

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Daniel John Paterson (Applicant)
AND Woodland Developments Limited
t/a Visual Coatings (Respondent)
REPRESENTATIVES Mark Nutsford, for Applicant
Bruce Debenham, for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 16 May 2006
DATE OF DETERMINATION 19 May 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Daniel Paterson was employed by Woodland Developments Limited trading as Visual Coatings (“Visual Coatings”) in May 2005, as a plasterer. Visual Coatings is an external texturing and painting company which contracts to local building and construction companies.

[2] On 22 July 2005 Mr Paterson says he arrived late at work and was dismissed with one weeks notice. Mr Paterson says the dismissal was unjustified and he seeks reimbursement of lost wages, compensation and costs.

[3] In response Visual Coatings deny the dismissal was unjustified and says that having heard Mr Paterson’s explanations for his lateness and taking into account his employment history to date, the company was justified in making the decision it did.

[4] Section 103A of the Employment Relations Act 2000 provides that whether a dismissal or action was justifiable must be determined on an objective basis by consideration of whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[5] The only witnesses at the investigation meeting were Mr Debenham and Mr Paterson. The evidence has amounted to one person's word against another's, with no supporting witnesses for either, and minimal supporting documentation. There were aspects of Mr Paterson's evidence which he conceded were not correct, and at times he struggled to accurately recall events. However, I do not believe that either man has attempted to deliberately mislead the authority. My observations of both witnesses lead me to conclude that their versions of events are clouded by a lack of any real communication between them. In Mr Paterson's case this has been exacerbated by his youth.

The circumstances leading up to the dismissal

[6] During his employment Mr Paterson was picked up for work and dropped off at the end of the day in the Visual Coatings van.

[7] It was common ground that prior to the dismissal there had been two previous incidents which had been of concern to Mr Paterson's employer. The first was a fuel incident and the second was a graffiti incident.

The fuel incident

[8] On Saturday 25 June 2005 a work colleague, Mr Sam Savage, and Mr Paterson had been out drinking together. On the way home at approximately 12.30am, Mr Savage was driving Mr Paterson's car and suggested they fill the car up with petrol at the petrol station used by the company, by means of the Visual Coatings fuel card.

[9] It was common ground that the attempt failed. Mr Savage did not have the authority to use the fuel card and the card was not for use outside normal business hours. The petrol station attendant immediately contacted Mr Debenham and advised him of what had occurred. On the following Monday morning Mr Debenham viewed the video tapes at the service station and identified Mr Paterson and Mr Savage as being the two culprits.

[10] Mr Debenham says he then spoke with Mr Paterson and gave him a warning. Mr Paterson says Mr Debenham never discussed this incident with him during his employment and never gave him any warnings over the incident. I am satisfied the incident was discussed with Mr Paterson, however, I consider no warning on Mr Paterson's job was given at that time. I accept Mr Debenham's evidence that he told Mr Paterson that it was a misuse of a card and it was wrong. I

also accept he told Mr Paterson that if he had any further evidence of wrong doing he would be taking action.

[11] The words used by Mr Debenham did not put Mr Paterson on notice that his job was in jeopardy.

Graffiti incident

[12] On 8 July 2005 Mr Paterson was responsible for writing offensive words on the side of a house being built by Classic Builders on behalf of its clients. Another employee was responsible for drawing swastika's onto the wooden frame of the house. The words and drawings were seen by the owners of the property (one of whom was jewish and had an elderly jewish parent who was a holocaust survivor and was due to visit) and their 7 year old son.

[13] It was common ground that Mr Debenham received a call from Classic Builders reporting a complaint it had received from the owners of the house. The call was received at about 4.45pm and while most of the staff were present at work enjoying a "shout". Mr Debenham addressed those present and asked who was responsible. It is common ground that Mr Paterson fronted up and accepted responsibility for the words.

[14] Mr Debenham asked Mr Paterson to immediately contact the building company and apologise, which Mr Paterson did. Mr Paterson was also told by Mr Debenham that if he saw the owners on the site he should apologise to them.

[15] As events transpired Mr Paterson did not return to that site. Two weeks later Mr Debenham advised Mr Paterson that the owners the house wanted a personal apology for the offensive words. Mr Debenham drove Mr Paterson to the house at which time Mr Paterson apologised in person. I am satisfied that the owners accepted the apology with thanks and appreciation but made it clear to Mr Paterson that they were not happy with what had happened.

[16] Mr Debenham says Mr Paterson received a warning for this incident. He says the incident nearly cost the business its biggest client. Mr Paterson denies he received any sort of warning for this incident and that Mr Debenham seemed quite relaxed about it.

[17] Mr Debenham says he spoke to Mr Paterson on Monday 11 July 2005, and told him that if there were any further problems he would be dismissed. Mr Paterson told me at the investigation meeting that the conversation did not happen. I am satisfied that it is more likely than not that Mr

Debenham did speak with Mr Paterson on the Monday and that he counselled Paterson about his behaviours but did not provide an unequivocal warning that Mr Paterson's job was in jeopardy.

The dismissal

[18] On 22 July Mr Paterson arrived at work late. He was late because he and the driver of the van who picked him up had gone to PBT Couriers to pick up some plaster and on the way to the work site they stopped at Mr Paterson's house so he could pick up his lunch.

[19] When Mr Paterson arrived at work Mr Debenham was there and asked him why he was late. Mr Paterson admits he lied to Mr Debenham at that time, in an effort to protect Mr Mankelow (the van driver). He told me he did that because he thought Mr Mankelow might get dismissed although he couldn't tell me why he thought that.

[20] Not happy with the response from Mr Paterson, Mr Debenham then asked Mr Mankelow for an explanation for the lateness, which Mr Mankelow provided. Mr Debenham then went back to Mr Paterson who admitted he was late because he had gone via his place to pick up his lunch. Mr Paterson maintained that he had the permission of the person he considered to be his foreman to make the diversion to his home. Mr Debenham did not accept this explanation and took into account the fact that Mr Paterson had not been truthful when he made his initial enquiries into the reasons for Mr Paterson's lateness. Mr Debenham dismissed Mr Paterson with one weeks notice.

[21] Even though he had been given one week's notice, Mr Paterson left the worksite at about 11.00am that day and has never returned.

The decision to dismiss

[22] When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct, but whether the employer had reasonable grounds for believing that there was misconduct justifying dismissal.

[23] Fairness and reasonableness requires that an employee is given an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct. The Court has also set out the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

(NZ (with exceptions) *Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

[24] Mr Debenham accepted at the investigation meeting that he did not follow the required procedure when dismissing Mr Paterson.

[25] The decision to dismiss was based on Mr Debenham's misapprehension that he had previously warned Mr Paterson that he could be dismissed for future problems. I am not satisfied he did that. Standing back and looking at the employment relationship problem objectively, I am satisfied Mr Paterson has been unjustifiably dismissed and remedies are available to him.

Remedies

[26] Section 124 of the Employment Relations Act requires the Authority to take into account the extent to which the actions of the employee contributed towards the situation giving rise to the grievance and, if the actions so require, for the remedies to be reduced accordingly.

[27] Mr Paterson's employment with Visual Coatings extended over a 2 month period. During that time he admitted attempting to use a company fuel card for his own benefit which he accepts was wrong. He also accepted responsibility for the graffiti incident (the words only) and made his apologies as required by Mr Debenham. He was then counselled on his behaviours.

[28] Then Mr Paterson was late for work. Although I have been unable to ascertain the extent of Mr Paterson's lateness with any certainty, I am satisfied that it is more likely than not he was at least 45 minutes late. Mr Paterson told me his usual start time was 7.30am but that by the time he and Mr Mankelow had gone to PBT and then past his house they arrived at work at about 8.15 or 8.30am. Mr Debenham says it was much later than that but was unable to put a time on it.

[29] Mr Paterson's lateness to work followed closely on the heels of the previous two incidents and this contributed significantly to Mr Debenham's decision to dismiss him. I am satisfied that Mr

Paterson must take some responsibility for the situation which developed in his employment relationship with Mr Debenham.

[30] I am satisfied that it is just to reduce the remedies available as a result of Mr Paterson's conduct by 20%.

Lost wages

[31] Sections 123 and 128 of the Employment Relations Act 2000 provides a discretion for the Authority to award either the lesser of a sum equal to the whole of any part of the wages lost or to 3 months ordinary time remuneration.

[32] Mr Paterson attended his doctor on the Monday following his dismissal. He did so because he was suffering a rash on his arms. The doctor advised him to apply for a sickness benefit. At the investigation meeting Mr Paterson told me didn't take his doctors advice.

[33] Mr Paterson was provided with one week's notice. He chose not to work the week's notice and left before he had completed his days work on 22 July 2005. Further, at the investigation meeting Mr Paterson told me he worked for two days for 0800 Labour during the week immediately following his dismissal and that he then took up employment on a fishing vessel which lasted about 3 days. He was unable to provide me with any other details of the steps he took to mitigate his loss, except to say that he was employed by either December or January.

[34] I have concluded from Mr Paterson's responses that he took no further steps to prevent his loss of wages. When asked why he did not continue to pick up work through 0800 Labour he told me he had to wait at the office of 0800 Labour from 6.00am to 9.00am and there wasn't a lot of work, so he didn't go back. Mr Debenham refuted the evidence about the amount of work available at 0800 Labour. He told me he often uses staff through that organisation and he is aware there is a lot of work available.

[35] It is well established that where an employee, who has been dismissed, has made no attempt to obtain alternative employment, the loss of wages will not be as a result of the grievance but, rather, as a result of the employee's failure to mitigate his loss (see *Gorrie Fuel (SI) Ltd v Marlow*, unreported, 21 November 2005, CC 14A/05, Couch, J.)

[36] Mr Paterson chose not to work his weeks notice when the evidence shows he was able to work, as he completed two days work for 0800 Labour in the week following his dismissal. Mr Paterson chose not to return to 0800 Labour and in taking that decision, failed to take steps to mitigate his loss. Mr Paterson then took up employment on a fishing vessel, but was unable to complete the assignment due to sea sickness. He took no further steps until he was employed in either December 2005 or January 2006. On the evidence this is one of those cases where the failure to mitigate means Mr Paterson is not entitled to any order for the reimbursement of lost wages.

Compensation

[37] Mr Paterson gave compelling evidence of the hurt and humiliation he suffered as a result of the dismissal. In considering the remedy of compensation I have reflected on Mr Paterson's relative youth, and the short duration of employment. Having regard to all the circumstances I have reached the conclusion that an appropriate award of compensation, would be \$3,000.00. This will be reduced by 20% for contribution.

Woodland Developments Limited trading as Visual Coatings is ordered to pay to Mr Paterson \$2,400 pursuant to section 123(1)(c) within 28 days of the date of this determination.

Costs

[38] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member of Employment Relations Authority