

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY WELLINGTON OFFICE**

BETWEEN Anthony William Johnston
AND Ballance Agri-Nutrients Ltd
REPRESENTATIVES J Langford for the applicant
M Beech for the respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION Wellington
MEETING 16 February 2006
FINAL SUBMISSIONS Received by 27 February 2006
DATE OF 23 March 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. The applicant, Mr Johnston, claims that his dismissal by the respondent (Ballance) was unjustified on both substantive and procedural grounds. By contrast, Ballance considers that Mr Johnston's dismissal, for what was in effect "theft of company time", was justified in all the circumstances of the matter.

The Facts

2. Ballance is a farmer owned co-operative supplying farmers with fertiliser and other agricultural nutrients. Mr Johnston is an experienced sales person who was employed by Ballance on 27 January 2004, following several years out of sales studying agricultural sciences at university.
3. Mr Johnston was employed as a technical sales representative covering the Manawatu area. He lived in Palmerston North. During the relevant periods of his

employment he reported to Mr Glenn Pederson, Sales Manager for Taranaki/Manawatu. In turn Mr Pederson reported to Mr Graham Smith, the General Manager, Sales and Marketing, who was based in Ballance's head office in Mt Maunganui.

4. The parties' employment agreement covered many of the relevant matters later in dispute between them. Clause 7 covered the position description and employee duties. It stated:

"In addition to the functions and responsibilities set out in the position description, you will during your employment:

(a) Diligently serve the company and use your best endeavours to promote and protect the interests of the company

...

(c) Devote your full time and attention during working hours to the discharge of your duties in the business of the company and at such other times as your services may reasonably be required having regard to your job functions and responsibilities."

5. The Schedule to the employment agreement set out the requirements of Mr Johnston's hours of work as follows:

"Your ordinary hours of work shall be up to 40 hours per week Monday to Friday.

Times of starting and ceasing work shall be by mutual agreement and generally between the hours of 6am and 6pm.

...

In recognising the nature of this position and the work involved, the parties acknowledge that normal hours may vary and the employee is required to attend for duty at such times as is necessary to meet the requirements of the position.

The salary paid is in full consideration of the requirements of the position, in respect of hours and times of employment."

6. Unfortunately, Ballance and Mr Johnston never reached agreement as to what the times of starting and ceasing work were. The differing expectations of the parties over hours of work were later to cause problems.

7. In 2005 Ballance also issued General Terms of Employment to staff such as Mr Johnston. I accept that these General Terms of Employment covered Mr Johnston at the appropriate time even although he never formally accepted the terms.
8. The General Terms of Employment make it clear that Mr Johnston is required to devote his full time and attention during working hours to the discharge of his duties and the business of the company and such other terms as his services may reasonably require, having regard to his job functions and responsibilities.
9. Technical sales reps are required to spend a lot of time on the road visiting potential farm clients. At the end of the day their performance is judged by the amount of sales that they achieve on behalf of Ballance. The amount of sales made also forms part of their remuneration by way of commission payments. So it is clearly in the interests of Mr Johnston and Ballance for him to make as many sales as possible.
10. Given that gaining sales may involve working at any given time on any given day, Mr Pederson acknowledged to Mr Johnston that his working hours were not fixed. This related particularly to the seasonal nature of fertiliser sales, whereby Spring and Autumn were the busiest periods. Specifically, Mr Pederson made Mr Johnston aware that the job did require more than 40 hours work per week and because of that there was a give and take arrangement with respect to absences on occasion.
11. As Mr Johnston worked in the field and lived in Palmerston North, while Mr Pederson lived in Taranaki, direct supervision was not possible and they kept in contact by regular telephone calls and by weekly reports. Mr Johnston was also expected to report in Ballance's computer system on key developments in his area.
12. When seeking leave Mr Johnston was expected to fill in a leave application form. Those forms provided for different types of leave, including lieu days. Mr Johnston's performance was also monitored by way of personal business plans and half yearly performance development meetings.
13. Mr Johnston is a keen golfer. He regularly participated in industry golf tournaments, which he informed Mr Pederson about. As they were industry events Mr Pederson had no problem with Mr Johnston attending and playing golf on such occasions. Mr

Johnston saw potential for gaining clients for Ballance as a result of his involvement with golf, particularly when playing on rural courses, where many farmers were also regular attendees. He determined on a strategy of occasionally attending golf days at rural clubs in his region. When doing so he always played in Ballance-branded gear and sought to make contacts to improve his sales with local farmers. The industry golf days that Mr Johnston attended, however, which averaged one a month, but involved three rounds in the week preceding this matter coming to the attention of Ballance, were played without any direct or indirect knowledge of Mr Pederson.

14. On 13 December 2005 Mr Pederson and Mr Johnston had a half yearly review of his performance, based on results from key indicators. A particular area of concern was the result of a customer satisfaction survey, where Mr Johnston fared very poorly. Mr Johnston was seen as over-promising and under-delivering.
15. No mention was made by Mr Johnston at this meeting of his golfing activities, although he had played one round at Rangetikei that week and was due to play there again the next day.
16. As a result of Mr Pederson's concerns over the survey results, he decided to approach a number of former and potential customers of Mr Johnston himself. One of them told Mr Pederson that he ought to look into the amount of time Mr Johnston spent playing golf. As this customer was also a shareholder in Ballance (it being a customer owned co-operative) Mr Pederson took the matter seriously. He conducted a computer search of the golf cards that Mr Johnston had filed with New Zealand Golf and discovered that of the 23 occasions in the last 15 months that Mr Johnston had played golf during the day, Monday to Friday, only 8 had been approved by him.
17. Mr Pederson took these matters up with Mr Smith and Ballance's human resources manager, Mr Raymond Scott. Mr Smith and Mr Scott considered that the matter was serious and decided that a disciplinary investigation was required.
18. Mr Smith was originally to conduct the investigation meeting, but could not do so because of prior commitments. He therefore decided that Mr Scott would run the disciplinary meeting, together with Mr Pederson, and that they would then make a recommendation as to the outcome, which he would then decide on by telephone. If,

however, for some reason Mr Smith was unable to be contacted on the day then Mr Scott was delegated to make the decision himself.

19. Mr Pederson spoke to Mr Johnston about the matter, stating that Ballance wanted to talk to him about his work patterns and in particular the rounds of golf, as identified on the website, which occurred during normal working hours. Mr Johnston was informed that the matter was serious, that the meeting was being convened under Ballance's disciplinary system and that it had the potential to affect his ongoing employment with Ballance. Mr Johnston was also told of his right to professional representation and was encouraged to get such representation. The meeting was set for the next afternoon.
20. Mr Johnston was aware of the matters in issue, but did not think his employment was at risk. Even although he did receive legal advice before attending the meeting the next day, he went on his own.
21. Discussions soon concentrated on the 15 or so rural club golf days. Mr Johnston read from a pre-prepared written statement, which he declined to give to Mr Scott and Mr Pederson. He stated that his attendance at the golf days was first and foremost to build relationships with Ballance clients, and secondly raising his profile, noting that he was in full Ballance-branded clothing on each day. He added further that he was using these opportunities to make contacts and get sales directly with current and prospective clients. He stated that a large percentage of new clients were gained as a direct consequence of this networking, yet at the meeting he was unable to specify any one particular such client. In this regard I do not take into account Mr Johnston's subsequent table of actual and potential clients gained through his rural golfing days' participation, as it was prepared well after the event. Rather I have preferred the evidence on this matter of Mr Smith and Mr Pederson.
22. Mr Johnston went on to clarify his "working hours". He noted he was on call 24 hours a day and that his working day started around 6.30 – 7am each morning, followed by planned farm visits. He also allowed a minimum of one hour per night for outward calls, plus two hours on Sundays. He stated that he generally made himself available at times that suited farmers, including weekends. He stated that he

had been told that he could take time to do personal or family activities within his discretion but to be fair and not abuse the autonomy of his position. He noted that he regularly let his family down by giving a lot of time to his job, such as soil testing until 7pm in the evening. He questioned what his work hours were meant to be and noted that the time questioned by Ballance equated to four hours per month, or 51 minutes per week. Mr Johnston made it clear that he always worked more than 40 hours per week, not including any time taken for playing at rural club days.

23. In response to questions Mr Johnston admitted that he had not logged the golfing days on Ballance's computer system and that on club days there was a random arrangement for playing partners, so therefore it could not be guaranteed that he would be playing with an actual or potential customer.
24. Mr Johnston went on to question the motive behind the allegations against him and the way that management had handled them. In particular he stated that he had just had a performance review with no issues of concern raised. He requested an acknowledgement that his behaviour was in keeping with developing business in his region and not in conflict with the code of conduct, as well an investigation into the motives of the people behind the allegations.
25. An adjournment was then taken by Mr Scott and Mr Pederson. They noted:
 - that other staff usually seek permission from their manager prior to taking significant time off;
 - that additional hours worked beyond the normal part of the working week were expected of a technical sales incentive;
 - that Mr Johnston had not included the golf days as a networking exercise in his business plan;
 - that he had advised his manager when he was playing golf in industry tournaments as opposed to club days, he had not recorded the club days in Ballance's computer system and he was unable to provide any evidence of the networking he had done; and

- that the draw for partners was random and that when Mr Johnston was playing golf he was not available to his other Ballance clients.

26. Both Mr Scott and Mr Pederson agreed that this constituted serious misconduct. They then rang Mr Smith with the recommendation that because of the seriousness of Mr Johnston's conduct, he should be summarily dismissed. While the meeting to that time had taken around 90 minutes, the phone call to Mr Smith lasted 5-10 minutes. During that time Mr Smith was informed of Mr Johnston's explanations. He concurred completely with Mr Smith and Mr Pederson's recommendation that Mr Johnston be summarily dismissed and therefore authorised Mr Scott to carry out Mr Johnston's dismissal.
27. When so informed Mr Johnston demanded written notice of his termination and said that he would take legal action against Ballance. Mr Johnston was asked to return his company property but declined to do so until he had spoken to his lawyer.
28. Mr Johnston was very upset. Discussions moved to Mr Johnston's car after he left the meeting. Mr Johnston yelled at Mr Pederson to get Mr Scott out of the car and was abusive at times, using bad language. Mr Johnston swore at Mr Scott telling him he didn't want to see or talk to him ever again and told him to get out of his sight.
29. During this altercation Mr Pederson rang Mr Smith to see what to do. Mr Johnston then interrupted the conversation and asked to speak to Mr Smith directly. Mr Johnston told Mr Smith that he was going to take the matter to Court. He then swore at Mr Smith and called him "gutless" because he was not at the meeting. He then went on to state:

"It's bloody lucky you didn't turn up, because if you did I would smack you ..."
30. Mr Smith then intervened and told Mr Johnston to watch what he said because anything that he did say would be used against him later. He then counselled him not to do something stupid. Perhaps as a result of this Mr Johnston calmed down a bit and allowed Mr Pederson to drive him home. He then returned his remaining company property except his computer (from which he wanted to clear personal

information), while Mr Pederson and Mr Scott waited. The computer was later returned.

31. Mr Johnston sought interim reinstatement. The matter was dealt however, by agreement, on the basis that an early substantive investigation would meet the needs of both parties. In the meantime mediation was held but was unsuccessful. It therefore falls to the Authority to make a determination.

The Law

32. I must determine this matter on an objective basis by considering whether Ballance's actions and how Ballance acted was what a fair and reasonable employer would have done in all the circumstances at the time Mr Johnston's dismissal occurred. I consider that it is incumbent upon me therefore to determine on an objective basis whether what Ballance did and how Ballance acted was what any fair and reasonable employer would most likely have done, as there can be no certainty as to what any particular fair and reasonable employer would do in any given circumstances.
33. Serious misconduct requires conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship (*Northern Distribution Union v. BP Oil NZ Limited* [1992] 3 ERNZ 483). Issues of substantive and procedural fairness are also relevant. In particular, one aspect of procedural fairness is the right to be heard. In this regard an employee needs a real and purposeful hearing before the person who is to decide how the disciplinary matter is to be dealt with (*Irvines Freightlines Ltd v. Cross* [1993] 1 ERNZ 424).

Determination

34. I do not accept that Mr Johnston was unaware that Ballance was treating the matter as a serious one, or of the possibility of dismissal. In fact Mr Johnston knew what the meeting was about and had taken legal advice, but he did not consider that his job was at risk, because he did not think he had done anything seriously wrong, not because he was not warned of a potential risk to his job. He had taken legal advice and had prepared a full explanation of his conduct, after considering Ballance's code

of conduct. While the matter was dealt with quickly I do not consider that it was done with indecent haste, as Mr Johnston submitted.

35. There was unfairness, however, in that Mr Smith was the actual decision maker, not Mr Scott and Mr Pederson. The 90 minute meeting had to be distilled into a short conversation with Mr Smith and Mr Smith did therefore have the opportunity to properly analyse Mr Johnston's behaviour. One can accordingly never be certain of the outcome had he had such an opportunity. For example, Mr Johnston referred directly to the Code of Conduct in the meeting, which was not taken up by those in attendance. Mr Smith may have decided to look at the matter in more detail than this. Furthermore, Ballance did not directly address a number of matters, such as Mr Johnston's claim that he regularly worked after 6pm and at weekends until after his dismissal. I therefore determine that Mr Smith's absence and the other procedural shortcoming highlighted above did lead to substantial unfairness to Mr Johnston.
36. In determining whether Mr Johnston's summary dismissal was substantively justified, it is vital to look at the parties' employment agreement. I consider that Ballance's representatives were acting on a misinterpretation of that agreement in terms of the hours of work that they expected from Mr Johnston. The normal hours of work are defined as being up to 40 hours per week, Monday to Friday, not any time between 6am and 6pm Monday to Friday, as considered by Mr Scott and Mr Pederson, which constitutes 60 hours per week. Rather the parties were required by the agreement to agree on times of starting and ceasing work and that they should be up to eight per day if the normal hours of up to 40 were to be met. The agreement also acknowledges that these hours may vary and that Mr Johnston was required to attend at such times as necessary to meet the requirements of the position. While this means that additional hours to 40 hours might have to be worked, it does not mean that Mr Johnston had to be available during all hours between 6am and 6pm Monday to Friday.
37. One problem between the parties was that there were no mutually agreed times of starting and ceasing work. This certainly makes sense in the type of work that was required of Mr Johnston – thus there was a system of "give and take". Ballance's concern was that Mr Johnston's golf playing showed that he was unfairly taking off

time that should have been working time. He was certainly unavailable for normal duties during the periods that he was at golf. Furthermore, as Ballance's investigation showed, Mr Johnston made no effort to inform Mr Pederson of what he later described as a marketing initiative. Ballance was therefore quite entitled to conclude from this that Mr Johnston was loath to inform them of his golfing activities. In particular, even although Mr Johnston's actions were repeated he always failed to communicate with his employer about his going to golf in any of the ways that were expected of a technical sales representative, despite seeking permission to go to industry club golf days.

38. Furthermore, I accept that permission would not have been granted to Mr Johnson to partake in these club rural days, particularly as many farmers are shareholders in Ballance and, as this case shows, many take a dim view to staff playing golf in what they would consider normal working hours.
39. I conclude that the most likely reason for Mr Johnston not informing Ballance was that he was concerned that if he did so he would be told that his rural playing golf playing days could not continue. In other words, Mr Johnston believed that what Ballance didn't know wouldn't hurt it.
40. For Ballance to conclude that serious misconduct had occurred, however, it had to conclude that Mr Johnston had deliberately taken time off to play in rural club golf days in the knowledge that he was required to be at work during those times. Furthermore, any such misconduct must have been serious enough to warrant summary dismissal.
41. I find, applying the test set out in paragraph 32, that a fair and reasonable employer would not so conclude. That is for a large range of reasons, as summarised below. First, there was no certainty over Mr Johnston's starting and finishing times. Second, he was not required to work or be available to work for at least 60 hours per week as Ballance considered. Third, Ballance had no reason to doubt Mr Johnston's claim that he always worked over 40 hours per week. Fourth, his attendance at rural club days in Ballance-branded clothing showed that he may have considered it alright to play on such days. Fifth, insufficient account was taken of the give and take

arrangements that were acknowledged as existing over hours of work, given the nature of the technical sales representative position. In this regard any requirement to fill in a time in lieu form does not assist Ballance, as Mr Johnston saw such an application as unnecessary in the circumstances. Sixth, Ballance's code of conduct categorises consistent absenteeism, persistence lateness and/or persistent failure to comply with time reporting requirements as general misconduct, which would result in the appropriate formal warning procedures being implemented. Mr Johnston's failure to inform Mr Pederson at least of his playing golf on rural club days could be described as persistent failure to comply with time reporting requirements and perhaps persistent absenteeism, but that does not make his behaviour serious misconduct rather than general misconduct.

42. I thus reject Ballance's argument that Mr Johnston's conduct constituted an irreconcilable breakdown in trust and confidence between him and Ballance. I therefore determine that Mr Johnson's dismissal was unjustified on both substantive and procedural grounds.

Remedies

43. Mr Johnston seeks reinstatement. Reinstatement is the primary remedy for an unjustified dismissal. The Authority must, however, be satisfied that, were Mr Johnson be reinstated, he would be an effective and harmonious member of Ballance's sales team. Given that I have already determined that Mr Johnston's conduct should not have been categorised as serious misconduct, it follows that the only bar to his reinstatement is his reaction to his dismissal.
44. Mr Johnston's abusive and threatening behaviour was quite unacceptable, even given the fact that he must have been shocked at his dismissal. In particular, his abuse of Mr Scott was unacceptable and his behaviour towards Mr Smith was extremely serious. Fortunately for Mr Johnston, Mr Smith interrupted him before he made a direct threat against Mr Smith. In this context Mr Johnston stated that if Mr Smith had been there he would have "smacked him". While this is disgraceful behaviour by Mr Johnston, it was not in fact an actual and direct threat to Mr Smith. I also note

that Mr Johnston's direct dealings with Mr Scott and Mr Smith upon reinstatement will not be extensive.

45. In all the circumstances of this case I consider that justice would be best served if Mr Johnston is reinstated into Ballance's employment. Mediation may assist the parties in clearing the way to Mr Johnson's reinstatement, which is to take place within 14 days of the date of this determination.
46. I turn now to claims for financial remedies. Mr Johnston's omission to tell Mr Pederson of his attendances at rural club golf days was a serious error of judgment and contributed to the situation which gave rise to his personal grievance. Furthermore, his belligerent and abusive behaviour post-dismissal must be taken into account. In all the circumstances of this case I consider that appropriate financial remedies are for Mr Johnston's reasonable costs to be met and that he be paid for any remuneration he has lost as a result of his dismissal. Reasonable costs may be assessed on the basis that Mr Johnston's legal costs pursuant to his claim in the Employment Relations Authority should be met in full, provided they are less than those for Ballance's senior counsel. Leave is reserved for either party to return to the Authority should agreement not be forthcoming on calculating these particular remedies. For the avoidance of doubt I note that no other claims for compensation are appropriate in these circumstances.

Costs

47. Costs are reserved.

Conclusions

48. Mr Johnston was unjustifiably dismissed by Ballance on both substantive and procedural grounds. I therefore order the respondent, Ballance Agri-Nutrients Limited to:

- Reinstatement Mr Johnston to his position as technical sales representative for the Manawatu region within fourteen days of the date of this determination;
- Pay Mr Johnston all of his lost remuneration until his reinstatement, plus reasonable costs incurred pursuant to bringing this claim before the Authority.

G J Wood
Member of Employment Relations Authority