

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Owen Kingi (Applicant)  
**AND** Responsive Maintenance 2000 Limited (Respondent)  
**REPRESENTATIVES** Bryce Quarrie, for Applicant  
Matt Hanna and Rebecca Emery, for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 14 November 2005  
**DATE OF DETERMINATION** 10 February 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

Mr Kingi submits he was unjustifiably suspended from his employment on 18 October 2004. To remedy his alleged grievance he seeks compensation pursuant to s.123 (1) (c) (i).

He also submits that his dismissal on 1 November 2004 was unjustified and to remedy this alleged grievance he seeks lost remuneration and compensation pursuant to s. 123 (1) (c) (i).

The respondent denies the claims and submits that Mr Kingi's suspension was justified and states that he was justifiably dismissed for serious misconduct.

**Background**

Mr Kingi commenced employment with Responsive Maintenance 2000 Ltd (RML) in August 2004.

The evidence discloses that prior to the events in question Mr Kingi had a history of addressing colleagues and supervisors in a confrontational and intimidating manner when he disagreed with them.

In October 2004, Placemakers were promoting specials of DeWalt tool kits. A customer buying a tool kit could chose to buy it with an extra battery (4 in total) *or* could elect to have a free radio i.e. to have the tool kit, 3 batteries and a radio.

On 6 October Ms Te Koi, a builder with RML, sought permission to leave the work site to go to Placemakers to purchase one of these tools kits for use on the job. Ms Te Koi was given permission to go. Mr Kingi decided to accompany her despite the fact he had not obtained permission to leave the work site.

Whilst there Mr Kingi decided to buy one of these tool kits for his personal use. He paid for the tool kit and then went to a stand near the check-outs to collect the boxed tool-kit. The check-out operator was not entirely sure which kit was which and she signalled for another staff member to come and clarify the situation. A Mr Walton came over to assist and explained to Mr Kingi the terms of the special – that Mr Kingi could have the kit plus *four* batteries or the kit with *three* batteries plus a radio. Mr Walton ascertained that Mr Kingi wanted the radio so he indicated that he needed to remove one battery from the box that Mr Kingi had selected. Then, by all accounts all hell broke loose. Mr Kingi became extremely agitated. He refused allow Mr Walton to remove one battery from the kit. Mr Walton said that would be alright as he had a pack with three batteries out the back. However, Mr Kingi became abusive, he swore and waved his arms around and behaved in an extremely intimidating manner. Mr Walton continued in his attempts to explain the situation (referring to the brochure) and then to calm the situation. Mr Walton thought Mr Kingi was going to hit him and he walked away, unsure about how to deal with the situation.

Ms Te Koi counselled the check-out operator to stay out of it saying, “don’t go down there, he won’t let up now”.

The incident ended with Mr Kingi ripping up the invoice and saying “stick it up your arse” and he and Ms Te Koi left Placemakers without either tool-kit. Ms Te Koi was so embarrassed about the incident that she sent someone else back to collect the company’s unit.

Staff at Placemakers submitted a written complaint to RML. This complaint was submitted at the request of Ms Te Koi. It was followed by a formal complaint from the Manager of Placemakers.

RML carried out inquiries into the matter. The company’s HR Manager requested Mr Kingi to provide an Incident Report. Mr Kingi was abused her and refused to comply until directed to do so by Ben Tau, a company director. Meetings were held with Placemakers personnel and with Mr Kingi. On 18 October Mr Kingi was formally suspended. On 1 November, he was dismissed following a formal disciplinary meeting.

The dismissal was confirmed in a letter to Mr Kingi dated 12 November 2004. The reasons given for the dismissal were that Mr Kingi, being recognised as an RML, employee had confronted a supplier in an inappropriate and intimidating manner; that this had brought RML into disrepute; that his actions breached the statement of Expectations of Employee’s contained in his IEA and the company’s Code of Conduct.

## **Positions of the Parties**

### Applicant

Mr Kingi does not dispute that he got pretty wound up at Placemakers on the day in question. However, he submits he was standing up for his rights as he saw them. He had brought the deal as he understood it and Placemakers were trying to back out of it.

It is Mr Kingi’s submission that there was no mention of a possible suspension at the meeting on 11 October and that the suspension came out of the blue on 18 October. He had been given no notice of the possibility of suspension, nor any opportunity to comment on the proposal.

With respect his dismissal Mr Kingi submits that at the disciplinary meeting on 1 November the employer did not take account of his explanations that he had visited Placemakers in his private capacity and that his conduct did not bring the employer into disrepute. Neither did the company’s

representatives have regard to advice he gave them that Placemakers had apologised in writing to him following the incident.

### Respondent

RML contracts to Housing New Zealand (HNZ) to maintain HNZ properties. Relationships with its principal contractor and its clients (HNZ tenants) are critical to its business success. In recognition of this, the establishment and maintenance of good relationships with suppliers, contractors and clients of RML/HNZ is given prominence in all the company's contracts (including employment contracts) and in the company's rules and Code of Conduct. It is emphasised in the employee induction process and documentation.

The company supports local communities by offering employment to those who might otherwise have difficulty in obtaining employment. This philosophy is given contractual voice in its arrangements with HNZ. Consistent with its philosophy Mr Kingi was offered employment with the company. He was provided with accommodation and other benefits and the opportunity was available for him to complete his training to become trade certified.

Prior to incident at Placemakers Mr Kingi had been reported as having acted in a confrontational and intimidatory manner towards colleagues and supervisors. He had been counselled about this.

An important consideration in taking the decision to dismiss Mr Kingi was his failure to accept he had done anything wrong at Placemakers. As a result the company could have no confidence there would not be a repetition of the inappropriate conduct he displayed that day.

## **Legal Framework**

### Suspension

Speaking generally there must be either a statutory or contractual right to suspend. In this case the contract between the parties does not contain a provision which gives the employer the right to suspend.

The Court of Appeal in *Birss v Secretary of Justice* [1984] 1 NZLR 513,521 referred to suspension as a "*drastic measure which if more than momentary must have a devastating effect on the [employee] concerned.*" The decision to suspend an employee pending an investigation into their conduct is not a decision to be taken unilaterally and the rules of procedural fairness apply. At the minimum the employee should be advised of the proposal to suspend and be given an opportunity to comment.

### Dismissal

With regard to the dismissal, I have had to keep in mind the following legal principles (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

Was the decision to dismiss Mr Kingi one that a reasonable and fair employer could have taken?

For me to be able to answer this question in the affirmative the respondent must satisfy me, not that it can prove serious misconduct on Mr Kingi's part, but that it has conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.

However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed.

*“Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person”* (New Zealand (with exceptions) Food Processing Etc IUOW Unilever NZ Ltd [1990] 1NZILR 35.)

The issues to be decided in relation to this matter are:

1. Was the suspension justified?
2. Did the employer carry out a thorough and fair investigation that disclosed conduct capable of being regarded as serious misconduct?
3. Was the dismissal an option open to the employer based on the inquiry conducted?

## **Discussion and Findings**

### Credibility

There is little dispute between the parties in relation to the critical issues in this matter. However, the parties have divergent perspectives of the events in question and whether or not Mr Kingi's dismissal was warranted in the circumstances

For the sake of clarity, however, where the evidence is in dispute between the parties it is the evidence of the respondent's witnesses that I prefer. Mr Kingi's evidence was discursive and characterised by evasion. Further, whilst he did not dispute the incident at Placemakers on 6 October - and other similar incidents in which he was involved - he minimised the impact of his conduct on others. This was entirely against the weight of the evidence.

### Findings

The company's rules stipulate the standard of behaviour expected by employees towards those involved with the employer's business. Employees are expected to treat clients, suppliers and others with respect and in a professional manner at all times. The individual employment agreement that Mr Kingi signed up to states that breaches of this and other company rules will be considered serious misconduct and could lead to summary dismissal. Mr Kingi accepts he went through the company's induction process and that performance expectations were made clear to him. I therefore find that Mr Kingi was aware of the company's policies that he was to behave in an appropriate and professional manner in his dealing with others as an employee of RML.

I find that Mr Kingi was not authorised to go to Placemakers to purchase equipment on 6 October. Permission had been given to Ms Te Koi to go there alone. However, having gone there Mr Kingi, who was known to staff at Placemakers as an employee of RML, was bound to observe the company's policies in his interactions with Placemakers' staff.

I find that Mr Kingi was well aware of the nature of the offer that he purchased. He had no right to expect to depart Placemakers that day with the tool kit, a radio and four batteries. He had purchased and was entitled to elect to take away the tool kit and four batteries *or* the tool kit, three batteries and a radio.

Mr Kingi's conduct at Placemakers when approached by Mr Walton was 'egregious' within the meaning given to that word in *Amaltal Fishing v Morunga* [2002] 1 ERNZ 692 i.e. 'outstandingly bad or infamous'. There Chief Judge Goddard described such conduct (p. 696) as connoting 'a diversity from normal behaviour of a kind that people were not expect to celebrate but rather could have been counted on to condemn' There was no unreasonable conduct by Mr Walton that contributed to or justified the outburst by Mr Kingi. I find Mr Walton genuinely feared for his safety and other staff were alarmed and frightened by Mr Kingi's conduct.

The evidence discloses too that this confrontational, intimidating conduct by Mr Kingi was not an isolated incident. RML staff described themselves as having been at the receiving end of aggressive and intimidating conduct by Mr Kingi on other occasions, such that they feared for their safety. On one occasion Mr Tau (Company Director) had counselled Mr Kingi with regard to this behaviour. Mr Tau described Mr Kingi as having an anger management problem and I find on the evidence this is an accurate description of his conduct at times.

I find too, on the evidence before me that the conclusion reached by the company that it could not be confident there would be no repetition of the conduct complained of is sound. The evidence discloses that Mr Kingi did not accept that his behaviour at Placemakers was inappropriate and unacceptable. He was and remains of the view that it was all Placemakers fault. That is entirely against the weight of the evidence.

Speaking overall the company carried out a scrupulously thorough and fair investigation. Mr Kingi failed to co-operate with critical aspects of the inquiry and only co-operated after direct orders from Mr Tau and at the last minute. Otherwise Mr Kingi was put on clear notice of the allegations against him. He was advised of his right to representation. He was invited to a disciplinary meeting where he was given every opportunity to explain and put forward submissions on his behalf. Those submissions were heard and considered prior to the decision to dismiss being taken. The employer also considered alternatives to dismissal and Mr Kingi was offered employment in night security – a role he declined.

However, there are two aspects of this matter that concern me. Both were raised in submissions by the representative for Mr Kingi.

### 1. Suspension

There was no contractual right to suspend Mr Kingi. However, in certain circumstances where the safety is an issue it may be appropriate to suspend a worker even where there is no statutory or contractual obligation to do so (*Amaltal* cited above). Certainly, the safety of other RML employees, clients and suppliers would in the circumstances of this case have justified serious consideration being given to suspending Mr Kingi immediately pending an investigation into the matter.

It was submitted that the principles in *Amaltal* are applicable in this case and that the respondent was justified in suspending Mr Kingi.

The success of this submission depends on my agreeing that the facts of this case qualify it as one of those rare situations in which the employer was entitled to act without further inquiry *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand* (1990) Sel Cas 985. That is one of the concerns I have. The suspension was not implemented until 12 days after the event. That is inconsistent with the company's submission that suspension was warranted – given the volatile nature of Mr Kingi - to ensure the safety of others. No action was taken to suspend Mr Kingi despite the fact that over these 12 days he had behaved in an intimidating and abusive manner towards Ms Kitto in relation to the request that he complete and submit an incident report. But for the delay

occasioned in suspending Mr Kingi I might have been so persuaded to accept the respondent's submission on this point. However, a delay of 12 days in considering and implementing the suspension militates against finding this was one of those cases where the employer was entitled to act without inquiry. That being the case Mr Kingi was entitled to be put on notice of the proposal to suspend him and he should have been given the opportunity to take advice and to comment on the proposal. He was not given that opportunity.

In the circumstances, then, I must find the suspension to be unjustified.

## 2. The decision makers did not attend the disciplinary meeting.

The right to be heard is the right to be heard by the decision maker (*Irvines Freightlines Ltd v Cross* [1993] 1 ERNZ 424, *Quinn v BNZ* [1991] 1 ERNZ 1060 and *Ioane v Waitakere City Council* 2003 1 ERNZ 104).

I have seriously considered this issue as normally the failure of the decision maker to be present to hear the worker's explanation will render the dismissal unjustified. However, on balance in the circumstances of this case I consider this flaw does not vitiate the dismissal so that I must say it was unjustified.

The decision to dismiss Mr Kingi was taken by Mr Tau and Mr Baker, company directors. Neither was present at the final meeting with Mr Kingi and these directors acted on the advice and recommendations of senior staff who did attend the meeting. However, Mr Tau was not a remote decision maker. He had been closely involved in the matter from the beginning of the inquiry and had been present at the first meeting with Mr Kingi on 11 October. He had previously counselled Mr Tau with respect to one instance when he had acted in a confrontational and intimidatory manner towards other employees. Mr Tau was, I find, well placed to consider the report and recommendations for dismissal from the senior management employees that conducted the disciplinary inquiry and to reach a fair and reasonable decision in the matter. These circumstances are therefore distinguishable from the facts of cases cited above.

If I am wrong in this assessment no remedies would have been awarded in this matter as I find Mr Kingi's contribution was total and such as to disallow him remedies. (See Remedies below).

Two other submissions require addressing. It is argued that Mr Kingi was at Placemakers in his private capacity that day. This argument extends to a submission that his conduct there did not bring RML into disrepute.

I do not accept this submission. Mr Kingi went to Placemakers in work time and was clearly identified as a member of RML's staff. Placemakers is contracted to supply Placemakers with materials and Mr Kingi was obligated to conduct himself in a professional manner in his dealings with Placemakers' personnel. In accordance with the principles described in *Smith v Christchurch Press Ltd* [2000] 1 ERNZ 624, I am satisfied that the nexus between the employment and the conduct complained of is clearly established and in particular I find that Mr Kingi's conduct had the potential to bring RML into disrepute with its supplier, Placemakers. The conduct complained of was inimical to the employment relationship and destructive of the trust and confidence necessary to the maintenance of the relationship.

Mr Kingi also submits that the employer, when it made the decision to dismiss him, did not take into account the fact that Placemakers had sent him a written apology. Placemakers did write to Mr Kingi apologising to him for any confusion that may have arisen over the terms of the offer. The evidence shows that the respondent accepted this but did not accept that Placemakers apology

extended to an acceptance on their part that his behaviour was acceptable. The evidence from Placemakers' personnel supports this interpretation of their letter i.e. that Placemakers did not and do not accept that any confusion over the exact nature of the offer warranted the conduct exhibited by Mr Kingi that day.

To close on this point I note that I have found Mr Kingi was not confused about the offer.

## **Determination**

Mr Kingi's suspension was unjustified. To this extent he does have a personal grievance against the respondent.

The inquiry was otherwise thorough and disclosed serious misconduct on the part of Mr Kingi and the decision reached to dismiss him was open to the employer on the basis of the inquiry undertaken.

## **Remedies**

I have found that the suspension of Mr Kingi was unjustified.

However, S.124 of the Act dictates that I consider the extent to which (if at all) the worker contributed to the events that gave rise to the personal grievance. Mr Kingi's contribution to the events that gave rise to his grievance was total and no remedy should be awarded to him.

I note too my earlier stated position, that if I am wrong on the approach I have taken to the fact that the directors of RML did not take part in the final disciplinary meeting, Mr Kingi's contribution would have disentitled him to any remedies resulting from a finding he had been unjustifiably dismissed.

## **Costs**

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott  
Member of Employment Relations Authority