

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 419/10
5296637

BETWEEN STEVEN PORTER
Applicant

AND D & L INVESTMENTS
LIMITED
Respondent

Member of Authority: Vicki Campbell

Representatives: Gail Bingham for Applicant
Mason Gillies for Respondent

Investigation Meeting: 16 July 2010

Determination: 21 September 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Steven Porter was employed by D & L Investments Limited (D & L) as a Forecourt Attendant. He held this position from 13 October 2008 until he was dismissed on 15 December 2009. Mr Porter was employed to work the graveyard shift at the Shell Service Station on Hewlett's Road.

[2] On 30 November 2009 Ms Linda Patchett, Mr Porter's manager, came in to take over from Mr Porter at 6.45am. On her arrival she asked about some cigarette butts that littered the door way. Mr Porter says Ms Patchett asked "who smokes here". Mr Porter understood Ms Patchett as enquiring about who smoked generally and answered in the affirmative.

[3] Ms Patchett says she asked "who was smoking at the door" to which Mr Porter replied he had. Ms Patchett says she told Mr Porter to pick up the cigarette butts but he told her he didn't drop his there.

[4] Smoking on the graveyard shift and outside the building would be in breach of the D & L's smoking policy and night pay & lockdown policy. Ms Patchett was concerned about this possible breach and advised Mr Dave Gillies, a co-owner of the

business. Mr Gillies investigated the allegations against Mr Porter which led to a disciplinary meeting. At the end of the disciplinary meeting Mr Porter was dismissed. Mr Porter challenges that dismissal which he says was unjustified, and seeks remedies including reinstatement, reimbursement for lost wages and compensation for hurt and humiliation.

[5] D & L does not deny it dismissed Mr Porter. The issue for this determination then, is whether the dismissal was justified, and if not, what (if any) remedies should be awarded.

Relevant terms and conditions of employment

[6] Mr Porter's employment was subject to a written employment agreement. At clause 13 Mr Porter agrees to comply with all the house rules and policies of D & L. He acknowledges that changes may be made to those rules through notification in bulletins either handed to him or displayed in the workplace.

[7] The agreement also included a job description for the Night Shift. The job description which is initialled by Mr Porter requires Mr Porter to follow the night pay & locked door policy.

[8] The night pay & locked door policy is also attached to the employment agreement. That policy prohibits employees from leaving the safety of the building between the hours of 7.00pm to 6.00am for any reason other than an emergency. Emergency is defined as a requirement to evacuate due to fire or any life threatening situation. The only other exceptions to the lock down policy are specified as being when a person is sick or having to go home to attend to an emergency, and is being replaced.

[9] The Progressive Warning System, also attached as part of the employment agreement, sets out the types of behaviour considered to be serious misconduct. The penalty for serious misconduct is stated as being instant dismissal. Two items included in the list are unauthorised absence from the workplace during a graveyard shift, and a breach of the night pay policy.

[10] Another document appended to the employment agreement includes a policy prohibiting smoking during the hours of work.

Was the dismissal justified?

[11] Section 103A of the Employment Relations Act (the Act) requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[12] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion, provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred³.

[13] Prior to the incident which led to his dismissal, Mr Porter's employment was subject to two warnings. The first warning was issued to Mr Porter on 23 February 2009 for failing to comply with D & L's security procedures. This breach was viewed as serious misconduct, however, based on his explanations that others also breached the policy, Mr Porter was issued with a warning rather than dismissal. Mr Porter was warned that any further breaches of the security policy would result in the termination of his employment. Mr Porter has not challenged the warning.

[14] In August 2009 Mr Porter was issued with a written warning for falsifying a company document. After an investigation and disciplinary meeting Mr Gillies was satisfied that Mr Porter had knowingly falsified his timesheet by claiming a sick day when he was not actually sick.

[15] Mr Gillies believed that Mr Porter had taken a pre-planned day off. Mr Gillies believed this because Mr Porter acknowledged that he had previously asked for the day off and was told he could, but only if he could find a replacement. Mr Porter had not found a replacement by the time his shift was due to start. Mr Porter has not challenged the written warning.

[16] On 7 December Mr Porter received a letter inviting him to attend a disciplinary meeting to discuss an allegation that on 30 November he had told Ms Patchett that he had smoked outside the front door. Mr Porter was advised that his actions would be in breach of the company smoking and night pay & lock down policies. Mr Porter was

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Shaw, J, Auckland Employment Court AC 39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

given an opportunity to have a support person with him and advised that dismissal was a possible outcome.

[17] The disciplinary meeting went ahead on 10 December. Mr Porter had his mother Jackie Porter in attendance while Mr Gillies had his son, Mason Gillies, D & L's Human Resources manager, in attendance.

[18] In answer to questions from Mr Gillies, Mr Porter explained the difference between what Ms Patchett asked him and how he had interpreted it. Mr Porter says Mr Gillies was dismissive of his explanation.

[19] Following his explanation Mr Gillies confirmed with Mr Porter his understanding that he was telling him [Mr Gillies] that he did not go outside the service station between 10pm and 6.00am. Mr Porter was adamant that he did not go outside the service station during his hours of work at all.

[20] The meeting lasted about 10 mins and ended with an agreement that Mr Gillies would look at the CCTV footage to establish whether there had been any breaches of the policies.

[21] The meeting reconvened on 15 December. Mr Gillies told Mr Porter what he had viewed on the CCTV footage. Mr Gillies told Mr Porter that the footage showed Mr Porter leaving the lock down area to get newspapers off the delivery man. Mr Gillies told Mr Porter he understood that at the 10 December meeting Mr Porter had told him he had not left the service station at all. Mr Gillies told Mr Porter that after viewing the CCTV footage he was left believing Mr Porter had lied to him at the previous meeting. Mr Porter then told Mr Gillies that he had also left the service station to remove the pre-pay signage but that he had permission to do so.

[22] Mr Gillies believed Mr Porter was in breach of D & L safety policies with respect to leaving the building to get the papers and that Mr Porter had lied to him. He put this to Mr Porter and when asked if Mr Porter had anything to add he said "no". The meeting was adjourned.

[23] When the meeting reconvened Mr Gillies advised Mr Porter that he believed Mr Porter had breached company policy by leaving the confines of the service station during hours of work, when he was restricted to staying inside. In addition, Mr Gillies

advised Mr Porter that he believed Mr Porter had lied to him. Mr Porter was dismissed without notice.

[24] Mr Porter was already subject to two warnings. One of those warnings put Mr Porter on notice that D & L was serious about enforcing its security policies. The night pay & lock down policy was a security policy. Mr Porter was also on notice that a second breach of the security policies may lead to dismissal.

[25] Mr Gillies provided full information to Mr Porter as to the allegations he was asked respond to. Mr Gillies considered Mr Porter's explanations and undertook further enquiries to check Mr Porter's response. The further investigations showed that Mr Porter had not been truthful at the disciplinary meeting on 10 December. This new allegation was put to Mr Porter for his response and his explanation, once again, considered.

[26] Standing back and considering the matter objectively, I find the actions of D & L and how it acted, was how an employer acting fairly and reasonably in all the circumstances of this case would have acted. The decision to dismiss is justified and I can be of no further assistance to Mr Porter.

Costs

[27] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, D & L Investments Limited may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions being lodged within 14 days of receipt. I will not consider any application outside that timeframe without the prior leave of the Authority.

Vicki Campbell
Member of Employment Relations Authority