

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 90/08
5100517

BETWEEN JOHN HOUGH
 Applicant

AND ALTO PACKAGING
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: J Angus Burney, Counsel for Applicant
 P Kiely, Counsel for Respondent

Investigation Meeting: 24 April 2008

Submissions received: 10 June 2008 and 1 July 2008 from Applicant
 17 June 2008 from Respondent

Determination: 3 July 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Alto Packaging Limited (“Alto Packaging”) employed Mr Hough as a die setter. It dismissed him on the ground of repeated lateness to work.

[2] Mr Hough says the dismissal was unjustified. He had sought reinstatement, but withdrew that application at the investigation meeting.

[3] The statement of problem also contained generalised allegations of unjustified disadvantage. The allegations seemed to be associated with disciplinary warnings Mr Hough received, but were framed in an unusual way. Rather than alleging directly that the respective warnings amounted to unjustifiable actions on the part of the employer at the time they were issued, it was said that Mr Hough suffered ongoing disadvantage as a result of the warnings, up to the date of termination.

The employment relationship

[4] Mr Hough's employment began in January 2002. He worked in various divisions in Alto Packaging in the course of his employment, although at the relevant time he worked in the injection moulding division. The division operated in three shifts: a day shift from 8.00 am – 4.30 pm; an evening shift from 4.00 pm – midnight; and a night shift from midnight to 8.00 am. It was common ground that these hours were agreed between the union and employer, being the kind of site-specific arrangements contemplated by clause 14.2 of the applicable plastics industry collective employment agreement (“the cea”).

[5] Clause 14.2 reads:

“Local agreements between the employer and the majority (60%) of the employees directly affected may be reached at each workplace on changes to start and finish times on changes to start and finish times within the span of hours provided in clause 14.1. ...”

[6] The setters were the most skilled of the company's operating staff, and for operational reasons most of them were deployed on day shifts. Mr Hough was one of those who worked on the day shift. His daily routine was to arrive at work, liaise with the previous shift supervisor, re-start his machine and remove or replace the machine tool as necessary, conduct a sample run then commence the full run. Close liaison with the quality staff was also important, particularly in the light of the technical nature of the product.

[7] Mr Hough had a long-standing inability to report to work consistently by 8.00 am. Lateness on his part inevitably delayed the preparation and re-starting of the machines with which he worked. He acknowledged in evidence that his supervisors tried to address the matter with him, and that in or about early 2005 he was called to the (then) plant manager's office to discuss the matter. The reason he gave for his lateness at that time was that he was not sleeping well. He said the manager asked him if the problem of lateness would be fixed if he could start work at 8.30 am and finish at 5 pm.

[8] Mr Hough said his response was 'yes' and that he entered into an agreement with the plant manager allowing him to start at 8.30 am.

[9] In support he produced an unsigned memorandum dated 9 February 2005, which included the statement:

“Specifically, it is agreed that your ordinary starting time to now be 8.30 am and your ordinary finishing time of 5.00 pm, Monday to Friday, both days inclusive.”

[10] Following that statement was a request that Mr Hough sign the document “to demonstrate that the above does in fact reflect that agreement as reached.” That document was produced for the first time for the purposes of this employment relationship problem. Mr Hough said he had found it at the bottom of his tool kit after he was dismissed. Alto Packaging had no record of it or anything associated with its contents, the human resources manager who was nominally the author had ceased to be a company employee prior to the events leading to Mr Hough's dismissal and had no recollection of the letter or any matter associated with it, and no-one could explain why the company had no record of it and why it was not signed.

[11] I do not accept that the document is, in itself, evidence of an agreement between the parties in the terms now contended by Mr Hough. Nor - if the document embodies such an agreement - do I accept the agreement is of the kind provided for in cl 14.2 of the cea.

[12] Even so the document was on company letterhead, the nominal author at least recognised his style of writing (without confirming any direct recall of the matter), and there was no suggestion that, for example, Mr Hough had fabricated the document. Moreover, the company's payroll system had been amended to accommodate an 8.30 start time for Mr Hough. There was enough in the circumstances to prompt me to enquire further into the existence and nature of any agreement that Mr Hough start work at 8.30 am rather than 8 am.

[13] At the time the document was ostensibly created, Mr Hough was working in the blow moulding division. He said he started work at 8.30 am for the rest of the

year. When he moved to the injection moulding area in or about early 2006 he told his supervisor he would try to arrive at work by 8 am, and his evidence was that he began to start work at 8 am 'because everyone else did.' In doing so Mr Hough was not simply following the crowd. He had a lead role on a production line. It was important that standardised working hours be observed for the purposes of the operation of the production line.

1. The verbal warning

[14] Following a confrontation with a colleague in February 2007, Mr Hough was asked to attend a disciplinary meeting. The meeting went ahead on 22 February 2007. Those attending were Mr Hough, his union organiser Ron Angel, the company's production manager Jason Bray, and the business unit manager Daniel Prenter.

[15] The result was that Mr Hough received a verbal warning, which was recorded in writing in a letter of the same date. The warning was expressed as follows:

"This letter serves as formal confirmation of the verbal warning that was issued to you this morning in relation to this incident.

...

I must also advise you that if behaviour of this nature occurs again, or if any form of misconduct or lapse of performance occurs further disciplinary action may be taken and you may be issued with a written warning."

[16] The letter went on to say:

"As final point, we also noted that on Monday you arrived for work 45 minutes late and that this is not the first instance of late attendance. You were aware of your shift hours (8.00 am to 4.00 pm) and you must arrive at work on time ready to start your shift at that time. Continued late arrival for work is unacceptable."

[17] There was a conflict in the evidence concerning whether Mr Hough's timekeeping was raised with him during the February meeting. There was no record of the matter in Mr Angel's meeting note, which was a good attempt at capturing the content of the conversation as it occurred. For his part Mr Prenter was adamant that Mr Hough's timekeeping was raised.

[18] I consider it likely that, if there was a discussion about timekeeping, it was as an add-on to the main discussion concerning the confrontation. That is because even on the wording of the warning letter timekeeping was raised in that way. The structure of the warning letter is to summarise the incident of concern as well as matters associated with that concern, then to set out the warning, then to mention timekeeping. The decision to issue a warning arose expressly out of the confrontation rather than timekeeping. However that is not to say I disregard the more general aspect of the warning regarding future instances of misconduct or lapse of performance. That part of the warning is sufficiently broadly stated to include timekeeping.

[19] Otherwise the letter does at least instruct Mr Hough to report to work on time, and it indicates that the company finds his timekeeping unacceptable. If that was not said in the meeting, it was made clear in the letter.

[20] Finally the letter of warning, as well as the subsequent letters of warning, included in its text:

“Please sign a copy of this letter and return it to me.”

[21] A clause at the end of the letter read:

“I have received a copy of this [verbal] warning dated [22 February 2007] and confirm that its contents have been satisfactorily explained to me.

Signed : _____ Date: _____

2. First written warning

[22] On 26 March 2007 Mr Hough was 15 minutes late for work. This prompted a meeting of the same four people on 27 March 2007 to discuss the lateness. Mr Hough’s explanation was to say he was ‘not a morning person’, and allege that he was not the only person who was late. He complained that he felt singled out.

[23] There was no mention of the February 2005 document or any agreement that Mr Hough start work at 8.30 am. On the contrary there was discussion about improvement in Mr Hough's timekeeping and of whether the improvement was satisfactory, as well as limited comment about moving Mr Hough to an afternoon shift.

[24] Mr Prenter told Mr Hough his timekeeping was a serious issue, he was expected to work from 8 am to 4 pm, and his explanation was not satisfactory. A first written warning would be issued.

[25] The warning was confirmed in a letter also dated 27 March 2007. It summarised the discussion about lateness and recorded Mr Prenter's view of the unsatisfactory nature of the explanation. It reiterated that Mr Hough's hours of work were 8 am to 4 pm, together with an instruction that Mr Hough arrive at work ready to start his shift at that time. It confirmed a first written warning would be issued, and repeated:

"I must also advise you that if behaviour of this nature occurs again, or if any form of misconduct or lapse of performance occurs further disciplinary action may be taken and you may be issued with a written warning."

3. Second written warning

[26] Mr Hough was late several times in May 2007. The lateness varied from 5 – 11 minutes. This led to a further meeting of the same four people on 24 May 2007.

[27] Mr Hough again said he felt singled out. According to a note which Mr Angel took at the time, the following exchange also occurred:

JH: Start at 8.30 as per agreement

DP: Whole shift starts at 8.00. Trying to standardise work

JB: Don't need to have another person to talk to at 8.30 after speaking to everyone at 8.00 am.

RA: John has agreement 8.30 – 5.00 and would like to start that again – solve problem."

[28] Mr Prenter's response amounted to a 'no' to Mr Angel's proposition that the agreement be started again. He repeated that the current shift time was 8 am to 4 pm and he wanted everyone on that arrangement.

[29] Otherwise Mr Prenter did not engage with Mr Hough or Mr Angel about their references to an agreement. However Mr Bray's evidence was that, after the matter of an agreement was raised, he made enquiries. He was unaware of any agreement himself, but enquired whether the team leaders had any knowledge of the matter and perused the company's files. As I have indicated, there was no relevant material on the company's files. No existing company employees were able to assist. Mr Bray even had continuing conversations with Mr Hough about the matter, but the conversations were limited exchanges to the effect that Mr Bray was unable to find any record of an agreement.

[30] A letter dated 25 May 2007 recorded the terms of the warning. Again Mr Hough's explanation for his lateness was found to be unsatisfactory.

[31] The letter also referred to the discussion about an agreement that Mr Hough start at 8.30 am, and Mr Hough's wish to 'move back' to that arrangement. The letter addressed that by saying there had been an agreement during the March disciplinary meeting that Mr Hough start work at 8 am. Mr Hough's request to move back to a start time of 8.30 am was declined on the ground that the agreement reached in March over-rode any earlier agreement.

[32] On the evidence available to me Mr Prenter went too far in asserting in the letter that agreement on the start time was reached during the March meeting. It is more accurate to say he confirmed the company's required hours of work and instructed Mr Hough to observe them. If there was already an agreement of the kind Mr Hough contends, it could not be over-ridden in the unilateral way Mr Prenter appeared to be attempting. In the circumstances, nothing turns on that.

[33] The terms of the warning were that, if behaviour of this nature occurred again, Mr Hough's employment may be terminated.

[34] Again the required hours of work were stated, and Mr Hough was instructed to observe them.

4. The dismissal

[35] Mr Hough was late for work again on 6 June 2007.

[36] A disciplinary meeting went ahead on 13 June 2007. Mr Hough said he had tried to improve, but Mr Prenter did not agree any improvement had been shown. Mr Angel argued that Mr Hough should be given more time to improve. Mr Hough alleged that Mr Bray had told the staff he was trying to get rid of Mr Hough, which Mr Bray denied.

[37] There was no further reference to an agreement that Mr Hough start work at 8.30 am, nor further attempt to rely on such agreement.

[38] Mr Prenter took into account that Mr Hough had not provided any real explanation, and continued to be late. He concluded that dismissal was appropriate. He recorded his conclusion as follows in a letter dated 14 June 2007:

“... I have seen no evidence of improvement in your timekeeping, and if anything it has become worse since February 2007. I interpret your lack of effort towards adhering to the specified start time (8.00) that you have no intention of complying with your employment agreement with Alto which specifically states an agreed start time.”

Justification for the dismissal

[39] The test to be applied to the justification for Mr Hough's dismissal is an objective test of whether the employer's actions were the actions of a fair and reasonable employer in all of the circumstances at the time of dismissal.

[40] Mr Hough was a chronic latecomer. In general such conduct is capable of amounting to serious misconduct in circumstances where the late arrivals continue after repeated warnings.

[41] However here the required start time was disputed in the context of the justification for the dismissal, in reliance on the alleged agreement between the parties that Mr Hough's hours of work be 8.30 am – 5.00 pm. Overall I consider it likely that an arrangement of some kind was reached with Mr Hough in early 2005, and the arrangement involved permitting Mr Hough to start work at 8.30 am. That does not necessarily mean I accept the document of February 2005 as evidence of an agreement in the terms now contended. I am not persuaded to go that far.

[42] Of more importance is Mr Hough's own recognition that from early 2006 he attempted to start work at 8 am, the general evidence that at times he was 'tracking well', and the acknowledgement in at least two meetings during the disciplinary process that he was continuing to work on improving his timekeeping. This was so to the extent that Mr Angel even asked if the earlier agreement could 'start again'.

[43] As for Mr Hough's actual time of reporting for work there has been no suggestion that he had a pattern of reporting for work at or about 8.30 from early 2006, as would be expected if there was a continuing and binding agreement to that effect. He was not, for example, dismissed for lateness in that he regularly or repeatedly reported for work at or about 8.30. On the limited detail available to me, his lateness occurred in no particular pattern and varied from some 5 minutes to some 45 minutes.

[44] Accordingly, even if an agreement had been reached in the terms contended, it had ceased to be observed by 2007 to the point that Mr Prenter was entitled to reassert the hours of work otherwise agreed to in terms of the cea. There is no doubt that he did so very clearly.

[45] I take into account, too, that at the relevant times the existence of the agreement was not raised as a reason why Mr Hough should not be disciplined at all. It was raised in the context of a request that it be revived as a way of addressing Mr Hough's lateness.

[46] Finally, it was fair and appropriate that an effort be made to find out more about whether there was an agreement, as Mr Bray in particular did. He was unable to obtain any information, including from Mr Hough, to assist in taking the matter any further. Mr Hough's inability or failure to make available a document which as it transpired was in his possession, and which might have affected the company's attempts to address his timekeeping had it been available, is not a matter that can be laid at the door of the employer.

[47] Mr Hough also seemed to take issue with the relevance of the warnings, although it is not entirely clear how. For example his refusals to sign the letters embodying them do not mean they are not relevant or cannot be taken into account. Mr Hough said he disagreed with the content of the warnings, but the mere refusal to sign the letters did not advance that matter.

[48] As I discuss in more detail later, the warnings have not properly been made the subject of any personal grievance. For the purposes of the present grievance, there was nothing in the evidence about the warnings to cause me to question the company's entitlement to take them into account in making the decision to dismiss. Mr Hough was guilty of conduct about which he was warned at appropriately escalating levels, he did not correct the conduct, and his explanations of the conduct were not acceptable.

[49] The explanations were essentially unchanged when offered during the final meeting when dismissal was a possibility. Mr Hough was simply someone who found himself incapable of reporting to work for an 8 am start on any consistent basis. As for Mr Hough's allegations that he was being picked on Mr Prenter accepted that other people were late to work, but the evidence was also that these people were spoken to about their lateness and none was guilty of the same chronic lateness as Mr Hough. Mr Hough was not 'picked on' and there was no evidence of disparity of treatment of a kind capable of calling into question the justification for the dismissal.

[50] For all of these reasons I conclude that the decision to dismiss was one an employer acting fairly and reasonably would have made at the time. The dismissal was therefore justified.

The disadvantage grievances

[51] Because of the framing in the statement of problem of the disadvantage grievances, I raised certain matters with Mr Hough and his representatives at the investigation meeting.

[52] In particular, s 114 (1) of the Employment Relations Act provides:

“Every employee who wishes to raise a personal grievance must, ... raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later ...”

[53] It was said that the warnings made Mr Hough’s employment less secure. That was correct. However the date on which the action amounting to a personal grievance – or the action rendering Mr Hough’s employment less secure – occurred or came to Mr Hough’s notice must have been the date on which Mr Hough was advised of the relevant warning. At the very latest the applicable date is the date on which he received the written confirmation of the warning.

[54] I enquired whether grievances were raised in respect of each of the warnings at the time they were issued or within the next 90 days. At the time I was referred only to Mr Hough’s refusal to sign the warning letters. I referred to the law on that matter and indicated I would not accept that a mere refusal to sign the letters amounted to the raising of a grievance.

[55] I referred to the need to apply under s 114(3) of the Act for leave to raise a grievance if no grievance had been raised in the requisite 90-day period. No such application was made. The disadvantage grievance was withdrawn.

[56] Nevertheless the submissions on behalf of Mr Hough made various references to unjustified disadvantage. These appeared to amount new claims and should not have been raised for the first time in submissions. They involved Mr Hough’s request for determinations that:

- (a) the employer's action in leaving him under a permanent threat of termination between February 2007 and May 2007 was unjustified; and
- (b) the employer's action in refusing to follow the terms of Mr Hough's employment between February 2007 and May 2007 was unjustified.

[57] The remedy sought in (a) above appears to refer to the February 2007 warning. Accordingly it suffers from the same difficulties as those discussed at the investigation meeting.

[58] The remedy sought in (b) above appears to concern the allegedly repeated denial on the part of Alto Packaging of Mr Hough's 'actual contractual starting time as 8.30 am following his disclosure of those terms during the disciplinary meeting in March 2007.' Again such a determination first requires a finding as to whether a personal grievance was raised within 90 days, and if not, whether a grant of leave to raise one should be made. At the same time, I have found that by 2007 any earlier arrangement that Mr Hough start work at 8.30 am had fallen into abeyance in practice.

[59] If these remedies have been sought on some other legal basis, I am unable to ascertain it. The associated matters are not properly before the Authority and I take them no further.

Costs

[60] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination of the Authority any party seeking costs shall have 28 days from the date of this determination in which to file a memorandum on the matter, and the other party shall have a further 7 days from the date of receipt of the memorandum in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority