New Zealand Employment Relations Authority Decisions

Rivers v SCA Hygiene Australasia Limited [2011] NZERA 62; [2011] NZERA Auckland 42 (1 February 2011)

Last Updated: 21 February 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 42 5313921

BETWEEN OWEN RIVERS

Applicant

AND SCA HYGIENE

AUSTRALASIA LIMITED Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Kathryn Beck for Applicant David France for Respondent

29 October and 2 November 2010

1 February 2011

DETERMINATION OF THE AUTHORITY

A. **The decision of SCA Hygiene Australasia Limited to dismiss Owen Rivers was not unjustified.**
B. **Mr Rivers' personal grievance application is declined.**

Employment Relationship Problem

[1] SCA Hygiene Australasia Limited (SCA) dismissed Owen Rivers from his position as a storeman at its Kawerau plant on 2 July 2010. Mr Rivers lodged a personal grievance application about whether his former employer was justified in dismissing him for taking, for his own use, a bucket of bolts that he described as *"rubbish"* and two disused liquid soap dispensers.

[2] SCA support services manager Roger Dallison, who made the dismissal decision, gave these reasons for it in a letter to Mr Rivers dated 5 July 2010:

Through the investigation you clearly stated that you were aware of the Company Policies and Procedures with regard to removing Company property from site, yet on two separate occasions you removed Company property without any authorisation.

On determining that each separate incident of unauthorised possession of Company property amounted to serious misconduct as outlined under the Company Disciplinary Policy and Procedure and after considering your statement, the decision was made to terminate your employment immediately.

[3] Mr Rivers submitted SCA's decision to dismiss him, the reasons given and how those reasons were reached were not the actions of a fair and reasonable employer because, summarised broadly:

(i) SCA managers took an overly mechanistic approach to deciding whether breach of the procedure amounted to

serious misconduct; and
(ii) SCA managers failed to fully and fairly investigate the circumstances, which resulted in people with relevant information not being questioned and created the impression that his explanations were inconsistent; and
(iii) SCA managers' decision failed to properly consider relevant personal circumstances and all the alternatives to dismissal.

[4] Those criticisms were the issues investigated and determined by the Authority.

The investigation

[5] A one day investigation meeting was held at Kawerau. Written witness statements were lodged by Mr Rivers, his union delegate Denis Fahey, SCA maintenance contractors Jonathon Metcalfe and Owen Te Riini, and the following SCA personnel: Mr Dallison, employment relations manager Sue Gibbs, support services supervisor Jacques Botha, procurement supervisor Pauline Mitchell and maintenance leading hand Craig Pilkington. Each witness, under oath or affirmation, confirmed their statements and, where asked, answered questions from the Authority member and the parties' representatives.

[6] The representatives gave oral closing submissions, speaking to written synopses, in Auckland a few days later with the parties listening by telephone conference.

[7] As allowed for under s174 of the Employment Relations Act 2000 (the Act) this determination sets out findings of fact and law and expresses conclusions but does not record all evidence and submissions received.

Had Mr Rivers committed serious misconduct?

[8] SCA has a procedure requiring staff to get prior permission to take away any surplus items which would not otherwise be recycled or reused by the company. Staff wanting such items had to see Mr Botha who, after checking the item was of little or no value to the company, would provide a form labelled 'Authority to remove goods from site'. This was commonly referred to as a "chit".

[9] Mr Rivers did not have a chit for two disused soap dispensers he took from the site some time during May 2010. Neither did he have a chit for the bucket of bolts he had taken out into a staff parking area and put on the back of his truck on 24 June 2010. I make the following findings about those incidents.

The bucket of bolts

[10] Mr Rivers owns a small truck and other workers often asked him to transport items which they had permission to remove from the worksite.

[11] On 23 June 2010 Mr Pilkington had permission to remove a table being taken out of a work area. He asked Mr Rivers to transport the table on his truck. Mr Pilkington had a chit for the table. Mr Rivers checked the chit before taking the table away.

[12] The next day Mr Pilkington tidied up the work area, including bolts removed with the table. He put the bolts in a bucket. Mr Pilkington told Mr Rivers the bolts would be thrown out and asked if he wanted them.

[13] Mr Rivers took the bucket and put it on his truck. The truck was parked on a publicly-accessible part of SCA property. To get to and from that area Mr Rivers had to pass through a security turnstile using an electronic access card.

[14] Shortly afterwards Mr Rivers was approached by Ms Mitchell. She asked if he had removed anything from site recently. Mr Rivers replied that he had taken a table for Mr Pilkington and had a bucket of scrap on his truck. Once Ms Mitchell left Mr Rivers went to look for Mr Pilkington *"to check the paperwork before taking the bucket off site".* He could not find Mr Pilkington so went and got the bucket from his truck and put it back in the work area he had picked it up from.

[15] Ms Mitchell returned shortly after. She asked Mr Rivers if he had removed any soap dispensers from the site. He said he had taken two dispensers.

[16] Mr Rivers then went to see Mr Botha. He intended asking about whether Mr Pilkington's chit for the table also covered the bolts and whether - as he put it in his witness statement to the Authority - "the *soap dispensers were all good, because I hadn't got the official authority form - only his verbal permission"".*

[17] Mr Rivers was briefly able to ask Mr Botha about the dispensers but their conversation was interrupted by a phone call. Before they could continue talking Ms Mitchell came to Mr Botha's office and told both men not to discuss the matter. She then told Mr Rivers he needed to attend a meeting.

The soap dispensers

[18] Ms Mitchell's two inquiries to Mr Rivers on 24 June - whether he had removed anything offsite and then later specifically

asking about soap dispensers -were sparked by an earlier conversation she had with Mr Te Riini. Mr Te Riini had mentioned he had given Mr Rivers some disused soap dispensers.

[19] In September 2009 the company had replaced Ecolab-branded soap dispensers in the workplace with Tork-branded dispensers as the latter were products sold by SCA and used its own liquid soap product. During May 2010 at least eight of those dispensers were replaced with a newer model of Tork-branded dispenser. Both the earlier Ecolab dispensers and the more recently removed Tork dispensers were then kept in a storeroom used by the maintenance contractors, including Mr Metcalfe and

Mr Te Riini.

[20] When the Ecolab dispensers were removed Mr Botha told Mr Metcalfe - in a conversation most likely heard or possibly reported to Mr Rivers - that the dispensers should not be thrown away but anyone who wanted one could have one.

[21] However after the replacement of the first set of Tork dispensers Mr Botha said he had discussed with Mr Rivers why those dispensers could not be taken offsite. The Tork dispensers used soap refills which could only be found locally at SCA's Kawerau plant. If SCA employees were allowed to take surplus Tork dispensers home, there would then be an incentive to also take soap refills from the company's premises.

[22] Sometime during May Mr Rivers asked Mr Metcalfe about getting some soap dispensers. Mr Metcalfe recalled his conversation with Mr Botha in September 2009 about allowing anyone who wanted Ecolab dispensers to have them. For that reason Mr Metcalfe told Mr TeRiini to get eight dispensers from where they were stored and to deliver them to Mr Rivers at the company's store room.

[23] Mr Metcalfe did not specify which kind of dispensers to take. The dispensers Mr Te Riini picked up were not the Ecolab ones but the Tork ones. Mr Rivers said he then put those dispensers on the store room counter so anyone could take one. After an unspecified number of days there were two dispensers left. He put both under the counter during his shift and, as he left work that day, put the two dispensers in his bag and took them home. He intended using one at home and giving one to the Waterwheel Museum, a local community project with which he was actively involved.

[24] During SCA's subsequent disciplinary investigation Mr Rivers returned the two dispensers he had taken.

SCA's argument on serious misconduct

[25] Mr Dallison, in consultation with Ms Gibbs, decided the two incidents - of preparing to take the bucket of scrap bolts and having taken the dispensers - were serious misconduct. SCA submitted they were justified in reaching that conclusion on its behalf because:

> (i) SCA had a clear procedure about removing disused or surplus items. This policy was well-known to Mr Rivers. He had followed it the previous day in helping Mr Pilkington remove a table. As recently as February 2010 Mr Rivers had got a chit himself to remove some old rope.
> (ii) SCA's disciplinary policy made it clear that unauthorised possession of company property was serious misconduct. This was well-known to Mr Rivers because he got a written warning in 2005 for taking some fittings without following proper procedure.
> (iii) Following the recent theft of some copper wire from the site, all employees (including Mr Rivers) had been reminded through a special notice about the consequences of taking company property without authorisation.
> (iv) Mr Rivers' action on 24 June of going to see Mr Botha to ask about a chit for the soap dispensers showed he knew that he had not followed the proper procedure.
> (v) Mr Rivers was in a position of trust as a storeman with a key responsibility being to ensure property did not leave the store without authorisation.

Mr Rivers' actions

[26] Mr Rivers submitted that his knowledge of the policy requiring a chit in advance of removing items from the site and his breaches of that policy did not justify SCA reaching the conclusion that his actions were necessarily serious misconduct.

[27] He submitted that SCA could not justifiably conclude the two incidents went to the heart or root of their employment relationship because of the following particular circumstances:

> (i) he had not removed the bucket from company property; and
> (ii) he had misunderstood or misheard what Mr Pilkington had said about the bucket of scrap; and
> (iii) he mistakenly believed he had permission to remove the soap dispensers brought to him from the contractors' store room by Mr Te Riini.

[28] The evidence, I find on the balance of probabilites, does not support Mr Rivers' submission that he had no intention to remove the scrap bucket from the site without permission and that he took active steps, prior to Ms Mitchell's questions,

toensure he complied with the policy.

[29] This was not a situation like that in the case of *Farmers Trading Co Ltd v Deadman* [1998] 3 ERNZ 128 where the employee - who had taken home some nuts and bolts - had a mistaken but sincere belief that he had permission and had reasonable grounds for thinking so. Mr Deadman had the items with him and clearly visible to his manager at the same time as he asked for, and was granted, permission to borrow a cordless drill to use on a task at home.
[31] Mr Rivers raised the possibility that, as he had a hearing problem known to the

[30] I find a fair employer would reasonably have inferred that Mr Rivers would have taken the bucket of scrap home on 24 June 'but for' the unexpected question from Ms Mitchell. Such an employer would reasonably consider Mr Rivers' later action in bringing the bucket back into the storeroom more likely than not resulted from Ms Mitchell's questions rather than any difference of intention by Mr Rivers. His true intention was evident from having put the items on his truck without having confirmed permission was given to take them. It made, I find, no difference to the reality of that intention whether the truck on which the bucket sat was on or off company property. If he had a genuine or reasonably held belief in the existence of permission to remove the bucket, it is unlikely Mr Rivers would have brought the bucket back from the truck to the storeroom. In fact his own evidence was, at best, that he had doubts on two points which he was going to check with Mr Pilkington before leaving work - firstly, whether Mr Pilkington wanted the scrap or meant Mr Rivers to have it and, secondly, whether it was covered by the chit for the table taken on the previous day. The evidence, I find, established that this was not a situation of the type recognised by the courts in other cases of a workplace where there was a history of permission lacking clear delineation of what was and was not allowed to be removed.[1] There was no previous practice of openly removing goods without authorisation and without censure from responsible supervisors and managers. Mr Rivers knew and confirmed in his oral evidence that his previous warning and the recent mill notice had made him mindful of the permission requirements. His actions contrary to that knowledge did justify Mr Dallison's conclusion regarding serious misconduct.

company (but not corroborated by any independent medical evidence in the Authority investigation), he may have misheard what Mr Pilkington said about what could or should be done with the bucket of bolts. I find it was not unfair for SCA to discount that prospect. It was put forward as a possibility and it was not unreasonable for SCA to effectively discount its probability in light of the immediate context of how the bucket was found and Mr Rivers' knowledge that a chit was required before any item was removed from the workplace to a personal storage point (whether that point be a locker or, as in this case, the deck of a truck parked elsewhere on company land).

[32] The prospect of mistaken belief in permission to take the dispensers is more complex. Serious misconduct has been said to generally involve deliberate actions inimical to the employer's interests but *"will not generally consist of mere inadvertence, oversight, or negligence however much it ... may seem an imcomprehensible dereliction of duty"*[2]

[33] Case law also acknowledges a tendency of *"human nature"* to overlook important systems and procedures in the workplace:[3]

A failure to follow them may, therefore, equally show either dishonesty (serious misconduct) or mere oversight capable of an innocent explanation (not serious misconduct). People are inclined to take short cuts. It would be harsh to dismiss an employee for a single departure from procedures. Before considering dismissal, a reasonable employer will take steps to find out where the failure fits -whether it is the result of deliberate malversation or whether it is quite innocent. An adequately full investigation is needed with regard being paid, among other things, to the history of the employment and what explanation of the apparent facts is more likely to be in character with the employer's previous experience with the particular employee. Such considerations may help to explain ambiguous actions but would be less helpful where the acts speak for themselves. (my emphasis)

[34] Mr Rivers' actions in taking the soap dispensers were not inadvertent. He had them delivered to the storeroom and put two below the counter so they would be available for him to take home - both quite deliberate rather than spur of the moment actions. Neither was taking them in the manner he did a *"single departure from procedures"*. Rather it repeated a breach of a similar nature for which he received a warning in 2005. Although that warning was five years previous, it was not a long period in the context of 40 years service and SCA was entitled to see Mr Rivers' most recent actions as in character with its previous experience.

[35] Even accepting Mr Rivers had not specified which dispensers he wanted and was not responsible for Mr Te Riini innocently bringing the Tork branded ones that Mr Botha had directed be kept, I find nothing in the evidence to support Mr Rivers having a mistaken belief that he was then entitled to remove those items from the site without getting a chit. Such a belief would require him to have understood Mr Botha's comments in September 2009 as authorising the surplus Ecolab dispensers to be taken without a chit. That proposition might have had more weight if there were evidence that the 'chit' policy was more honoured in the breach than its observance (as occurred, for example, in the *Watties* case). There was no such evidence. Rather all the witnesses agreed and accepted the requirement for a chit was well understood and followed. In those circumstances I accept a fair and reasonable employer would have concluded Mr Rivers could not reasonably have held such a mistaken belief.

Did SCA fairly and fully investigate Mr Rivers' actions?

[36] Mr Rivers submitted SCA made multiple failures in the thoroughness of its investigation on whether there were plausible explanations for his actions. These included:

> (i) not rechecking with Mr Botha about what he had said in September 2009 and after the first Tork dispensers were taken down; and
> (ii) not checking thoroughly with Mr Pilkington about his conversations with Mr Rivers about the bucket, including the prospect that Mr Rivers may have misunderstood or failed to hear what was said;
> (iii) not checking with Mr Metcalfe about exactly what Mr Rivers had asked for when he requested soap dispensers; and
> (iv) not checking thoroughly with Mr Te Riini about how he came to deliver the Tork brand rather than Ecolab brand dispensers to Mr Rivers at the store room.

[37] The purpose of that criticism was to identify a flaw in how Ms Gibbs and Mr Dallison viewed the information they got from Mr Rivers. They considered some of what he said was inconsistent with what information they did have from those otherwitnesses. Mr Rivers submitted that if further inquiries had been made, more information from those witnesses would have corroborated more of his explanations and removed the appearance of inconsistency.

[38] However I consider that submission overlooks an important aspect of how Mr Rivers responded to SCA's inquiries. From the outset he acknowledged he had not completed the necessary paperwork for the dispensers.

[39] Ms Gibbs' notes of the 24 June meeting recorded Mr River saying he knew he had to have a chit to remove anything, including scrap, and he understood what he did was not acceptable and apologised. A written statement Mr Rivers prepared for the 1 July disciplinary meeting said he knew the rules and was *"disappointed I let myself down with those soap dispensers"*.

[40] It was a situation to which the principle identified in *Murphy and Routhan t/a Enzo'sPizza v vanBeek* applied:[4]

The point about procedure is that it is required not for its own sake; its purpose is to give the employer a better chance to arrive at the truth than exists without a full and fair inquiry into the facts and circumstances. The procedure then cloaks the employer's decision with the legitimacy that stems from credibility. But if the employer is, in the course of carrying out the procedure, presented with the truth by the employee admitting responsibility for the very activity that the employer to the employee's knowledge was looking into, then it does not matter that no further attempt was made afterwards to follow the procedure. It is the employee's admission that then cloaks the employer's decision with legitimacy. Nor does it matter that there are differences in detail between the admission and the complaint if the differences bear only on the extent or frequency of the apparent wrongdoing but do not contradict the basic premise that it had taken place.

[41] I do not accept Mr Rivers was not told or was not clear about the allegations to which he was responding. He understood from the outset that his employer was inquiring about his possession of the bucket of bolts and the dispensers without first getting chits for them. And it was plain from his own evidence that he knew this because they were the very two matters he said that he went to speak to Mr Botha about on 24 June and before being called by Ms Mitchell to the first of what became the four investigation and disciplinary meetings. I also accept Ms Gibbs' evidence, asmore likely than not, that she did also specify the matters under investigation in both the 24 and 25 June meetings as well as again in the meeting of 30 June.

[42] However if I were wrong in that conclusion I consider this is a situation to which the following statement of the law would also apply:[5]

[56] ... Section 103A requires the Court to consider both elements to standards of fairness and reasonableness although I do not understand Parliament to have altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny. Put another way, even if in some instances over a long process, the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified and that remedies should be awarded accordingly.

[59] To have concluded that the flaws in [the employee's investigative process caused the subsequent dismissal to be unjustified would have been to scrutinise that process minutely, pedantically and without sufficient regard to its overall fairness and reasonableness. Such an approach is not mandated by s103A. Alternatively, even if such an examination may have resulted in a finding that the process was unfair or unreasonable, I am satisfied that even if appropriate standards had been met by the employer, it would nevertheless have dismissed [the employee].

[43] The evidence in the Authority investigation - from Mr Metcalfe and Mr Te Riini particularly - established that some of what appeared to Ms Gibbs and Mr Dallison as inconsistencies in Mr Rivers' explanations, most probably, were not. However those clarifications did not change the substantive nature of Mr Rivers' actions in breach of the chit policy nor, I find, the overall fairness of SCA's disciplinary process which led to its dismissal decision.

[44] Thoroughout SCA's inquiries Mr Rivers was assisted by his delegate, Mr Fahey, who was experienced in such matters. Nothing in the evidence suggested Mr Fahey was anything but thoughtful and thorough in checking how Ms Gibbs and Mr

Dallison dealt with the matter.

[45] Neither was Mr Rivers unjustifiably disadvantaged by his suspension on fullpay on 24 June. While Ms Gibbs announced this was SCA's decision, Mr Rivers and Mr Fahey had the opportunity to discuss that action before she confirmed the suspension while the investigation took place.[6]

Were the personal circumstances and alternatives properly considered?

[46] The third broad element to Mr Rivers challenge to his dismissal was whether his personal circumstances were properly considered and, once the SCA managers reached the decision that he could be dismissed for serious misconduct, whether alternatives to that course of action were fairly explored.

[47] SCA did consider Mr Rivers' long service as a factor in making its decisions. Such service was a *"double edged sword"* as acknowledged in his submissions. After so long with the company he should have been and was fully aware of the chit policy and the risks of breaching it. However his service had, on Mr Dallison's evidence, already be taken into account as a mitigating factor in the issuing of the 2005 written warning at a time when SCA might legitimately have decided to dismiss him.

[48] The final written warning issued to Mr Rivers in October 2005 followed an investigation about 20 fittings he took from the store for personal use. He had filled out company records so the cost for the fittings was charged to another part of the business rather than arranging for it to be paid by a deduction from his wages. At the time, and repeated in his evidence to the Authority, Mr Rivers said this was an error which occurred because he was new to the job, interrupted while filling out the forms, and tired when he completed them at the end of a night shift. However he had raised no personal grievance when the final written warning was issued. Importantly it recorded that the company had decided on the warning as an alternative to dismissal because he acknowledged he was at fault and because of his, then, 35 years of service.

[49] It was Mr Dallison who issued that warning. The circumstances of it were known to him at the time of deciding on the present matter. The evidence of Ms Gibbs and Mr Dallison confirmed Mr Rivers' length of service was considered again in this disciplinary process but SCA was, I accept, entitled to decide that it would not again reduce the potential severity of the disciplinary outcome for that factor having already done so earlier.

[50] Mr Rivers offered the explanation that he had overlooked the chit policy requirements in June 2010 because, at the time, he was under a great deal of personal stress due to an insurance issue. In January a barn burnt down on his property and the insurer investigated whether it might be a result of arson involving Mr Rivers. The insurer ultimately accepted no blame attached to Mr Rivers and paid out the claim but he was deeply upset by the episode over the several months it took to resolve.

[51] It was an explanation he gave in the 1 July disciplinary meeting and which was emphasised in Mr Fahey's submissions to Ms Gibbs and Mr Dallison before they made their decision. Because they did not accept the explanation as a reason not to decide on dismissal does not mean they failed to consider it. However, even if they did not expressly weigh it as a potential factor excusing his actions, it made no real difference to the fairness of SCA's decision. Mr Rivers' distress over the insurance issue was not, I hold, a sufficient explanation for his actions (or rather omissions) because he had followed the chit policy properly in February (after the January fire) and the claim dispute was probably resolved before he took the dispensers in May. His evidence was not specific about the duration of the insurance dispute, just that it went on "for *months".* Overall, objectively assessed, it was not a compelling excuse.

[52] Similarly I do not accept SCA failed to consider alternatives to dismissal. Ms Gibbs gave evidence of considering the prospect of redeploying Mr Rivers from the stores to a factory job. However SCA was not obliged to offer him an alternative job in light of its conclusion that Mr Rivers misconduct was serious and went to the root of its trust in him, which I have found was reasonable in all the circumstances at the time.

[53] Ultimately SCA's decision to dismiss Mr Rivers, assessed against general social and moral standards, would appear overly harsh to many people. The items involved were of little dollar value. He had 40 years service. The job in a small community with few other employment prospects was hugely important, financially and socially. However the Authority is not permitted to substitute its own opinion about an appropriate outcome, but only to assess the particular employer's actions anddecision against the statutory test of justification. As the Employment Court commented in the *Enzo's Pizza* case,[7] there will be situations such as this where other employers might have approached the matter differently and might have given Mr Rivers a third chance, but the Authority cannot require employers to be lenient or kindly. An uncharitable outcome may still be legally justified. SCA did have a procedure which allowed for employees to take scrap or surplus items, mostly with no charge, provided they got prior permission. It had good reasons to enforce that procedure firmly - specifically to prevent pilfering of its property. Mr Rivers knowingly failed to follow it and unfortunately incurred a severe consequence that, I have found, the law allowed SCA to impose in the specific circumstances at the time.

Determination

[54] For the reasons given I find the actions of SCA in investigating Mr Rivers conduct were not unjustified and he does not have a personal grievance. His application is dismissed.

Costs

[55] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so, SCA may lodge and serve a memorandum of costs within 28 days of the date of this determination. Mr Rivers would then have 14 days to lodge a memorandum in reply before the Authority determines costs. No application will be considered outside this timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority

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[1] See for example *United Food Workers v Wattie Foods* [1991] 3 ERNZ 839 at 851.
[2] Makatoa v Restaurant Brands (NZ) Limited [1994] 2 ERNZ 311 at 319 (EC, per Goddard CJ).
[3] Glengarry Hancocks Limited v Madden [1998] NZEmpC 174; [1998] 3 ERNZ 361 at 367 (EC, per Goddard CJ).
[4] [1998] NZEmpC 96; [1998] 2 ERNZ 607 at 620
[5] Chief Executive of Unitec Institute of Technology v Henderson (unreported, EC, AC 12/07, 19 March 2007, Chief Judge Colgan) at [56].
[6] See *Kereopa v Go Bus Transport Limited* (unreported, EC, AC25A/09, 18 September 2009, Judge Travis) at [29].
[7] Above, at 620.
