

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 46/09  
5076597

BETWEEN                      HAROLD PERKIN  
Applicant

AND                              NICK McCABE t/a McCABE  
SILVICULTURE  
Respondent

Member of Authority:      Helen Doyle

Representatives:            Anjela Sharma, Advocate for Applicant  
Nicole Ironside, Counsel for Respondent

Investigation Meeting:    2 December 2008 at Nelson

Submissions received:    2 and 18 December 2008 from Applicant  
2 December 2008 from Respondent

Determination:              14 April 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Harold Perkin commenced his employment with Nick McCabe in his business, McCabe Silviculture, in or about late February or March 2006. He entered into an individual employment agreement with Mr McCabe. Mr Perkin says that he was unjustifiably dismissed from his employment on 4 August 2006 following an incident that occurred when he was planting trees on a hillside on 2 August 2006.

[2] Mr McCabe is the owner, operator and manager of McCabe Silviculture. He does not accept that Mr Perkin was unjustifiably dismissed and says that the incident on the hillside was such that the dismissal was justifiable in all the circumstances.

**The test in s.103A of the Employment Relations Act 2000**

[3] The Authority is required to determine the justification for the dismissal in accordance with the test in s.103A of the Employment Relations Act 2000. The test requires that the Authority determine objectively from the point of view of a neutral observer whether Mr McCabe's actions and how he acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

**The issues**

[4] The issues for determination are:

- Was Mr Perkin warned about his behaviour before 2 August 2006;
- Did the actions of Mr Perkin that were relied on by Mr McCabe amount to serious misconduct;
- Was the decision of Mr McCabe to dismiss Mr Perkin justifiable in all the circumstances?

**Was Mr Perkin warned about his behaviour before 2 August 2006?**

[5] Mr Perkin and Mr McCabe knew each other through karate. Mr Perkin is a fourth Dan black belt and has been involved in the silviculture industry for 19 years and the logging for seven years. Mr McCabe has had a career in forestry for 30 years and established McCabe Silviculture in 2000.

[6] Mr Perkin was employed to work Monday, Tuesday and Wednesday of each week for eight hours per day. The employees at McCabe Silviculture are paid on a piece rate and there is some healthy competition between the workers. Mr McCabe said he had some concerns about employing Mr Perkin in 2006 because of his reputation of being aggressive and difficult. He said that he talked to the other employees about Mr Perkin and there was a degree of apprehension but he said that nevertheless he took Mr Perkin on because he felt that a job would be helpful to him in his particular circumstances.

[7] Mr McCabe said that he talked to Mr Perkin on a number of occasions after his employment about his behaviour when other crew members described him as

unduly competitive, aggressive and felt that he did not work cooperatively. Several employees said in their evidence that the job for them became less pleasant because of Mr Perkin and they did not enjoy going to work.

[8] The issue for the Authority is what steps were taken to address this with Mr Perkin. Mr McCabe said he was sure that Mr Perkin recognised that his behaviour was inappropriate. Mr McCabe said he formally warned Mr Perkin on two occasions. The first of these was when he verbally warned Mr Perkin between March and June 2006 about leaving trees in the gorse which he would have expected him to prune. This behaviour led to another employee, Steve, becoming annoyed because a crew member does not leave trees in a difficult patch for someone else to prune.

[9] I think it is likely that this was the occasion that Mr Perkin recalled he asked Mr McCabe whether he was getting a warning. Mr McCabe confirmed that he was. Mr Perkin did not accept that he was in the wrong on that occasion and refused to apologise to Steve when he was asked to.

[10] After that occasion Steve said in his evidence that his relationship with Mr Perkin deteriorated and that Mr Perkin would intimidate him and bully him. Steve said that he decided to give Mr Perkin *the silent treatment* and simply ignore him in the hope that Mr Perkin would leave him alone. He also said that he complained to Mr McCabe and that Mr McCabe said that he had warned Mr Perkin about his behaviour.

[11] Mr Perkin concluded that no-one would talk to him and that Steve had told them not to. He was not pleased with the situation but was of the view that he went to work to work. Steve did not accept that he had told other employees not to talk to Mr Perkin.

[12] Mr McCabe said that he gave Mr Perkin a final warning after an incident with an employee called Tommy. Mr McCabe said Tommy had complained to him because he felt intimidated and unsettled when Mr Perkin came through the scrub toward him in an aggressive manner after there had been a verbal exchange. Mr McCabe talked to Mr Perkin about the matter and explained to him that he had had a discussion with Tommy and he had the entire crew to think of. Mr McCabe said that Mr Perkin responded that Tommy had started it. Mr McCabe said that he gave Mr Perkin a final warning and, in his written evidence, said that he told him that

if he used threatening behaviour in the workplace on any more of Mr McCabe's employees then he would have to let him go.

[13] Mr Perkin, in his evidence, denied that he used abusive language when spoke to about Tommy but said that he did accept that he did not handle the matter in a suitable way because he should not have reacted to what was being said. He did not recall being given a written (final) warning and said that Mr McCabe told him *don't behave like that again and don't let it escalate like that again*.

[14] The foreman at McCabe Silviculture, Jamie, said that he could recall a discussion with Mr Perkin a few months before the incident on the hillside when Mr Perkin had said he was on a final warning. Mr Perkin could not recall a discussion of that nature with Jamie. I found Jamie to be a straightforward and credible witness. The context of the discussion however was vague and Mr Perkin could not recall it at all. Importantly too for reasons which I shall set out, the process for warnings in the employment agreement was not followed by Mr McCabe. When I take all those matters into account I cannot place much weight on that discussion.

[15] Jamie in his evidence said that he thought Mr McCabe was *softer* on Mr Perkin than with other employees. Jamie's evidence about that was consistent with the view I formed from hearing all the evidence. Mr McCabe appeared to me to be a fair and thoughtful employer who, I accept, wanted to make it clear to Mr Perkin that certain behaviours could not continue. I am not confident that he was actually able to convey that to Mr Perkin.

[16] Mr Perkin's employment agreement contained an excellent process for the issuing of warnings which, if properly followed, would have left him in no doubt as to the unacceptability of his conduct and the consequences of such conduct if it continued. The process in the employment agreement required consisted of a verbal warning (recorded on file), a written warning and then a termination letter.

[17] Mr Perkin was not warned along the lines set out in the employment agreement. In particular, he had never been given, as required by his employment agreement, a copy of a formal written warning setting out the matters of concern and the consequences if there was another incident within seven days of the warning meeting. Had that occurred, it would have made the matter crystal clear to Mr Perkin

in writing that his behaviour was considered inappropriate and a repeat of that behaviour may well have the consequence of dismissal.

[18] In those circumstances I do not conclude that Mr Perkin was warned before 2 August 2006 in terms of his employment agreement with Mr McCabe that a repeat of the behaviour could result in his termination. Mr McCabe did raise concerns with Mr Perkin about his interactions and/or work methods with other employees. Mr Perkin did consider, after one such discussion and clarification from Mr McCabe that he was issued with a verbal warning.

**Did the actions of Mr Perkin on 2 August 2006 that were relied on by Mr McCabe amount to serious misconduct?**

[19] Mr McCabe says that the reason for Mr Perkin's dismissal was for ongoing violence, an inability to follow a reasonable request and to moderate his behaviour. He says that it was the seriousness of Mr Perkin's conduct on 2 August that led to the decision to dismiss being made.

[20] The crew arrived at the site on 2 August 2006 with Mr McCabe to undertake planting. Mr McCabe discussed with the crew the way that the planting should be undertaken and he said he wanted the crew to plant the area of rougher country first.

[21] In Mr McCabe's written evidence, he made no reference to any direct conversation between Steve and Mr Perkin before the incident that caused concern occurred. He said that Mr Perkin heard Steve talking to him and he reacted to that. In his evidence at the investigation meeting, Mr McCabe said that Steve called out to Mr Perkin and said something along the lines that it was unfair that Mr Perkin was in the clean area and they were in the rough area. Steve then asked Mr McCabe to do something about it.

[22] Mr McCabe said that he looked up and could recall Mr Perkin lifting his plant bag and trees falling to the ground and that he threw his shovel down. He said Mr Perkin then stormed across the hill with fists clenched and then downwards towards Steve. He said that Mr Perkin was using offensive and aggressive language. Mr McCabe said that he was sure that Steve was going to be assaulted and so he went and stood by Steve to try and fend off an attack. Mr McCabe said that Mr Perkin came close to Steve and abused him. Mr Perkin then stormed up towards the van and told Mr McCabe that he *can stick your job*. Mr McCabe then said that Mr Perkin

asked him if he could drop his plant bag and spade off to him because he was walking off.

[23] That evening, Mr McCabe went to see Mr Perkin at his home and returned his planting bag and spade. He said that he wanted to check that Mr Perkin had got home safely and to give him an opportunity to give an explanation for his behaviour that morning on the hillside. Mr McCabe said that he asked Mr Perkin if he was going to go to work on Monday because he normally picked Mr Perkin up in the van. Mr Perkin responded that he was intending to. Mr McCabe said that part of the reason for his questioning was to see if Mr Perkin was going to offer an explanation for his actions on the hillside but none was forthcoming. Mr McCabe did not actually ask Mr Perkin anything about the events that morning.

[24] Mr McCabe said that he then went away and thought about the events and the situation. He said that as part of his decision-making process he took into account the safety of his crew and his health and safety obligations. He said that he thought Mr Perkin had been given every opportunity to modify his behaviour which he said was violent, repetitive and aggressive. He said he took into account the workplace was a dangerous one and the serious consequences that could have occurred if he had not been present.

[25] Mr McCabe then telephoned Mr Perkin and arranged with Mr Perkin to meet him at his house on Friday, 4 August 2006. I find it likely that when Mr McCabe arrived at Mr Perkin's residence there was only some limited discussion before he advised Mr Perkin that it was very difficult but he was going to have to let him go. Mr Perkin got his wife Deborah to come outside and had Mr McCabe advise her that Mr Perkin's employment was terminated. There was a dispute about whether there was a discussion about any earlier warnings. Mr McCabe said that he made reference to them but Mr Perkin said that there was nothing said at all about warnings. Having heard the evidence, I find that that it is unlikely that the word *warning* was used although Mr McCabe, in all probability, referred to previous discussions with Mr Perkin about his behaviour. Had the term *warning* been used, then I think it more likely that Mr Perkin would have raised an issue about it at the time.

[26] Mr Perkin said he was told by Mr McCabe that the reason for his dismissal was for a *clash of personalities* although the discussions did focus on the events of

2 August 2006. Mr Perkin said that he was very upset by the dismissal and started to look for another position. He was able to start in a new job the following Tuesday.

[27] The issue as to whether Mr Perkin's actions on 2 August 2006 amounted to serious misconduct has to be determined in terms of what a fair and reasonable employer would have concluded. Mr McCabe observed Mr Perkin's actions on the day in terms of the planting bag and the spade. He observed Mr Perkin's rapid descent towards Steve with clenched fists and overheard some of the language. Mr Perkin then walked off the site and Mr McCabe said he told him to stick his job.

[28] In his evidence at the investigation meeting, Mr Perkin did not accept that he behaved the way that Mr McCabe and other employees said they saw him behave. There was a significant difference in the evidence in that regard. Mr Perkin said that he had had enough of Steve's abuse and advised Mr McCabe that he was not staying to be abused and that Mr McCabe should sort it out. Mr Perkin did not accept that he was running across and down the hillside with clenched fists yelling abuse. Mr Perkin said in his evidence that he did not accept that he threw his planting bag down or his spade. He said the planting bag full of trees would have weighed in excess of 70kgs. Mr Perkin said that whilst he did walk off the job he did not tell Mr McCabe to *stick his job*.

[29] I do not agree with Ms Ironside's submissions that this is one of the exceptional cases of misconduct where there is no need to look beyond the facts or afford an employee an opportunity to explain. A fair and reasonable employer would have put matters to Mr Perkin which were considered to amount to serious misconduct. A fair and reasonable employer would have advised Mr Perkin that the matters were considered serious and dismissal could be an outcome. A fair and reasonable employer would have wanted to hear an explanation as to why Mr Perkin acted the way he did and I accept Ms Sharma's submission that simply leaving the matter for Mr Perkin to give an explanation on 2 August 2006 without actually asking him to was insufficient and unfair.

[30] I have not found it likely that Mr McCabe used the word warning on 4 August 2006 and, if it had been used, Mr Perkin would have had an opportunity to advise Mr McCabe of his view as to whether or not he had been warned.

[31] Mr McCabe had already made a decision to terminate Mr Perkin's employment when he arranged to meet with him on 4 August 2006. There is a conflict in the evidence as to whether Mr Perkin accepted or agreed with his dismissal. I am not satisfied that the evidence goes so far as to suggest that Mr Perkin agreed or acquiesced to the dismissal. It is more probable than not, from the evidence, that he accepted the inevitable. He did not react angrily.

[32] In conclusion, I find that, objectively assessed, the process adopted by Mr McCabe was not one that a fair and reasonable employer would have followed in all the circumstances. Mr Perkin was led to believe that the incident on 2 August 2006 was not treated seriously by Mr McCabe because there was no mention of it made that evening. Mr McCabe confirmed with Mr Perkin that he was intending to return to work the following week. Mr Perkin was then advised that his employment was terminated two days later.

[33] It is sometimes difficult to separate out procedural and substantive fairness and this case is an example of that. Assessed objectively, an important consideration as to whether a fair and reasonable employer would conclude that Mr Perkin's actions on 2 August amounted to a fundamental breach of trust and confidence was whether Mr Perkin had been previously warned about the unacceptability of his conduct. I have not found that Mr Perkin was warned in terms of his employment agreement that further misconduct may result in the loss of his job. Had there been a proper process and an opportunity for explanation then that would in all probability have come to light.

[34] In the absence of an opportunity for an explanation I do not find that a fair and reasonable employer would be in a position to conclude that Mr Perkin was intending to physically assault Steve. He did not do so but it was not put to Mr Perkin for his explanation what language Mr McCabe heard him use as he descended down the hill. That is a matter that goes to the heart of the seriousness of the conduct as to whether it was threatening and violent language as does exactly what was said to Steve when Mr Perkin reached him at the bottom of the hill. Mr Perkin said in his evidence, for example, that he asked Steve *what his problem was* but Steve did not respond.

[35] A fair and reasonable employer would have wanted to hear from Mr Perkin as to what had triggered his extreme reaction. Mr Perkin in his evidence said that he believed that he had been abused by Steve.

[36] I do not find, in the absence of a fair investigation and/or previous warnings in terms of the employment agreement about that conduct, that a fair and reasonable employer would have concluded that the conduct on 2 August 2006 was conduct destructive of the trust and confidence so as to amount to serious misconduct

**Was the decision of Mr McCabe to dismiss Mr Perkin justifiable in all the circumstances**

[37] A fair and reasonable employer is entitled to set appropriate standards of conduct and expect them to be complied with. I accept, objectively assessed, that a fair and reasonable employer in the silviculture industry would have wanted to have a fairly harmonious crew who worked cooperatively and that that would have been part of the decision-making in this matter. A fair and reasonable employer would have considered health and safety issues in making a decision.

[38] In the absence of a fair investigation of Mr Perkin's conduct in this case I do not find it inevitable as is suggested by Ms Ironside that a fair and reasonable employer would have made a decision to summarily dismiss Mr Perkin. A different decision may very well have been reached if there had been a proper investigation with an opportunity for explanation. Mr Perkin has a personal grievance that he was unjustifiably dismissed from his employment and he is entitled to remedies.

**Remedies**

[39] In this case I have not had to decide whether Mr Perkin did what Mr McCabe and the other employees say that they saw him do. I do, however, have to reach some conclusion about this now because I am required, under s.124 of the Employment Relations Act 2000, to consider whether Mr Perkin contributed to his dismissal.

[40] On the balance of probabilities, I conclude that Mr Perkin did contribute to his dismissal by his conduct on 2 August 2006. He placed his planting bag and shovel down at the very least forcefully and then descended at some speed towards Steve. I think it very probable, having heard the evidence, that he was making comments as he went about Steve that could be considered threatening and/or aggressive. Mr Perkin chose not to talk to Mr McCabe about his concern at the way Steve spoke to him but walked off. I find on the balance of probabilities that Mr Perkin's conduct intimidated Steve and made him anxious. It was a unusual and unacceptable reaction to being spoken to. There were health and safety concerns with respect to such a reaction. I

find it less likely that Mr Perkin told Mr McCabe to *stick his job* but if Mr Perkin did make such comment Mr McCabe was left in some doubt as to whether that was made in the heat of the moment. I also take into consideration that although Mr Perkin had not been warned in terms of his employment agreement he had been told in relation to the incident with Tommy not to escalate matters or react inappropriately. Ms Ironside submitted that the fact Mr Perkin expressed no remorse was significant. I have not taken that into account because there was no proper investigation undertaken.

[41] Ms Ironside submitted that Mr Perkin's conduct after dismissal disqualifies him from any remedies. She submits that in November 2006 Mr Perkin advised Mr McCabe that he had brought his personal grievance as a result of a verbal incident that occurred whilst Mr McCabe was in the United States as a means of getting back at the people involved in the verbal exchange. Mr Perkin did not accept that he made that comment and says that he just made it clear that the bringing of the grievance was not a personal issue. I am not going to take that matter into account in terms of remedies.

[42] I consider however that I must apply some reduction to the monetary remedy under s.124 of the Employment Relations Act 2000 but not to the extent that Mr Perkin should be deprived of any remedy in the circumstances. I consider that a 50% reduction is appropriate.

[43] Mr Perkin does not seek to recover any lost wages because he was able to obtain employment the week after his dismissal. Mr Perkin does seek compensation for humiliation and loss of dignity in the sum of \$8,000. Mr Perkin says that he was humiliated because he had been sacked at his home and he also said that he was upset by the lack of a proper process. An appropriate starting point for assessing compensation is \$5,000. Applying the contribution which I have assessed, Mr Perkin is entitled to be paid the sum of \$2,500.

[44] I order Nick McCabe to pay to Harold Perkin the sum of \$2,500 under s.123(1)(c)(i) of the Employment Relations Act 2000 being compensation for humiliation and loss of dignity.

[45] There was a claim for a penalty in Ms Sharma's final submissions but such a claim was not made within the required time under s135 (5) of the Employment Relations Act 2000.

Costs

[46] I reserve the issue of costs. Ms Sharma has until Wednesday, 29 April 2009 to lodge and serve submissions as to costs and Ms Ironside has until Wednesday, 20 May 2009 to lodge and serve submissions in reply.

Helen Doyle  
Member of the Employment Relations Authority