

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Anthony Gregory Housham (First Applicant)
George Tawhai (Second Applicant)

AND Juken New Zealand Limited (Respondent)

REPRESENTATIVES Gregory Llyod, Counsel for Applicant
Gary Blair, Advocate for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 20 June 2006

DATE OF DETERMINATION 6 September 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicants Mr Anthony Gregory Housham (Podge) ("Mr Housham") and Mr George Tawhai ("Mr Tawhai") allege they have been unjustifiably disadvantaged and unlawfully discriminated against in their employment with Juken New Zealand Limited ("Juken").

[2] Juken denies the allegations and says its actions were justified for the reasons it set out in letters dated 15 November 2005 to Mr Housham and Mr Tawhai as follows: -

On Saturday the 12th of November 2005 at 00.36 am you left the site without the prior approval or explanation to your supervisor/manager.

In the absence of proper approval or explanation, this is considered to be a serious breach of Juken New Zealand Limited, Company rules. Under the relevant part of the Code of Conduct, leaving the site ("Walking off the job ...") is classed as "Serious Misconduct".

On the 14th of November 2005 you attended a Disciplinary Meeting with a representative and you stated that your reason for walking off the job was that you were protesting against the Company because of the lack of progress in the "5% NDU wage claim" and non-union members breaking the overtime ban.

After reviewing all the relevant information and listening to your explanation we cannot accept that your actions were reasonable or justified. In fact, not only were your actions a serious breach of the Code of Conduct but they had the potential of seriously compromising the safety of other workers and the normal operation of the site.

Accordingly, this letter is being issued to you as a Final Written Warning. This Warning will remain in place for 12 months from the date of issue.

Please note that your employment agreement with this Company requires you to attend for work and to complete fully all rostered shifts unless Leave has been approved. It also requires you to seek approval to leave site from your Supervisor or designated other responsible person if you need to leave your work area.

Failure to abide by the above requirements and any further breaches of "Code of Conduct", your Employment Agreement or Company rules and procedures could lead to further disciplinary action which may include a review of your ongoing employment.

Yours sincerely

*Campbell J Crooks
Sawmill Manager
Northland Mill*

[3] The letter to Mr Housham contained this additional advice: -

In addition, your actions have raised concerns about your ability to do your job safely, responsibly and efficiently. Accordingly, it is our intention to transfer you into the packaging area of dispatch in the Veneer Mill operations on your current shift pattern until we are satisfied with your ability to complete the requirements of a Lathe Operator. This change will be effective immediately.

[4] Mr Housham and Mr Tawhai ask the Authority to investigate and resolve the problem in their favour by orders for compensation, that the warnings issued be revoked and that Mr Housham be reinstated to his former position.

[5] The parties were unable to resolve the problem by the use of mediation.

The legal principles

[6] The Authority scrutinises Juken's actions in accordance with the statutory test of justification set out at section 103A of the *Employment Relations Act 2000* ("the Act").

[7] The application of the statutory test has recently been clarified by the Employment Court. The relevant question is how would a fair and reasonable employer have acted in all the circumstances of the case. These circumstances include not just the employer's reaction to the misconduct, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and employer. An employer does not have to prove the incident which it characterised as misconduct happened. It is not required to conduct a trial or even a judicial process and natural justice requires that the employee is given a proper opportunity to comment on the allegations against them.

[8] The Authority reviews Juken's actions to ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as

serious misconduct¹. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances².

The circumstances

[9] The applicants were both employed as operators, Mr Housham a Band 5 operator and Mr Tawhai, a Band 3 operator. Mr Housham has subsequently been dismissed and his claim of unjustifiable dismissal is dealt with in a separate Determination of the Authority. At material times he and Mr Tawhai were active members of their union. Mr Tawhai was an elected delegate but Mr Housham had "assumed" the role of delegate, without election, following the resignation in November 2005 of the head site delegate Mr Ron Clarkson.

[10] The union and Juken were engaged in negotiations for a new collective employment agreement following the expiry on 18 May 2005 of the previous collective agreement. The negotiations had been ongoing without agreement. The union and its members decided to take action in the form of an overtime ban for three weeks in November 2005.

[11] Mr Housham tells the Authority he believes Juken was approaching individual employees and encouraging them to leave the union and enter into individual employment agreements without disadvantage, as well as offering back paid wage increases. As a result he says, some employees did leave the union. He offers no detail of these allegations however.

[12] As a result of the state of negotiations, Mr Housham and Mr Tawhai resolved it was time to take industrial action to bring the situation to a head to exert some pressure on Juken into settling the negotiations. Mr Housham says Mr Clarkson's resignation from the union and former union members breaking the overtime ban was the final straw.

[13] On Friday 11 November 2005, Mr Housham and Mr Clarkson were rostered to work from 6.30 pm until 6.30 am the following morning.

[14] Sometime during the evening of Friday 11 November 2005, Mr Housham and Mr Tawhai advised their colleague employees that they intended to leave work part way through the shift. They asked four other employees to join them but those employees declined.

[15] Mr Housham gives evidence he informed the union organiser of his and Mr Tawhai's intentions before they left their duties. Juken asserts that the union organiser did not admit this contact in later meetings and I understand it to reject the evidence in this regard.

¹ *Air New Zealand -v- Hudson*, unreported, AC30/06, 30 May 2006, Shaw J

² *Pero Tamarua -v- Toll Tranzlink Limited*, unreported, WC11/06, 11 July 2006, Shaw J

[16] At 12.30 am (Saturday 12 November 2005), Mr Housham and Mr Tawhai handed a note to the shift leader Kura Walters ("Ms Walters") that stated: -

Podge Housham and George Tawhai are going home in protest against JNL lack of progress in the 5% NDU claim non union members breaking O.T. ban until Monday morning 6 AM.

[17] Mr Housham and Mr Tawhai then left the site and returned to work on Monday 14 November 2005. When they arrived, they were called to a meeting with solid wood manager Mr Campbell Crooks ("Mr Crooks") and the manager of veneer and log yard operations Mr Melvin Adams ("Mr Adams"). I accept that the notes Mr Crooks took of this discussion are an accurate account of the discussion. Mr Crooks suspended Mr Housham and Mr Tawhai on full pay and instructed them to be available for further meetings. Arrangements were made for the union organiser to attend to represent Mr Housham and Mr Tawhai later that day.

[18] There was a further meeting with the same participants and the union organiser at 5.30 pm that day. Mr Crooks took notes of this meeting which I also accept are accurate. Mr Housham and Mr Tawhai were asked to explain why they had walked off the job on the evening of 11 November 2005. Juken considered that their actions in doing so was contrary to its code of conduct.

[19] The union organiser asked which part of the *Employment Relations Act 2000* ("the Act") had been breached and whether Juken considered its code of conduct was more important. On behalf of Mr Housham and Mr Tawhai, he maintained the Act allowed two or more union members to act as Mr Housham and Mr Tawhai had when the union was in dispute and that both members should be reinstated to normal duties with pay. Mr Campbell stated he did not consider Juken and the union were in dispute because discussions or negotiations were still continuing and no notification of a dispute had been lodged.

[20] Mr Housham said he had nothing to add. He said the note he had left with Ms Walters contained his explanation for his actions. The union organiser asked if the meeting was disciplinary. Mr Crooks explained the intention was to establish the facts before a decision was made about any disciplinary action. The union organiser reiterated the action taken by Mr Housham and Mr Tawhai had been legal and asked whether the action had hurt the company. Mr Crooks responded that the financial consequences of Mr Housham and Mr Tawhai walking off the job had been huge. At that point he suggested a break.

[21] Mr Campbell's notes record the meeting reconvened at 6.13 pm. He immediately declared that after hearing the explanation, Juken considered the matter was disciplinary, outside the current negotiations and a disciplinary process would commence immediately.

[22] The union organiser asked for an adjournment to seek advice from the union's solicitor and whether the suspension would continue on pay. Both sides repeated their respective positions. Mr Campbell elaborated and said no notification had been received giving the required 14 days notice of intention to take industrial action (there is no such requirement at law). He also said Juken did not believe Mr Housham's self-appointment as union delegate was valid without a mandate from union members. The union organiser responded that the action taken by Mr Housham and Mr Tawhai were as union members in dispute with Juken. In essence, Juken maintained Mr Housham and Mr Tawhai's action was disciplinary in nature while they maintained their actions were lawful industrial action. The session ended with Mr Campbell reiterating Juken considered the action taken as serious misconduct contrary to its code of conduct. The meeting adjourned again.

[23] When the meeting reconvened at 6.55 pm, Mr Campbell asked if there was anything to add. The union organiser said there was not.

[24] Mr Campbell then advised that Mr Housham would be issued with a final written warning for serious misconduct and he would be transferred to the packaging department on the same shift with immediate effect. He explained that Mr Housham's position as lathe runner and assistant lathe operator was too important to Juken for any possibility of further behaviour and disruption. Mr Tawhai was advised he too would be issued with a final written warning for serious misconduct.

[25] The union organiser advised the union would contest the decision and that he would advise Mr Housham and Mr Tawhai not to sign any warning notice issued to them. The meeting adjourned at 7.04 pm.

[26] A new collective employment agreement was concluded on 30 November 2005.

The merits

[27] The relevant collective employment agreement binds employees to observe Juken's code of conduct. The code of conduct provides that "walking off the job" is an example of serious misconduct.

[28] Mr Housham and Mr Tawhai submit that their action in leaving their shift early is genuine strike action on the basis that it was more than one employee discontinuing employment. They also say that such strike action was lawful as it related to the bargaining for a collective agreement that would bind both of them. Their principal submission is that Juken is not

entitled to treat lawful strike action as serious misconduct. They also say that they were discriminated against.

[29] I accept that both Mr Housham and Mr Tawhai acted genuinely in terms of withdrawing their labour because of their dissatisfaction with the progress of negotiations for a collective employment agreement. This I find was their primary motivation and not any other purpose. I consider too that their action constituted lawful strike action in terms of the Act.

[30] That being so, Mr Blair is correct to observe that a strike has never denied an employer a right to take disciplinary action for breach of an employment agreement because the normal employment relationship obligations continue. Mr Blair is further correct to observe that convention tends to discourage employers from taking disciplinary action in relation to lawful strike action.

[31] After its disciplinary process, Juken concluded that both Mr Housham and Mr Tawhai had walked off the job in breach of the code of conduct. I am satisfied that it carried out a full and fair investigation which disclosed that conduct. That is not the end of the matter however, because a further exercise is necessary.

[32] I must now separate out the employer's action in relation to the established conduct and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these particular circumstances.

[33] It appears that Juken accepted both Mr Housham's and Mr Tawhai's explanation for their actions and why they acted that way. But even if Juken did accept their actions were genuine, it concluded those actions were not "reasonable or justified".

[34] I agree that Mr Housham's and Mr Tawhai's action was certainly inconvenient. But significantly, they were always lawful actions having regard to the provisions of the Act. It is difficult to characterise actions which the law expressly deems lawful as not "reasonable or justified".

[35] I conclude that it is wrong to consider Mr Housham's and Mr Tawhai's actions as anything other than an exercise of lawful industrial action. There was nothing repudiatory in what they did. Quite the contrary, they acted so as to facilitate the continuation of the employment relationship and not the end it. I do not consider that a fair and reasonable employer would regard lawful and genuine strike action, however inconvenient, as constituting serious misconduct. I adopt that view concluding it equally implausible that locked out employees would have legitimate personal grievances against their employer.

[36] I take into account Mr Housham's and Mr Tawhai's respective periods of service with Juken, Juken's very proper concern for the integrity of its operations, and Mr Housham's and Mr Tawhai's utility to their colleague employees as union representatives.

[37] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, **I conclude that Juken's actions in warning both Mr Housham and Mr Tawhai and transferring Mr Housham to other duties were not what a fair and reasonable employer would have done.**

[38] My investigation has not yielded any persuasive evidence leading to any finding of discrimination. Accordingly, I make no findings in this regard.

Determination

[39] **Accordingly, I conclude Mr Housham and Mr Tawhai have personal grievances. They are entitled to remedies in settlement of their personal grievances.**

[40] Mr Housham is no longer employed with Juken. This employment relationship problem is entirely independent of his termination for serious misconduct. As the Authority has determined he was dismissed justifiably, there is no need to deal with the final written warning given to him. I accept however, that he has suffered hurt and humiliation because he was issued a final written warning and that he was transferred to pallet making work. He gives evidence that he was humiliated. That is the full extent of his evidence in this regard. Having regard to that evidence, he shall have a modest award of compensation. **I order Juken New Zealand Limited to pay to Anthony Gregory Housham the sum of \$2,000.00 as compensation.**

[41] The full extent of Mr Tawhai's evidence is that he was humiliated. He too shall have only a modest award of compensation. His written warning remains in place and I consider that it should not. **I order Juken New Zealand Limited to pay to George Tawhai the sum of \$1,000.00 as compensation and to retract the final written warning dated 15 November 2005.**

Costs

[42] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Mr Blair is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. The union is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority