

required to inspect the machine and affected area, and finally the card holder is to be notified if the card is removed. None of this was followed.

[3] The repair work was carried out with the partial assistance of others in the maintenance team that included: Mr Tamehana Bishop, the machine operator, and Messrs Jack Katenga and Bruce Roberts, both fitters.

[4] What happened next was that the motor was certified by Mr Hewlett and restarted; Mr Hewlett says he found Mr Elers's hold card and put in on Mr Elers work bench and told him. Mr Elers made a complaint because he had not removed his card as he was required to do for safety reasons.

[5] On 29 November 2007 Mr Jacques Beukes, the electrical team leader, met informally with Mr Hewlett and Mr Elers, and asked Mr Hewlett about his role in the removal of the hold card. There is a dispute about whether or not Mr Hewlett at that meeting admitted removing the card. Unknown to them all at the time Mr Jake Ash, the stores and supply administrator, was a witness, and overheard them.

[6] Mr Beukes decided in consultation with Susan Bramley the Human Resources Manger, and another person, the Health and Safety Co-Coordinator, that Mr Hewlett's action of removing the card was potentially serious misconduct that required further investigation. They considered Mr Hewlett had breached WPI policy on removing the hold card.

[7] On 5 December 2007 there was a serious misconduct investigation involving Mr Swansbury, Ms Bramley, Mr Beukes, Mr Myles Leeson (EPMU organiser) and Mr Hewlett.

[8] Mr Hewlett agreed he located Mr Elers's hold card, and put it on Mr Elers's work bench, but says that he did not remove it from the isolator. He certified the start up as required because even if Mr Elers was available Mr Elers did not have the responsibility to certify the repair work. Mr Swansbury alleged that Mr Hewlett removed Mr Elers's hold card to start up the log line motor contrary to policy, and was a serious breach of safety.

[9] Mr Swansbury and Ms Bramley interviewed Messrs Bishop and Roberts and reached the conclusion that they had nothing to offer to support Mr Hewlett. Mr Katenga was not involved in any enquiry at the time but a statement was taken from him after Mr Hewlett was dismissed. He explained his knowledge of the hold card procedures but had nothing to add about what happened.

[10] Mr Swansbury and Ms Bramley also further interviewed Mr Elers. Mr Hewlett also suggested that another former WPI employee, Graham Haworth, be interviewed to confirm his understanding of the WPI policy, especially where Mr Hewlett relied upon custom and practice and denied knowing of any new policy that Mr Beukes relied upon. Mr Swansbury and Ms Bramley decided not to interview Mr Haworth because the investigation was about Mr Hewlett's conduct and Mr Haworth could not offer anything useful, in their opinion.

[11] Mr Swansbury and Ms Bramley concluded that Mr Hewlett removed the hold card. Mr Swansbury informed Mr Hewlett of the findings and the decision to dismiss him.

The Issues

[12] The first issue is whether or not a fair and reasonable employer would have concluded that Mr Hewlett made an admission that he removed the hold card. How did Mr Swansbury determine credibility?

[13] Secondly would the removal of the hold card, by a person other than the owner of the card, amount to serious misconduct?

[14] Thirdly, were all the relevant circumstances taken into account by the employer, including Mr Hewlett's aspergers, when a decision was reached to dismiss him from his employment?

[15] In the statement of problem Mr Hewlett initially sought reinstatement to his former position or a position not less favourable. During the Authority's investigation meeting Mr Hewlett withdrew the claim for reinstatement. He continued to seek compensation, lost wages and costs.

[16] WPI says the dismissal was justified. It contended that a full and fair investigation was conducted using standard company procedures, processes and guidelines. WPI says it found that Mr Hewlett's action amounted to serious misconduct in breach of the Code of Conduct.

Did Mr Hewlett make an admission he removed the hold card?

[17] It was not open to a fair and reasonable employer to conclude that Mr Hewlett admitted removing the hold card because the meeting held on 29 November was an informal meeting, and anything said then should not have been held against Mr Hewlett, especially since he was not represented, and he was not on any formal caution and or notice. A fair and reasonable employer would have acted more formally to ensure Mr Hewlett's rights were protected to ensure natural justice and put in place a formal investigation upon receiving Mr Elers's written complaint. Indeed it would have been prudent for Mr Beuke's to have had an independent witness present if information was going to be relied upon. It is the employer's problem that in a follow up meeting that Mr Hewlett provided an explanation contrary to what Mr Beukes says Mr Hewlett said earlier.

[18] Mr Swansbury made the mistake of believing Mr Beukes that Mr Hewlett made an admission when clearly that informal meeting was highly prejudicial to Mr Hewlett and not withstanding that Mr Elers was present and Mr Beukes made a written account of the events of 29 November. Mr Beukes and Ms Bramley reached a conclusion that Mr Hewlett had breached WPI policy on removing the hold card. This conclusion was unfair, although it would have been open to them, to conclude that there was an issue to be answered.

[19] Mr Hewlett subsequently denied admitting to Mr Beukes on 29 November that he had removed the hold card. He said that he only certified the de-barker for start-up. It was concluded that he did not endeavour to contact Mr Elers regarding the planned start-up of the de-barker or get Mr Elers to come and remove his hold card as required by the then current hold card procedure. I accept that the latter point was correct because there was no reply or response from Mr Hewlett. It then rested with Mr Swansbury to make a decision on credibility.

How did Mr Swansbury determine credibility?

[20] Mr Swansbury and Ms Bramley further considered that:

- Mr Hewlett disclosed that he had misled Mr Beukes in an effort to protect another employee who he says could have removed the card, but who he would not name at the time. Such a factor on its own could not be used to determine credibility because if Mr Hewlett genuinely did not remove the hold card then he was entitled to speculate and try and assist establishing who might have removed it. In any event Mr Bishop denied that he removed it and did not see it being removed.
- Mr Hewlett gave different explanations about where he found the hold card.
- Other witnesses could be eliminated; including Mr Bishop, Mr Elers and Mr Roberts.
- Mr Bishop believed Mr Hewlett removed the card. Mr Roberts could not see what happened.
- Mr Elers could not have removed the hold card to verify the machinery for restart without a certifying electrician's signoff. It is common ground that Mr Elers did not remove his hold card.
- Mr Hewlett did return Mr Elers's hold card back to his work station after he says he found it on the ground by the machine. It is correct that Mr Hewlett returned the card to Mr Elers's work bench, but it is not clear where the card was found.

[21] It was contrary to natural justice that the investigation process involved Mr Beukes in the conduct of the procedure of WPI's investigation when he became a key person when Mr Hewlett subsequently denied that he had made an admission to Mr Beukes.

[22] It was not known at the time that Mr Jake Ash was present when Mr Hewlett supposedly admitted removing the hold card. What he says he heard is not relevant to my scrutiny of WPI's investigation and decision at the time.

[23] A fair and reasonable employer would have treated Mr Elers's information with some caution, given he was the complainant and never responded to Mr Hewlett's claim that he told Mr Elers earlier that he had found the hold card and had left it on the

work bench. I hold Mr Beukes had a less than objective view about Mr Hewlett, because while he accepted Mr Hewlett's professionalism, he was actually intolerant of Mr Hewlett's personality differences and had been involved in other prior issues. I accept that Mr Elers and Mr Beukes did not know about the aspergers syndrome, but it was a factor known to Mr Swansbury and despite any issue of a request from Mr Hewlett to keep that information confidential should have been taken into account by Mr Swansbury in planning the procedure.

[24] No one saw the hold card being removed by Mr Hewlett. Mr Roberts and Mr Bishop were equivocal in their evidence before the Authority. A fair and reasonable employer could not have come to a decision based on eliminating their evidence. I conclude the information was not tested thoroughly enough given the equivocal nature of their evidence before me and left open the possibility that some one else could have removed the card.

Would the removal of the hold card as an incident on its own amount to serious misconduct?

[25] I conclude that WPI's evidence that removing someone else's hold card would be a very serious matter considering the policies produced and how Mr Beuke's viewed the matter when he up dated the policy. However, there was no certainty that Mr Beuke's up date was actually read and confirmed by Mr Hewlett and Mr Hewlett was confused about what the policy was that was being applied.

[26] Also WPI was not able to show that Mr Hewlett breached the Hold Card Procedure pursuant to the WPI Code of Conduct No. 9 that said: "*Deliberate or reckless acts adversely affecting quality, causing injury or otherwise affecting safety or health, or resulting in financial loss to the Company.*" WPI has not provided sufficient evidence to support a deliberate or reckless act given the involvement of others in the repair work and who were in the immediate vicinity of the work. There was genuine repair work being carried out and pressure to get the job up and running again. The law requires that for a serious allegation of such gravity that the proof needs to be convincing and at a high level. It does not meet that requirement here.

Was the procedure followed fair?

[27] WPI put Mr Hewlett on notice of the allegation and his right to be represented. He was represented in the WPI investigation meeting by a union official. WPI carried

out an investigation by interviewing people that it considered relevant. WPI put Mr Hewlett on notice that his job could be in jeopardy. These are fair elements in the process followed by WPI.

[28] The overall procedure, however, was not fair because:

- Mr Beukes, as a key player in the informal meeting, was also involved in the investigation process, at least in organising it, when he sent the letters, which outlined the allegations. This involvement leaves open the prospect of justice not being seen to be done, although I find that Mr Swansbury's and Ms Bramley's involvement would have countered this, except that Mr Beukes and Ms Bramley had reached a prior conclusion. Mr Swansbury and Ms Bramley could not explain why they accepted Mr Beuke's information, other than by relying on Mr Elers's evidence as to what he says Mr Hewlett said, and that Mr Beukes wrote a memorandum at the time. That memorandum should have been given to Mr Hewlett and his representative to scrutinise the detail.
- The notes from the interviews held with Messrs Bishop, Elers and Roberts should have been given to Mr Hewlett and his representative at the time because of the seriousness of the allegations, and because there was credibility involved. An opportunity for Mr Hewlett to scrutinise the documents might have assisted him. This was especially so considering other workers were present during the repair and Mr Swansbury did not adequately sort out what they all were doing and where they were at the time.
- Other documents were not provided either, including Mr Elers's letter of complaint, and witness statements, although the company relied on giving the information to Mr Hewlett orally. Given Mr Hewlett's aspergers and emotional state through out the investigation of the allegation, I hold he was at a disadvantage in needing to absorb the detail let alone understand the nuances being considered by Mr Swansbury and Ms Bramley. A fair and reasonable employer would have made greater allowance for Mr Hewlett in the circumstances. Thus, WPI's reliance on Mr Hewlett changing his story a number of times in trying to explain his position, including saying that he misled

Mr Beukes to protect Mr Bishop, cannot be determinative for the credibility finding and Mr Swansbury not believing him.

- Mr Bishop's information on what he recalled changed during the Authority's investigation. It was also unclear what each of the people involved was doing at the time. The evidence put before me involved some differences. Such findings would have been important considerations on the outcome.
- Differences have emerged about where the hold card was found by Mr Hewlett.
- At the time the decision to dismiss Mr Hewlett was made, Mr Hewlett and his union representative did not know who the two witnesses were, and nor did they know that another employee, Mr Jake Ash was apparently present during the informal meeting. The information about Mr Ash was raised for the first time during the Authority's investigation and was not relied upon at the time. Thus, it highlights that the process was not thorough enough at the time. The lapse in time has meant that his evidence should be treated cautiously.
- Mr Beukes involvement at least initially and his early conclusions arising out of his informal meeting tainted the process given Mr Hewlett's responses. Mr Swansbury needed to ensure the process was free from bias. In other words I was not satisfied that there was sufficient reasoning at the time put Mr Hewlett and his representative to enable Mr Swansbury and Ms Bramley to reach a conclusion that Mr Hewlett removed the hold card as alleged and that he admitted it.

[29] Other witnesses such as Mr Ash and Mr Jack Kahika, the log yard supervisor, were not interviewed during the company's investigation. It would have been reasonable for Mr Ash to have been located, although no one seems to have known he was present during the informal meeting on 29 November. Mr Kahika could not add anything more.

[30] The decision to dismiss Mr Hewlett was made by WPI during an adjournment and then conveyed to Mr Hewlett without Mr Hewlett having the opportunity to

mitigate the findings, which I am satisfied he was not informed of, such as the finding on credibility and the reasons for the findings.

[31] A fair and reasonable employer would have put the findings to Mr Hewlett to comment on and especially to permit him to comment and reply on the possibility of being dismissed as a tentative and preliminary decision.

[32] Mr Swansbury and Ms Bramley say they made their decision quickly because Mr Hewlett's representative said that he needed the entire matter concluded in one day as he needed to get away. Mr Leeson told me this needed to be considered in context and he denied his circumstances should have impacted on the employer's process. I do not accept that a fair and reasonable employer would rely on the above, and not control the process, to ensure that fairness was achieved. In any event Ms Bramley told me she did not believe more time would have created a different outcome. That opinion should not have denied Mr Hewlett his right to mitigate and comment on a preliminary decision and the findings if they had properly been put to him.

Other circumstances that a fair and reasonable employer would have taken into account include:

[33] WPI did not afford Mr Hewlett an adequate enough opportunity to discuss the health and safety provisions and the WPI code of conduct that were being relied upon. There was reference made to the rules on the hold cards being changed with a new policy, but there is the possibility Mr Hewlett was not aware of any policy change. WPI could not establish that Mr Hewlett had read any changes, especially involving the evidence about Mr Beuke's communication by email. Mr Hewlett claimed that Mr Beukes did not tell him at any informal meeting about up dating the policy. WPI was not able to rebut Mr Hewlett's evidence that he was not told, and that he was unaware of any new policy.

Does Mr Hewlett have a personal grievance?

[34] I hold that Mr Hewlett has a personal grievance for the reasons set out above.

Remedies and consideration of Contribution

[35] Mr Hewlett withdrew his application for reinstatement, despite this being a very difficult thing for him to do. His partner did not support him returning to that job.

Indeed it emerged when I heard the evidence that a return to work would be very difficult and it would be difficult for the relationships to be repaired amongst the other workers and Mr Hewlett.

[36] I hold that there was no contributory conduct.

[37] Mr Hewlett's lost wages amount to three weeks lost wages because he promptly got a new job. He is entitled to that entire amount. Leave is granted if there are any difficulties calculating the sum.

[38] Mr Hewlett is entitled to compensation. There has been an impact on him in regard to hurt feelings and a financial impact that in part has been caused by a dislocation from his home; where he has had to get a job out of the district; and make arrangements for staying away from home, because of the distance to travel and because he could not get work locally. This was supported by Nicola Hewlett, Mr Hewlett's partner, who says she observed the impact of the dismissal on him. Mr Hewlett has been at pains to prove his innocence and it is quite possible there was some other explanation for the removal of the card. I accept there was an impact on Mr Hewlett linked to his dismissal that has hurt him and affected his feelings. I assess compensation as \$15,000 under s 123 (1) (c) (i) of the Act.

Summary of the Remedies

[39] WPI is to pay Mr Hewlett the sum of three weeks lost wages to be mutually agreed between the parties, and the sum of \$15,000 compensation for hurt, humiliation and loss of dignity.

[40] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority