

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Tony Moore (Applicant)  
**AND** Alto Plastics Limited (Respondent)  
**REPRESENTATIVES** Tony Wilton, Counsel for Applicant  
Jonathan Smith, Counsel for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 19 August 2004  
**DATE OF DETERMINATION** 21 February 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] The applicant, a die and machine setter who had been employed by the respondent since February 1982, claims he was unjustifiably, summarily dismissed on 17 March 2004.

[2] Mr Moore seeks reinstatement to his position, reimbursement of all remuneration lost as a result of his dismissal, compensation for hurt and humiliation in the sum of \$5000 and costs incurred in bringing his claim to the Authority.

[3] The respondent denies it dismissed the applicant unjustifiably and declines to agree to the remedies sought by the applicant. Mediation has been attempted but the parties were unable to resolve their differences.

*A brief recent history*

[4] Prior to the incidents which gave rise to the applicant's dismissal, the company became concerned at aspects of the applicant's behaviour following an injury to his neck. The respondent's records indicate that on 13 September 2002 the applicant began a period of rehabilitation on ACC as a result of his aggravating an injury which he suffered in December 2001. On or about 13 January 2003 the applicant underwent corrective surgery.

[5] In March 2003 a Workplace Assessment Report by a registered Occupational Health Physiotherapist recommended that the applicant return to light duties. A structured rehabilitation programme was put in place with the expectation that after starting at three hours per day, the applicant would be fully restored to full duties after some three months.

[6] The respondent's view is that Mr Moore failed to apply himself to the rehabilitation programme and in order to encourage his participation, a meeting was convened on 11 June 2003.

Those to attend were Mr Shaw, the HR manager, Mr McKenzie, the technical manager, Mr Moore and Miss Elliot, the occupational health physiotherapist.

[7] It appears that upon learning who was to be at the meeting the applicant declined to be involved.

[8] In spite of this the applicant was attending work for eight hours a day and was able to change dies. In early July Miss Elliot recommended to ACC that the applicant undertake a Functional Capacity Evaluation. ACC agreed and made arrangements to have this done on 30 July 2003. It did not take place as arranged.

[9] The respondent through Mr Shaw, encouraged the applicant to undertake the evaluation process and a further appointment was arranged for 22 September 2003. In short, Mr Moore refused to attend because the employer had made the appointment without his consent. There was a concern expressed by the applicant that he did not want to pay for the evaluation in spite of a letter to him from Mr Shaw clearly stating that the evaluation would be at no cost to the applicant.

[10] Frustrated by what it perceived as the applicant's refusal to participate in a process to benefit him, particularly given that Mr Moore was a member of the site health and safety committee and a senior union delegate, the company issued a formal instruction for the applicant to attend and participate in the evaluation. This was done in writing on 16 September 2003 in a letter written by Mr Shaw, and I understand the letter advised Mr Moore of the consequences should he continue to refuse to undertake the evaluation.

[11] On 19 December 2003 some performance and behavioural issues arose in respect to the applicant. Mr Pearson, the Christchurch plant manager, advised the applicant of the company's concerns in a letter dated 22 December 2003 and of his right to respond to the concerns raised. Given the approaching Christmas break a meeting was not convened until 23 January 2004. At the meeting the applicant was represented by his union field officer Mr Angel with Mr Hough a site delegate. For the respondent Mr Pearson and Mr Shaw attended. There was no doubt that the meeting was convened in a disciplinary setting.

[12] The issues that were put to the applicant relate to incidents on 19 December 2003 which predominantly focussed on the failure of the applicant to follow an instruction from Mr McKenzie, the technical manager, that the applicant should cease doing any safety checks but to continue working on machine 25 and then later to undertake a die change on machine 29. Among the allegations put was that Mr Moore had told Mr McKenzie to *get fucked* and that he was *losing it*. A further allegation was that he failed to return to attend to machine 25 when he was notified it was giving trouble and instead went to the time clock and clocked out for the day. The applicant responded to these allegations and an adjournment was called.

[13] Following the reconvening of the meeting the applicant was asked if there was anything further that he wished to tell the company or anything in his responses that he wished to adjust. The applicant said there was nothing he wanted to add or change. The respondent advised that in the course of the adjournment they had undertaken some investigation of issues raised by the applicant's responses to the concerns put. The results of those investigations were essentially that in spite of the instruction to discontinue doing safety checks, the applicant had in fact ignored the instruction and carried on, and that the die change on machine 29 would have largely been completed within 3 ½ hours and prior to the applicant's departure for the day. As a result of this the respondent questioned the accuracy of the applicant's account of his activities on the day in question. Finally the respondent notified Mr Moore that regarding his denying responsibility for the state of machine 25 on the day in question, it did not find his explanation acceptable.

[14] The upshot of this meeting was that the company came to the view that it had reasonable grounds that it had been deliberately misled by the applicant and had reason to seriously question the trust they had previously placed in him. Further, the respondent indicated that the breach of trust was sufficiently serious to justify termination of the employment relationship.

[15] As a result of the meeting the respondent issued a final written warning dated 27 January 2004. It is clear from the company's correspondence that while dismissal had been a likely outcome, the respondent had taken into account the applicant's long service and his expressed enjoyment at working with the company staff.

[16] The respondent made it abundantly clear that any further breach by the applicant which entitled it to issue a further warning, would place the applicant's employment at risk.

[17] On 17 March 2004, the applicant was involved in a further incident which gave rise to the respondent invoking the disciplinary process. The incident related to an altercation on the factory floor between the applicant and Mr Higgins, the production manager. The point at issue related to a dispute over payment of wages in cash to a particular employee when, the applicant alleges, the company claimed all employees were being paid by direct credit. The matter need not detain us. What is important is that a loud, verbal interchange is said by Mr Higgins to have taken place in full view and hearing of other employees. Mr Higgins says that in the course of this interchange Mr Moore called him a *bullshitter* and stated that maybe some of Mr Higgins friends up north would be interested to know what he was up to now. Mr Higgins says that this last statement was an attempt to intimidate him. Mr Moore denies this occurred in the manner described by Mr Higgins and that he threatened the production manager.

[18] Mr Higgins cut off the exchange and told the applicant to meet him in the production office *in five minutes*. At this gathering the applicant and Mr Hough, a union delegate, Mr Higgins and Mr McKenzie were present. Mr Higgins says he began by explaining the events of the morning in detail and asked the applicant to respond. The applicant denied making threats and stood up over the table in what was perceived by the respondent as an aggressive manner. It appears when the applicant calmed down the meeting became somewhat diverted as a discussion took place regarding the applicant's use of his time and the importance of die-setters working to schedule to avoid work build up behind machines. As Mr Higgins believed the meeting was making no progress and the applicant was agitated he asked Mr Hough if he would talk to Tony about the issues and Mr Hough agreed.

[19] At 3.30 pm that same day a further meeting was convened at which Mr Higgins asked Mr Moore what assurances he was prepared to give in regard to his work ethic and work output. The respondent alleges that the applicant replied *none* and that *he would do what he had always done, his job*. Mr Higgins says he spoke to Mr Moore about the seriousness with which he regarded the deterioration of the relationship between the company and Mr Moore. The meeting then adjourned and Mr Higgins advised the applicant that a decision had to be made about his future given the seriousness of the incident.

[20] The meeting reconvened at 4 pm with Mr Siva Mudaly, the general manager, Wayne Pearson, the plant manager, and Heather Cogle as minute taker. Mr Mudaly covered the respondent's concern about the nature of his employment relationship and particularly in the light that the applicant had been issued with a final written warning on 27 January 2004. In the course of the meeting Mr Moore admitted that he had called Mr Higgins a *bullshitter* and told him that he did not trust him (Mr Higgins). Mr Mudaly also reminded the applicant that earlier in the day the applicant had also called him (Mr Mudaly) a *bullshitter*. The general manager made it clear that such actions were completely inappropriate and indicated a very serious erosion of the trust and confidence the respondent had in the applicant.

### ***The investigation meeting***

[21] At the investigation the Authority was assisted by counsel for the respective parties. For the applicant Mr Moore gave evidence on his own behalf and Mr Hough and Mr Angel provided their evidence on relevant issues. On behalf of the respondent the Authority heard evidence from Mr Shaw, Mr Higgins, Mr McKenzie and Mr Mudaly. I expressed the Authority's appreciation for their input.

[22] While I found all witnesses to be open and co-operative I found Mr Shaw to be a most sound witness, prepared to make concessions when questioned and a man who understands the need for sound records and correct procedures in a disciplinary setting. Where there is conflict over some events, I have relied on his coherent and detailed evidence in preference to the undocumented, and at times, hesitant recall of the applicant's witnesses.

[23] The evidence for the applicant I found relatively sparse on facts and characterised by attempts to minimise his behaviours. I formed the view that a common tactic of the applicant was to employ diversionary tactics when he was challenged by the respondent's management and a strong tendency to deny even well-substantiated allegations. I found him unwilling to concede on any significant issue where his evidence or views were challenged.

### ***Analysis and discussion***

[24] Mr Wilton submitted the key issue in this case was that Mr Moore's performance formed the basis of the dismissal. As he said, *trust and confidence is a little elusive*. Had the abusive behaviour of the applicant not been the foundation for the respondent's loss of trust and confidence, I believe I would have agreed with him

[25] His submission that poor work performance is not misconduct and could never justify summary dismissal is fully accepted. In this case, however, it was Mr Moore's objectionable behaviour and verbal abuse directed at the respondent's managers which incurred the disciplinary process.

