Mr Benvin \$320 so that Mr Benvin and his girlfriend could move into their new flat.

[29] Mr Benvin vehemently denied buying drugs from Mr Henry, either on 17 March 2008 or indeed at any other time, and he said that he was troubled by the fact that Lyttelton Engineering staff had told his present employer that he was a drug user.

[30] Although the nature of the communication makes evaluating the quality of the evidence difficult, I did not think that Mr Benvin was lying to me when he answered my questions, and I note that his responses were absolutely consistent with the second lot of responses that he gave to Lyttelton Engineering and to Mr Henry's own consistent story. Further, Mr Benvin's evidence is consistent with a portion of Mr Carter's evidence wherein Mr Carter indicated that Mr Benvin had asked him (Mr Carter) for money first, and it was Mr Carter who had referred Mr Benvin to Mr Henry.

[31] I communicated to the parties the results of my telephone discussion with Mr Benvin and invited their response. Lyttelton Engineering sought an opportunity to question Mr Benvin on oath and this was arranged in due course. Mr Benvin told me on oath that he was "scared shitless" and "shocked, stunned and scared" when questioned by Lyttelton Engineering on the first occasion. Mr Benvin also said that he was "100% sure" that Lyttelton Engineering accused him directly of buying marijuana from Mr Henry. Lyttelton Engineering could not be certain they did not frame their questioning of Mr Benvin on that basis but thought that they had simply asked for an explanation of the transaction seen on the video.

Mr Carter's involvement

[32] Mr Carter says that he was asked by Mr Benvin if the latter could borrow money from him because his cashflow card was not working. Mr Carter told Mr Benvin that he had no money, but that Mr Benvin should consult Mr Henry who often was able to lend money to colleagues. Mr Benvin's evidence was that it was

indeed Mr Carter who he had asked for money first and Mr Carter had referred him to Mr Henry.

[33] Mr Carter actually witnessed the transaction that was filmed by the video camera and he appears in the relevant clip, albeit on the sidelines. When the transaction was completed, Mr Carter and Mr Benvin went off together apparently to buy their lunch. They are of an age and were both apprenticed to Lyttelton Engineering at the time.

[34] Mr Carter said that he asked Mr Benvin when they were alone in the car together words to the effect *was that the money?* and that Mr Benvin had answered in the affirmative. Mr Carter confirmed that the bag that changed hands, on his recollection, appeared to have been a small used Courier Post bag.

[35] Mr Carter denied contacting either Mr Henry or Mr Benvin while both were suspended from work, and denied collaborating with either or both of them to hatch a story.

[36] Mr Carter acknowledged that he had not been the most outstanding apprentice and acknowledged that he had not always told his employer the truth about other matters.

The Employer's conclusion

[37] It appears that the factors which weighed with Lyttelton Engineering in reaching the conclusion it did, were its doubts about the reliability of Messrs Benvin and Carter and Mr Henry's extensive sweating during the first disciplinary meeting.

[38] Certainly, if Mr Benvin had told the same story on each of the occasions he was asked (and that story was consistent with Mr Henry's evidence), then that would have made Lyttelton Engineering's conclusion about Mr Henry's honesty far more problematical.

[39] However, Lyttelton Engineering was confronted with evidence from the person accused of wrongdoing appearing to be troubled by the allegation (the sweating), and then on the first occasion it asked the other protagonist what he was doing with Mr Henry, it got a bald denial. Then it talked to the other protagonist again and got evidence which is absolutely consistent with Mr Henry's evidence and

it then talked to Mr Carter whose evidence is also consistent with Mr Henry's. However, Mr Carter is considered to be unreliable (for other reasons) and so in effect his evidence is discounted.

[40] On the face of it then, Lyttelton Engineering had reached the conclusion it has because, working backwards, it felt it could place no reliance on Mr Carter's evidence (because of earlier experience with Mr Carter on unrelated matters), it felt it could not rely on Mr Benvin's evidence either (because he changed his story), and it felt doubtful about Mr Henry's own evidence (because of the sweating during the first meeting).

[41] In my considered opinion, a major flaw in Lyttelton Engineering's process is its discounting of Mr Benvin's evidence. I would have thought Mr Benvin's first statement must be discounted because it is plainly wrong and a good and fair employer, conducting inquiries into a matter of such significance, would have assertively pointed out to Mr Benvin the absurdity of his initial position. It is plain to anyone that Mr Benvin is in the pictures taken by the video machine and so a denial of any involvement with Mr Henry on any matter is no more and no less than an absurdity.

[42] It does not seem to me to logically follow that, because Mr Benvin had plainly told a lie in relation to the first attempt to get a story out of him, it necessarily follows that on the second and subsequent occasions when he is asked the same questions he is also lying. Indeed, by virtue of the fact that the lie told on the first occasion is so plainly a lie, it seems to me more logical to discount that lie altogether and look afresh at the rest of the evidence available.

[43] On that basis, Mr Henry has consistently told one story, namely that he was lending money and not selling drugs. Further, Mr Henry provided evidence to prove that he lent money to co-workers. Mr Benvin, with his credible second response, confirmed that and Mr Carter did as well.

[44] Mr Carter acknowledged at the investigation meeting that he had been less than honest with his employer in relation to other unrelated matters, but that does not necessarily mean that he was being dishonest about the information he conveyed concerning Mr Henry.

[45] In relation to Mr Henry himself, the sweating issue obviously resonated with Lyttelton Engineering but it took no steps to establish whether there was any medical basis for the sweating (as it seems there was). Furthermore, Mr Henry seems to have got no credit for inviting Lyttelton Engineering to involve the Police and give the Police free rein of all of his personal property for the purpose of their searching for drugs. On the face of it, that offer does not suggest behaviour of an individual who has been dealing in illegal substances. Nor does Mr Henry get any credit for providing documentary evidence of lending to co-workers.

[46] Finally, it is worth noting that Lyttelton Engineering may well have been influenced inappropriately (although it denies this) by the evidence of other staff who formed negative views about Mr Henry. Lyttelton Engineering declined to allow Mr Henry to have access to the detail of those allegations or indeed who was responsible for making them on the footing that Mr Henry allegedly had gang connections.

[47] Mr Henry gave evidence at my investigation meeting and was horrified at the suggestion that he had gang connections and vehemently denied the allegation. He continued to maintain that it was unfair of the employer to in effect keep a book on him and not let him know what other staff were saying about him.

[48] Finally in this general connection, I note that Lyttelton Engineering also alleged that there must have been collusion between the three protagonists in order to achieve the evidence that became available, particularly Mr Benvin's change of heart. The difficulty with this thesis is that there is not a shred of evidence to support a collusion theory and, in my opinion, there is a perfectly logical explanation for Mr Benvin's initial statement, namely a young man's confusion about a matter which was potentially very serious.

Determination

[49] On balance, after earnest consideration, I have reached the conclusion that the decision to dismiss Mr Henry was, in all the circumstances, not the decision that a fair and reasonable employer would have made after the conducting of a proper inquiry. In particular, I conclude that Mr Benvin's first statement on the matter ought to have been discounted as it was manifestly absurd and Mr Benvin ought to have been pressed to give a better account of himself at first instance. Even if that had not

happened, to rely on Mr Benvin's obvious failure to tell the truth at first instance, and to use that fact to discount his later evidence, is, in my opinion, illogical and not something a fair and reasonable employer would do.

[50] I am impelled to that conclusion by considering the relevant law. It is plain that an allegation of this level of seriousness must be met by evidence of the greatest weight. In *Honda NZ Ltd v. NZ etc Shipwrights etc IOUW* [1990 ERNZ Sel Cas 855] the Court held that “.....where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave”.

[51] Again in the well known judgment of the present Chief Judge in *Lawless v Comvita New Zealand Ltd* [2005] ERNZ at 861, a case almost directly on point, Mr Lawless was dismissed from his employment for theft. Although the case involved events which included happenings before the enactment of the s 103A test, the judgment is very relevant. In particular, Chief Judge Colgan made some clear observations about the care that needs to be taken by employers in placing too great a reliance on “*selective, indistinct and silent video clips*”.

[52] Further, the Court reiterated the principle from the Honda judgment noting that the “*suspensions the company harboured against the plaintiff were of the most serious sort that an employer could have against an employee*” ...(and)... “*the evidence in support of those suspicions.....had to be of a high standard*”.

[53] I hold then that Lyttelton Engineering placed too great a reliance on the video evidence and gave too little weight to the oral evidence from its relevant staff, that there was an innocent explanation for the images seen on the video film.

[54] Further, I remain troubled by Lyttelton Engineering's enthusiasm for reaching conclusions against the weight of evidence. In this regard I place their allegation of collusion amongst the three protagonists, their conviction that Mr Henry had gang connections, and their collecting of material from other staff about Mr Henry without being fully prepared to disclose that to him.

[55] It follows that Mr Henry has made out his claim of having been unjustifiably dismissed and therefore he is entitled to remedies.

[56] I am not satisfied that Mr Henry has contributed in any way to the circumstances giving rise to his personal grievance.

[57] To remedy Mr Henry's personal grievance, I direct that Lyttelton Engineering Limited is to pay him the following sums:

- (a) Compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 in the sum of \$2,500;
- (b) A contribution to lost wages in the sum of \$5,500;
- (c) Reimbursement of the Employment Relations Authority filing fee of \$70.

Costs

[58] Costs are reserved.

James Crichton
Member of the Employment Relations Authority