

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Steve Perkins (Applicant)
AND First in Print Ltd (Respondent)
REPRESENTATIVES David Garrett for applicant
Michael Herk for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 15 February 2005
DATE OF DETERMINATION 14 March 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem that has been investigated by the Authority arose out of the initial suspension by the respondent First In Print Limited (referred to as "FIP") of the applicant Mr Steve Perkins and the subsequent dismissal of Mr Perkins by FIP for serious misconduct.

[2] FIP contends that the suspension and the dismissal were actions which were justified in the circumstances and according to legal principle, as the reaction of a fair and reasonable employer to the conduct of Mr Perkins.

[3] Mr Perkins contends the contrary. To resolve his problem he seeks a determination that the actions were unjustified and he seeks monetary awards to reimburse him for lost wages and allowances and compensate him for hurt feelings and humiliation. He also seeks a penalty for the failure of FIP to record the terms of his employment in writing.

[4] The parties have tried to resolve the problem in mediation, as required in a dispute of this kind, but without success.

[5] To begin with, in giving my findings I emphasise that the primary function in a grievance claim of this kind is not to determine whether Mr Perkins did commit serious misconduct. Rather the initial task of the Authority is to determine whether FIP applied a fair and reasonable procedure and as a result was left with reasonable grounds for believing Mr Perkins had misconducted himself. Making findings as to whether there was misconduct by Mr Perkins does however become a function of the Authority at a secondary stage of the investigation, if reached, when consideration is being given to how any unjustified act of the employer is to be remedied. Any contributory fault on the part of Mr Perkins must be balanced up against FIP's wrongs, so that the remedies awarded address both.

[6] From the evidence taken and examined at the investigation meeting I find as follows. Concerns the employer had about Mr Perkins conduct were first raised with him by FIP's General-Manager, Mr Reg Priestly, at a meeting on 14 July 2004. The concerns that he had were;

- used FIP's time to do some work for his own business;
- dealt with FIP's competitors in this regard;
- acted against the interests of his employer by putting a recruitment agency into contact with persons looking for relevant employment in the same type of business;
- used his employers time for attending to personal business, including driving another person to a job interview with a competitor; and
- referred to Mr Peter Mills, the Managing Director of FIP, as "a bit of a wanker".

[7] Mr Perkins addressed these concerns by either denying there was any foundation for them or saying he could not remember relevant details. At the end of the meeting he was suspended on pay until FIP could investigate further. Suspension was imposed without consultation, I find, and was therefore an unreasonable action particularly when, as I also find, Mr Perkins had been given no advice that FIP was going to raise the concerns at the meeting rather than discuss operational matters as had originally been planned between Mr Priestly and Mr Perkins. There was some element of unfairness in the surprise of the meeting and its sudden outcome.

[8] A second meeting to discuss the concerns was held on 23 July. It was attended by Mr Perkins legal representative Mr Garrett and FIP had its representative Mr Herk present. There was also correspondence between them about the employers actions and the matters of concern. On 3 August Mr Perkins was notified by letter that a further meeting with him was required on the following day "to review the allegations and your denial of these". "Areas of concern" to FIP were specified in its letter which also advised Mr Perkins that "full consideration will be given to your explanation before any decision is reached."

[9] The meeting which did take place on 4 August lasted for a only a brief time, about five minutes, before it ended with FIP telling Mr Perkins that he was dismissed. This was confirmed the same day by letter from Mr Priestly who stated that the allegations against Mr Perkins had been substantiated and his explanations rejected, leading to the employers conclusion that he had "utterly destroyed" its trust and confidence in him.

[10] As the dismissal letter was silent in this regard the Authority asked Mr Herk, FIP's representative, what precisely the grounds were that the employer had relied upon to justify the dismissal of Mr Perkins. Mr Herk replied that they were the conduct of Mr Perkins in relation to;

- in an email to a third person, referring to the managing director of FIP as a wanker;
- taking Mr Dan Harvey to Times Colour Print at Warkworth, and not telling the truth when asked by Mr Priestly if he had done so;
- to solicit business for his own company called Solutions in Print, drafting a letter dated 9 July to a printing firm in Australia called GSB Chemicals.

[11] I accept that these were the grounds for dismissal, as Mr Herk was present as FIPs advisor at the disciplinary interviews held on 23 June and 4 August. He had declared the latter meeting to be over and, it can reasonably be inferred, he took part in the decision making.

[12] I conclude that the enquiry carried out by FIP to establish the presence of these grounds was inadequate and did not leave the employer able to reasonably believe that there had been serious misconduct. Referring to Mr Mills in an email as "a bit of a wanker" was wrong and acknowledged to be so by Mr Perkins, but his conduct in this regard justified no more than a

demand for an apology and the giving of a warning.

[13] The drafting and presumably sending of the letter to GSB Chemicals was a more serious matter but I do not consider FIP gave full consideration to Mr Perkins explanation, as it had represented to him in its letter of 3 August it would do. If it had FIP is likely to have regarded the letter as justifying no more than a warning. This is because Mr Perkins had explained that he had told Mr Mills that he had set up his own company which he intended to work full time for at the end of 2004. Also, his company was not directly in competition as a printing firm but was in the business of supplying and servicing print related products such as chemicals and providing training and technical support and service. That is what the letter, which he said he had merely printed off at FIP, is about.

[14] It is the third matter, the taking of Mr Harvey to Warkworth for an interview with a competitor of FIP, that I find best exposes the inadequacy of the employers disciplinary enquiry. On 14 July Mr Priestly asked Mr Perkins if he had been at Times Colour Print that morning with Mr Dan Harvey a printer who was out from England and was looking for a job. Mr Perkins said that he had not and in his evidence Mr Priestly confirmed that he had replied “emphatically no”. Mr Perkins has explained that he did take Mr Harvey, who is an old family friend, to Warkworth but on 12 July and not on 14 July as he was asked.

[15] If FIP had not suddenly brought the 4 August meeting to a close after only five minutes but had done what it said it was going to and had received and considered Mr Perkins explanations, it is likely to have realised that more information about the Warkworth trip was needed and that it could not simply rely on what a visiting sales rep had said casually and in passing about what he had seen. Instead FIP has concluded without foundation that Mr Perkins lied to it.

[16] Mr Harvey was a personal friend of Mr Perkins and he had not been offered a job by FIP at the time he was introduced to Times Colour Print. I consider that the trip was of a private nature undertaken in Mr Perkins own time. FIP claims that he used his employers time and resources to do this but because it did not give Mr Perkins a written contract of employment as it was required to do, FIP cannot point to any clear definition of the hours of work. I accept that there was flexibility in this regard because originally Mr Perkins had been a shareholder/director of an associated business and had then metamorphosed into the role of employee of FIP but without any formal record of the terms of that employment. There was nothing to say that his car allowance could not fund a private trip and the complaint that he had misused his FIP supplied cell phone is simply trivial.

Determination

[17] I conclude that both the suspension and the dismissal were unjustified, the former because of lack of consultation. However remedies are best addressed in relation to the dismissal as the primary or major grievance.

Remedies

[18] I have found that Mr Perkins did do things that would have justified a warning and it follows that his conduct was blameworthy and in part caused the situation that gave rise to the grievance. The degree of that contribution is relatively minor and I assess it to be no more than 20%. The awards to be made are therefore to be reduced correspondingly.

[19] Lost wages are to be reimbursed to Mr Perkins for a period of 13 weeks. The amount is \$18,750 (rounded) but is to be reduced by 20% to \$15,000 and further reduced by the earnings he

did receive in that period of \$7116, to a total of **\$7,884**. Further, Mr Perkins is to be compensated for the loss of the expected benefit of his car allowance which over 13 weeks would have been \$1,890. Reduced by 20%, the amount he is to receive on account of that allowance is **\$1,512** under s.123(c)(ii) of the Employment Relations Act 2000.

[20] I accept the evidence of Mr Perkins as to the distress the unjustified dismissal has caused to him, partly because of what he has witnessed to be the reaction of his wife and family to the situation and partly because he had had a long career as a printer during which he had not been dismissed before, and also because the dismissal left him feeling wronged and rejected. I assess the level of compensation to be \$8,000 which after reduction by 20% means he is to be paid **\$6,400** by FIP under s.123(c)(i) of the Act.

[21] FIP breached s.65 of the Act by not providing Mr Perkins with a written employment agreement, but as there is no penalty provided for that particular breach the Authority cannot order the payment of one under s.133.

Costs

[21] Mr Perkins is entitled to recover a contribution towards the legal costs he has incurred. FIP is to pay him **\$2,250** for the one day relatively straightforward investigation meeting at which he was well represented by his solicitor Mr Garrett.

A Dumbleton
Member of Employment Relations Authority