[26] The minutes of the 4.05 pm meeting on 17 March 2004 records that Mr Moore believed he had 90 days to object to the final written warning issued to him on 27 January 2004. This is a particularly odd contention. The applicant was senior site delegate for the union yet, according to the minutes of the meeting, said that he had 90 days to reply to that warning. There is no record in the (uncontested) minutes that Mr Moore indicated that he intended to pursue a personal grievance. Having considered the evidence and observed the applicant at the meeting I find it highly unlikely that an aggrieved Mr Moore would delay his attack on the final warning for over 2 ½ months and only after he had been dismissed for further misconduct.

[27] The evidence was clear that the respondent had concerns about the applicant's performance relating to his die setting duties and his failure to meet the standard change times agreed as he was frequently engaged in tasks associated with his health and safety role and delegate functions. These concerns over performance gave rise to the interchanges between the applicant and the respondent's managers during which the applicant resorted to abuse. However, the disciplinary process invoked by the company on each occasion is available to the employer only where misconduct and not performance is involved.

[28] The two issues that have exercised my mind in this particular case are firstly, whether on the evidence before it and having followed a full and fair investigation into the matter the employer was entitled to discharge the applicant from his employment and whether, in the final stages of the meeting held at 4.05 pm on 17 March 2004, a breach of natural justice occurred.

[29] In respect to the first issue I find that the respondent was entitled in all the circumstances of this case to invoke the disciplinary process on each of the occasions in question, and having followed a full and fair investigation and providing the opportunity for the applicant to respond and have representatives present.

[30] In respect of the second issue my concern centres around the following section of the minutes of that meeting:

*Siva felt the trust between Tony and the Company had been broken, the working relationship has now become untenable and as a result Tony's future employment with Alto Plastics is in serious jeopardy.*

*Tony Moore replied 'are you sure you want to go down that track'.*

*Siva Mudaly replied 'yes' and we have no alternative but to terminate your services with Alto Plastics. Siva asked do you have anything further to say? Tony Moore got up and left the room. John Hough followed him out. The meeting finished at 4.15 pm.*

[31] As I have no reason to regard these minutes as inaccurate, it is clear that the employer through Mr Mudaly failed to ask the applicant whether he had anything to add or whether there was anything he wished to change in his statements of defence in relation to the allegations prior to dismissing the applicant. There is no way that the Authority or the respondent's representatives at the time will ever know whether the applicant wished to add anything or change anything in his defence because he simply was not given the opportunity. What is important is that Mr Moore was denied a final opportunity to prevent his employment being taken from him. To put the matter in context, this procedural breach took place in the face of what Mr Mudaly saw at the time as an aggressive challenge from the applicant to the company's right to consider dismissal however, it remains a breach of natural justice nonetheless.

[32] In the last analysis the Authority is tasked with determining on the basis of its investigation where the overall justice of a case lies. Having considered all the evidence put before me I find the applicant was unjustifiably dismissed. I find this on the sole ground that the respondent, prior to dismissing the applicant, failed to give him a final opportunity to be heard. It did not state its proposed course of action for his final response but dismissed him, then asked if he had anything further to say.

### **Remedies**

[33] As I have found Mr Moore was unjustifiably dismissed his right to remedies needs to be addressed.

[34] While I accept that reinstatement is a primary remedy I am not persuaded in this case that this remedy would benefit either party in the long term. The basis on which the decision to dismiss the applicant was based rests squarely on his behavioural problems in respect to the company's management. In my view the applicant was and is likely to continue to be a disaffected employee and I believe that disaffection has been heightened by the events which gave rise to this determination. I decline in settling this personal grievance to order reinstatement.

[35] In respect to Mr Moore's claim for reimbursement of all remuneration lost as a result of the dismissal, I award him the sum of \$9271.60 gross, this being calculated on the basis of \$13 40 hour weeks at \$17.83 gross and a further \$260 gross which was the weekly bonus paid to the applicant.

[36] Mr Moore claims \$5000 compensation for hurt and humiliation. This is a very modest claim for a man who has been employed since 1982 yet apart from his own he led no supporting evidence

in respect of this claim. I award him \$4000 under section 123 (c) of the Employment Relations Act 2000.

[37] Having determined these issues the Authority is required pursuant to section 124 of the Act to consider the extent to which the applicant contributed to the circumstances which gave rise to his/her dismissal. I find the applicant's contribution was so substantial that I assess his contribution at 100 per cent.

[38] In this unusual case, applying the law and commonsense to the situation I can best do justice to the parties by awarding the applicant a contribution to his costs but no other remedy. In reaching this determination I have sought to acknowledge that the applicant has established a personal grievance based on a claim that he was unjustifiably dismissed without rewarding him for quite blameworthy conduct during the latter part of his employment, and while subject to a written final warning.

### *Costs*

[39] Mr Moore was ably represented by Mr Wilton, his union's solicitor. I reserve leave for counsel to submit a memorandum in respect of travel, accommodation and disbursements. Mr Smith is to have 14 days from the date of submission of the applicant's memorandum to reply.

Paul Montgomery  
Member of Employment Relations Authority