

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Albert Francis Moyle (Applicant)
AND SGS New Zealand Limited (Respondent)
REPRESENTATIVES Philip C Butler, Advocate for applicant
Chris Patterson, Counsel for respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 2 March 2005
SUBMISSIONS RECEIVED 10 March 2005, from the applicant
29 March 2005, from the respondent
DATE OF DETERMINATION 1 April 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Albert Moyle worked for SGS New Zealand Limited (and the prior owner of the business) from July 1984 until his summary dismissal for serious misconduct on 29 April 2004. Mr Moyle says that his dismissal is unjustifiable principally because there was no act of misconduct on his part. He seeks reinstatement as the primary remedy.

[2] SGS says that it justifiably dismissed Mr Moyle for serious misconduct following a fair and full investigation. After Mr Moyle lodged his statement of problem, SGS lodged a statement in reply which included a counterclaim against Mr Moyle. The counterclaim as lodged was for damages, an inquiry into profits, exemplary damages and penalties against Mr Moyle in respect of the behaviour that constituted the serious misconduct. At and before the investigation meeting, SGS withdraw part of the counterclaim.

[3] Despite mediation, the parties were not able to resolve these problems.

Background

[4] Mr Moyle was the Canterbury branch manager based in Christchurch and reported to SGS's business manager (Watson Mortimer) who was based in Wellington. Terms of the employment were set out in a written employment contract dated October 1995 including a job description. There is also Mr Moyle's signed acknowledgement dated 4 April 2001 confirming that he would comply with the SGS code of ethics.

[5] One service provided by SGS for clients is manual wool testing. Clients organise bales into lines or lots of similar type wool to minimise testing charges. SGS then takes samples from the bales of wool at the client's premises or at premises where the client's wool is being stored. The samples are couriered to a testing facility in Wellington, the sample analysed and a certificate containing the results is provided to the client by SGS. The business sector is obviously competitive and clients place great emphasis on obtaining results without delay. Wool dealers may have advanced considerable sums to growers and require certification before they in turn can ship the wool and receive payment. For reasons of service and finance, time is of the essence. Industry practice is also subject to long-standing traditions and those involved build up personal allegiances over the years. Mr Mortimer acknowledged that Mr Moyle is very experienced and skilled and is well regarded in the industry and, except for the issue that resulted in the dismissal, also by SGS. As Mr Mortimer put it, *There is a lot of diplomacy involved in the job. The wool industry is very traditional when it comes to business. If you do not do as you say you are going to do, you lose the business.*

[6] To service some Christchurch clients, SGS had for many years engaged a *coring agent*. That was work originally done by Mr Moyle but, as business grew, SGS decided to engage a casual employee. The position was held by others beforehand, then Mr Moyle's brother (John Moyle) was offered the position which he filled for some years until his employment was terminated about April 2004 in circumstances connected to Mr Moyle's dismissal. The role of the coring agent was to take the appropriate number of samples from the bales comprising the lot or line in accordance with the proper practice and weigh the bales. Testing involves punching a hollow rod into the bale to obtain the samples. It is physically demanding work. The samples are bagged and either held by the client for collection or retained by the coring agent for return to the SGS office. Once returned to the SGS office, the samples are dispatched with documentation for laboratory testing. The documentation includes a bar-coded form with space for hand written details about the client, the number of bales and weight, the sampling date and the sampling fee. It also provides for the signature of the sampler.

[7] John Moyle was also engaged by SGS to sharpen coring tips used by a number of other coring agents around the country.

[8] A practice had developed in the Christchurch office of holding blank sampling record forms pre-signed by the coring agent. Relevant information was then faxed into the office and whichever of the Christchurch branch staff members was available would transpose the information from the fax to the pre-signed form which was then couriered away with the sample when it was received in the office. Several completed forms that relate to SGS's disciplinary investigation were exhibited. Mr Mortimer told me that he believed the hand-writing on the forms was Mr Moyle's. However, it became clear during the meeting that the exhibited forms had been completed by other SGS branch office staff. Mr Moyle acknowledged in evidence that there would be other pre-signed forms that had been filled in by him over the years. Staff also confirmed in evidence that this practice was a long-standing one which had evolved by the agreement of branch staff rather than Mr Moyle's order.

[9] Mr Mortimer knew that Mr Moyle spent some time during the working week doing coring in Christchurch, including at Yaldhurst Wools (an SGS client at the time). He never raised any issue about that with Mr Moyle. Against that background, several factors caused Mr Mortimer to become suspicious of Mr Moyle. Because of a printing error, Christchurch had sampling record cards with duplicated numbers. They were asked by Wellington office to return those cards. Mr Mortimer's evidence is that in December 2003 and January 2004 several requests were made of Mr Moyle to return the duplicate cards but they were not returned. Another employee was requested to return the duplicates and did so on 9 April 2004. Mr Mortimer says that SGS noticed then that the unused

duplicates were pre-signed by John Moyle. Because of complaints about the sharpness of the coring tips, Mr Mortimer was considering alternatives. He also looked at the cost of John Moyle's coring services. His evidence is that he was surprised by the amount given his knowledge about Mr Moyle doing such work. However, that information came to him later in the piece. Mr Mortimer also says that there were discrepancies with cards that caused him to suspect that Mr Moyle and John Moyle were not undertaking the coring work in accordance with core sampling practice. As a result of these suspicions, Mr Mortimer sought and received permission from his managers to engage private investigators to conduct covert surveillance on Mr Moyle and John Moyle.

[10] Surveillance was conducted on Monday 5 April 2004, Tuesday 6 April 2004, Wednesday 7 April 2004 and Thursday 8 April 2004. The activities of Mr Moyle and John Moyle were observed and reported on. SGS's subsequent disciplinary investigation focussed on events on 5 April and 8 April and a two page document headed *SURVEILLANCE REPORT – Yaldhurst Wools* was provided to Mr Moyle as part of that investigation. For 5 April, the two page document reported Mr Moyle arriving at Yaldhurst Wools at 12.23pm (estimated), coming out of the building at 12.41pm with a plastic bag of wool and a sampling rod, going to his car at 12.46pm and driving to another parking space on site, then returning to the car and leaving the premises at 1.14pm. For 8 April, it reports Mr Moyle arriving there at 11.45am, going to the rear doors with plastic bags and a sampler at 11.47am, stabbing wool bales at 11.49am and again at 11.52, talking to a male Caucasian at 11.54am, filling a plastic bag with wool and sealing it at 11.56am and completing a second plastic bag at 12.03, starting a third sample bag at 12.04pm and completing and sealing that bag at 12.10pm, possibly starting a fourth sample bag, going into the building with the samples and the sampling rod at 12.14pm and departing possibly with a passenger at 1.07pm. The report says that there was no sign of John Moyle arriving at the premises *all day*.

[11] Mr Mortimer was also given further surveillance reports on both Mr Moyle and John Moyle. Mr Moyle's home was under observation from 7.00am on 5 April; then Mr Moyle was followed to work; later from work to Wrightons Wool, BOC Gas Ltd, CRT, 585 Wairaki Road then to Yaldhurst Wools. After departing from Yaldhurst Wools, Mr Moyle was followed to AW Taylor Coal Merchants then back to his office. The same day, John Moyle's home was under observation from 7.00am; John Moyle was followed to Waikuku where he was observed with clear plastic bags and a 50cm long metal pole; he was then followed to HD Farm Direct and from there to Clarkville where he exercised his dog; he was followed back to his home where he arrived at 12.03pm and apparently remained until the surveillance ended at 5.00pm. Mr Moyle was also under observation on 6 April. He was seen at 11.15am driving his work vehicle, then lost but the observation was re-established at 11.58am shortly before Mr Moyle arrived at Yaldhurst Wools; Mr Moyle was observed with a plastic bag and a length of pipe and went into the wool shed; Mr Moyle went to his car at 12.12pm with a plastic bag and metal pipe, returned to the wool shed and then left Yaldhurst Wools at 12.40pm; Mr Moyle next went to CRT where he went into the wool shed but came out again within one minute and left; Mr Moyle went to Montreal Street and eventually located and went into unidentified premises then returned to his office. Yaldhurst Wools surveillance on 7 April yielded observations of John Moyle there at 12.09pm and Mr Moyle at 12.20pm when they both sampled wool bales. Mr Moyle left at 1.05pm and John Moyle left at 1.19pm.

[12] Mr Mortimer reviewed the sample report cards relating to the observations. There are two cards for Yaldhurst Wools on 5 April 2004, both for lots of 19 bales. There are three cards for Yaldhurst Wools on 8 April 2004. One card is for a lot of 37 bales, another for a lot of 10 bales and a third for a lot of 9 bales. All five are signed by John Moyle despite him not being present at Yaldhurst Wools on either day.

[13] Mr Mortimer met with Mr Moyle on 15 April 2004 at 8.45am. Mr Mortimer had with him a principal of the private investigation firm (who he introduced) and SGS's HR manager (Cheryl Franklin). Mr Mortimer said that SGS had reason to believe that there are discrepancies with core sampling reports, that it was a serious matter that might result in dismissal and that he needed to make a decision about suspending Mr Moyle. Mr Moyle was encouraged to ring someone for advice or support but said that he saw no need. He asked for information about the allegation but was told that the meeting was for Mr Mortimer to make a decision about suspension and information from the investigation would be provided at a later meeting. Mr Moyle had nothing to say about the proposed suspension so Mr Mortimer told him he was suspended on full pay. Mr Moyle was told of arrangements for the next meeting, asked for his office keys and cellphone and told to clear the car of work possessions. Mr Moyle was told not to contact the staff, nor talk to or visit any clients during the suspension. Mr Moyle handed over his keys and cellphone. Mr Mortimer and the private investigator accompanied Mr Moyle to his car.

[14] Mr Mortimer wrote a letter dated 15 April 2004 to Mr Moyle. It confirms the suspension, acknowledges receipt of company property and sets out arrangements for the next meeting for the purpose of presenting information and documentation from the investigation.

[15] There was a meeting at 10.00am on 16 April 2004. Mr Mortimer had with him the private investigator and a solicitor. Mr Moyle had John Moyle with him. The usual cautions were given by Mr Mortimer who explained the background and the surveillance investigation. SGS noticed that John Moyle appeared to be taping the meeting with his cellphone and, after discussion, it was agreed that could happen. I accept Mr Moyle's evidence that no recording exists because John Moyle did not operate the cellphone properly. Mr Mortimer put the allegation that it appeared that John Moyle had been and was going to be paid for work actually carried out by Mr Moyle. Mr Moyle was given copies of the two page surveillance report and the coring sample cards. There followed an exchange about the substance of the matter. There are notes of that exchange made by SGS which I accept as a substantially accurate account.

[16] Mr Mortimer spoke to a number of other people as part of his investigation. On 15 April he met with Mike Welham, SGS's business manager from 1995 until 2002. Mr Mortimer told Mr Welham that he suspected Mr Moyle of carrying out coring at Yaldhurst Wools and submitting payment to be made to his brother for that work. Mr Welham said that he was unaware of such a practice during his time as manager. On 20 April Mr Mortimer spoke with Bill Russell who was general manager of SGS between 1990 and 1995. Mr Russell's evidence (which I accept) is that he was told by Mr Mortimer that *Albert had been guilty of coring to the benefit of his brother's account*. Mr Russell told Mr Mortimer that he had not been aware of this practice and would not have tolerated it. Mr Russell did tell Mr Mortimer that he was aware of Mr Moyle doing coring work outside of his normal work hours with payment for that work going to the coring agent. Mr Russell said that if staff did an agent's coring work within normal business hours, the coring agent would not be paid as that would mean SGS had paid twice for the same work. One branch manager (Jude Davidson) denied any knowledge of agents being paid when SGS staff had done the work and another (Steve Boyd) knew that Mr Moyle helped out John Moyle on the odd occasion but was unaware of what happened with payment for this work. File notes in respect of these inquiries were sent to Mr Moyle's representative on 21 April 2004.

[17] On 22 April 2004 there was a further meeting between Mr Moyle and SGS at which Mr Mortimer presented his preliminary findings. Mr Mortimer told Mr Moyle that he had falsely and deliberately recorded information intended to mislead SGS in respect of the core sampling cards and monthly reports for the 5th and 8th of April. As a result, SGS had lost all trust and confidence in Mr Moyle. He said that he was *simply unable to accept that the practice ever existed*. That was a reference to Mr Moyle's explanation that he had been helping out coring agents in the

manner observed on the 5th and 8th of April for 18 years. There was an opportunity for Mr Moyle to make any further comment and arrangements were made for a further meeting. At that meeting on 29 April 2004, Mr Mortimer confirmed the decision to summarily dismiss Mr Moyle because he had defrauded SGS.

Justification for the dismissal – the test

[18] In *W & H Newspapers v Oram* [2000] 2 ERNZ 448, the Court of Appeal held that the burden on an employer in cases such as this is of showing that a full and fair investigation disclosed conduct capable of amounting to serious misconduct. The alleged serious misconduct in this case is fraud, to abbreviate Mr Mortimer's words. That view of the behaviour no doubt informed SGS's counterclaim for an inquiry into profits, exemplary damages and penalties. In *Honda NZ Ltd v NZ Shipwrights etc Union* [1990] 3 NZLR 23 the Court of Appeal confirmed that the standard of proof is the balance of probabilities consistent with the gravity of the allegation. Fraud is a grave allegation.

Investigation process

[19] There is strength in the point that Mr Mortimer had a closed mind during the investigation and controlled the process in a manner designed to secure an apparently justifiable dismissal. For example, Mr Moyle was asked to make comment about whether he should be suspended but was given no information about the situation he faced. As a result, Mr Moyle had no real opportunity to influence that decision although there is the appearance of such an opportunity. Realistically, there was no risk to SGS if Mr Moyle had remained at work and I find that the circumstances as known to Mr Mortimer on 15 April did not merit excluding Mr Moyle from the workplace or contact with other staff. The suspension was not part of a fair investigation process; it was simply part of the implementation by Mr Mortimer of his decision to dismiss Mr Moyle for conduct which Mr Mortimer believed from the outset amounted to fraud.

[20] In his statement of evidence, Mr Moyle claimed that Mr Mortimer was biased towards him as a result of some of their earlier interactions. At the investigation meeting, I satisfied myself that most of the incidents amounted to simple but blunt differences of opinion on work issues and did not indicate that Mr Mortimer was biased towards Mr Moyle. However, more must be said about one matter. Mr Moyle came to know that Mr Mortimer had become involved in a relationship with another SGS employee. Derogatory comments by Mr Moyle about that were reported to Mr Mortimer who then phoned Mr Moyle in the later part of 2003. Mr Moyle made clear his disapproval of the situation and Mr Mortimer told Mr Moyle to complain to his (Mr Mortimer's) manager rather than others if he had a problem about it. That is as far as the exchange went. The reaction from Mr Mortimer is understandable but does not indicate any lasting resentment amounting to bias towards Mr Moyle.

What the investigation disclosed

[21] The observation established that Mr Moyle did some coring at Yaldhurst Wools on 5 April and 8 April 2004 and that John Moyle did not go to Yaldhurst Wools on those days. The relevant coring sample cards were signed by John Moyle. The payment forms established that John Moyle had been or would be paid for the work described in the cards. Mr Moyle acknowledged doing the work that the sample cards related to. Accordingly, John Moyle had been and would be paid for work actually done by Mr Moyle. Mr Mortimer knew that coring sample cards were presigned by John Moyle. He also knew that Mr Moyle often did coring work at Yaldhurst Wools and that all the coring sample cards for the last 6 months had been signed by John Moyle. SGS knew through discussion with other staff on 15 April that the pre-signed cards were kept in Mr Moyle's desk to

which they had open access and that whichever staff member was available filled in the sample details on the pre-signed card. Staff said that the system had operated that way for a long time. However, SGS wrongly believed that the cards for Yaldhurst Wools dated 5 April and 8 April had been filled out by Mr Moyle.

[22] Mr Moyle's explanation was that he helped out John Moyle in order to ensure the job was done for the benefit of the client and SGS, that he received no personal benefit from the practice, that previous management knew of the practice and that it was fair as regards John Moyle because he did other work that was not charged for. Mr Moyle described it as a *rob Peter to pay Paul* situation.

[23] Fraud is deception for financial or personal gain. SGS's investigation showed that John Moyle derived financial gain from Mr Moyle's actions. What it did not disclose is any evidence or grounds for believing that Mr Moyle had engaged in any form of deception. To the contrary, SGS was told by the other branch staff that the system of pre-signed cards had been in place for a long time as an administrative convenience. Those cards initiated the payment to John Moyle. Mr Mortimer also knew from his inquiries of Bill Russell that Mr Moyle did coring work for coring agents to help them out but Mr Russell thought that happened outside of normal working hours. He also knew from another branch manager that Mr Moyle helped out John Moyle *on the odd occasion*.

[24] At the investigation meeting, there was further evidence about the practice of helping out coring agents. What emerged was a difference between people about the acceptable extent of helping out. Mr Mortimer, for example, acknowledged that it was okay for SGS staff to help a coring agent to finish off a line even if the coring agent was not present provided that was only a small proportion of the work. In those circumstances, Mr Mortimer thought it acceptable for the coring agent to receive the payment for all the sampling work. I understood Mr Mortimer to have held that same view at the time of Mr Moyle's dismissal.

[25] Assessing the information available to SGS at the time, all that could have been concluded by a reasonable employer acting fairly was that Mr Moyle had for some years, without deception, been proving more assistance to a coring agent than his manager thought appropriate or acceptable. There was no misconduct involved. Mr Moyle has a personal grievance because SGS has not been able to discharge the burden on it in accordance with the law as set out in *Oram*.

Remedies

[26] I am required to consider the extent to which Mr Moyle's actions contributed to the situation that gave rise to the grievance. In the present case, the grievance has arisen because Mr Mortimer had a fixed mind about the nature of Mr Moyle's actions and dismissed him in circumstances where no reasonable employer could have found any misconduct. Mr Moyle did not contribute to the grievance in any blameworthy manner.

[27] Mr Moyle seeks reinstatement. There was some suggestion by Mr Moyle that his position may have become redundant during his absence as a result of the appointment of a South Island operations manager. However, SGS rejected that contention and explained that the decision to make that appointment had no effect on the branch manager's position. The only other potential impediment to that remedy apparent to me was the obvious enmity felt by Mr Moyle towards Mr Mortimer. Since Mr Moyle's dismissal, Mr Mortimer has shifted to a different position within

SGS and it was explained to me that, if he was reinstated, Mr Moyle would not be reporting to Mr Mortimer. I find that reinstatement is practicable and I order SGS to reinstate Mr Moyle to his former position. There should be an opportunity for SGS and Mr Moyle to discuss any practical arrangements before Mr Moyle actually recommences work. Accordingly, Mr Moyle is to recommence work on Monday 11 April 2005 or any earlier agreed date. The effect of the reinstatement order is that Mr Moyle's service for all purposes must be regarded as unbroken and inclusive of the time since the dismissal.

[28] One issue that should be discussed is the extent to which Mr Moyle should assist coring agents with their work.

[29] As an alternative argument, SGS submitted that any reinstatement order should be permanently stayed. There is no reason to permanently stay the reinstatement order and none was advanced. It sometimes happens that the Authority stays its orders pending disposition of any challenge but at this point I cannot say whether or not there will be any challenge to this determination.

[30] Mr Moyle is entitled to be compensated for all lost remuneration and benefits from the date of dismissal up to when he recommences work. He presented information about alternative earnings and it may be necessary for him to provide updated information but I will leave the parties to reach agreement about the quantum. Leave is reserved if there is any difficulty or undue delay in dealing with this.

[31] There is a claim for \$50,000.00 compensation for distress. Dr Peter Miller, a consultant psychiatrist, gave evidence about Mr Moyle's very distressed state and symptoms indicating a *Major Depressive Illness*. There was also evidence to similar effect from Mrs Moyle and Mr Moyle. There is no reason to doubt the accuracy of that evidence. Those established effects call for a substantial award of compensation. An appropriate sum is \$20,000.00 which I order SGS to pay to Mr Moyle.

Counterclaim

[32] It follows from the earlier findings that the counterclaim must be dismissed. Mr Moyle did not breach any statutory duties or contractual duties owed to SGS.

Summary

[33] Mr Moyle was unjustifiably dismissed and has a personal grievance.

[34] SGS is to reinstate Mr Moyle to his former position effective 11 April 2005 or earlier if agreed.

[35] SGS is to compensate Mr Moyle for lost remuneration and benefits from the date of dismissal until he recommences work. Leave is reserved if there is any difficulty with establishing the quantum.

[36] SGS is to pay compensation of \$20,000.00 to Mr Moyle.

[37] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority