

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 192/09
5144364

BETWEEN NEIL WILLIAM
 ROBERTSON
 Applicant

AND ENVIROWASTE SERVICES
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: David Hayes, Counsel for the Applicant
 Ray Parmenter, Counsel for the Respondent

Investigation meeting: 15 June 2009 in Hamilton

Determination: 18 June 2009

DETERMINATION OF THE AUTHORITY

[1] Neil Robertson worked for EnviroWaste Services Limited until he was dismissed on 28 October 2008 following an investigation into damage said to be caused by Mr Robertson to a client's property. He says that he was unjustifiably dismissed and has a personal grievance against his former employer. That is based on Mr Robertson's assertion that he did not cause any damage to the client's property. Mr Robertson also says that his manager had dealt with him unfairly over a number of issues during the preceding months. EnviroWaste says that Mr Robertson was justifiably dismissed for serious misconduct.

[2] To resolve this problem I will explain the incident which apparently resulted in damage to the client's property before reviewing EnviroWaste's disciplinary response. Justification for the dismissal must be assessed objectively by considering 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.

Damage to property

[3] Mr Robertson was a truck driver for EnviroWaste. On Friday 3 October 2009 he was tasked with collecting a bin from a timber yard, emptying it at a specified location away from the timber yard and returning it to the yard. Mr Robertson had done this same job perhaps 5 or 6 times previously. He knew that the bin had to be collected from and replaced alongside a hopper about 5 metres away since the bin if loaded on his truck did not fit under the hopper. On Mr Robertson's account of events he collected the bin, emptied it, returned it to the yard and unloaded it alongside the hopper without incident.

[4] Gary Stewart is the general manager of the timber yard. He provided a statement of evidence and was available by phone for questions. His evidence was not taken on oath but I did impress on him the importance of telling the truth. He answered my questions and those from counsel. There is no reason to doubt any of Mr Stewart's evidence. On Friday 3 October he returned to the yard from lunch at about 1pm. He was told by a staff member that there was damage to the hopper. No-one had seen what actually happened. He inspected the hopper and saw a blue paint mark matching the colour of the bin. He concluded that the truck driver had tried to back the bin under the hopper, caused the damage to the hopper then put the bin in the proper place alongside the hopper. Mr Stewart told me and I accept that the blue paint on the plywood side of the hopper is still visible. He also said that there was no doubt that the damage was caused by the EnviroWaste truck rather than any other machinery. Over the weekend following the incident Mr Stewart sent a fax to EnviroWaste setting out his view about what had happened, complaining that the driver had not reported the matter to anyone and saying that the damage would be repaired at EnviroWaste's cost.

[5] Sarah Hearfield is EnviroWaste's branch manager. She received the fax and checked the log book sheet and truck GPS record to confirm that the driver at the timber yard was Mr Robertson. She also went to the timber yard, spoke to Mr Stewart and inspected the damage. From that Ms Hearfield determined that there should be a disciplinary investigation into Mr Robertson's actions. She wrote a letter dated 8 October 2008 to him. The letter appropriately warned Mr Robertson that the incident might constitute serious misconduct because of the damage caused, a failure to report

it and the health and safety risk created. Mr Robertson was asked to attend a meeting on 13 October 2008. That meeting was eventually held on 28 October 2008.

[6] Where the evidence of Ms Hearfield and Mr Robertson about this meeting conflicts I prefer Ms Hearfield's evidence. When questioned, Mr Robertson frequently could not recall matters. On other evidence he was shown to be wrong. Ms Hearfield's recollection was assisted by a letter dated 28 October 2008 written after the meeting that encapsulates what happened during the meeting. During the disciplinary meeting Mr Robertson denied hitting the hopper and causing the damage. He provided some photos taken by him during the week after the incident which show a mark on the side of the hopper where the impact apparently occurred and a new panel on the opposite side. He said that if he had hit the hopper at the alleged impact site it would have broken that panel not the one opposite. He also said that he would have felt the impact if he had hit the hopper. Mr Robertson acknowledged knowing that the bin was to be placed alongside the hopper.

[7] Having listened to Mr Robertson's explanation Ms Hearfield rejected it. She concluded that Mr Robertson hit the hopper with the bin, knew that he had caused damage but did not report it contrary to his express obligations. Ms Hearfield adjourned the meeting to consider what should be done. She decided to dismiss Mr Robertson. John Tate is EnviroWaste's area manager to whom Ms Hearfield reports. He also attended the disciplinary meeting. Ms Hearfield's evidence, which I accept, is that Mr Tate decided he would convey the dismissal decision to Mr Robertson because Ms Hearfield felt a bit intimidated by Mr Robertson's conduct during the meeting. About 15 minutes after the meeting ended Mr Tate went and told Mr Robertson that he was dismissed.

[8] Ms Hearfield wrote a letter dated 28 October 2008 to Mr Robertson setting out the reasons for the dismissal. The letter was couriered to him on 29 October according to EnviroWaste's records. That is contrary to Mr Robertson's evidence, which I do not accept, that he collected the dismissal letter a week or so later. Mr Robertson's evidence is that he believes that dismissal letter was mostly prepared before the disciplinary meeting. Ms Hearfield's evidence is that she wrote the letter after the meeting. I prefer Ms Hearfield's evidence on this point.

Justification for the dismissal

[9] Whether a dismissal is justified must be assessed objectively by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances.

[10] Any employer would have reached the same conclusion as Ms Hearfield that Mr Robertson hit the hopper with the bin causing the damage complained of, knew that he had done so but did not report the incident. Ms Hearfield's investigation of the incident cannot be faulted in any material way. She personally visited the timber yard, spoke to Mr Stewart and saw the paint mark on the hopper. There was no doubt that the truck was driven by Mr Robertson at the relevant time. During the Authority's investigation meeting Mr Robertson suggested that a GPS report confirmed that his truck never got close enough to the hopper to cause any damage. I accept Ms Hearfield's evidence to the effect that the report is not sufficiently detailed to support for that view. Further during the investigation meeting it was suggested that EnviroWaste's no blame policy meant that Mr Robertson could have reported the incident without repercussions so he must not have caused any damage. I reject that inference. Not only am I satisfied that any reasonable employer would have disbelieved Mr Robertson's denials, I find on the balance of probabilities that Mr Robertson did hit the hopper causing the damage complained of and knew that he had done so.

[11] In August 2008 Mr Robertson and another employee unloaded a digger without using a bank and damaged the trailer drawbar. There was a disciplinary process which resulted in Mr Robertson being warned. Mr Robertson's evidence is that he does not recall ever being given a letter of warning dated 5 September 2008 but he acknowledges being told to *buck up my ideas*. He says that he did not know he was on a final warning. Ms Hearfield's evidence, which I prefer, is that she personally gave this letter to Mr Robertson. The last paragraph says:

I have very carefully considered the discussion we have had today and decided to give you a final written warning. This is your absolute last chance. I need to see an immediate and on-going improvement in your performance. This means, working diligently, meeting all of the obligations in your employment agreement and that you follow EnviroWaste policies and procedures (particularly, with regard to health and safety).

[12] With respect to this letter, Mr Robertson says that it is hard to know what the warning was for. I do not accept this evidence – the letter is very clear not just in the paragraph cited.

[13] When reaching the decision to dismiss Mr Robertson, Ms Hearfield had regard to this final warning. The dismissal letter refers to a *formal occasion* where there had been a discussion about Mr Robertson not following policies and procedures. This reference is to the earlier warning. Any employer would have referenced the *absolute last chance* warning as part of deciding to dismiss Mr Robertson given the overlap between the incidents. Mr Robertson says that he improved after being told to *buck up [his] ideas*. That is correct but it does not negate the warning's relevance in the event of subsequent misconduct.

[14] There are complaints about Ms Hearfield's interactions with Mr Robertson over the months before the dismissal. There are several matters related to Mr Robertson's pay as well as instructions to drive a vehicle without a certificate of fitness. I have already mentioned the final warning. All this evidence was led in an attempt to create a picture of Ms Hearfield unfairly hounding Mr Robertson prior to the dismissal. The only matter of any real substance was the warning but there is no reason to call into question its bon fidaes. The other matters are peripheral and even if I accepted Mr Robertson's position about them it does not affect justification for the dismissal.

[15] I have already rejected Mr Robertson's evidence that the dismissal letter was prepared before the disciplinary meeting. He also says that the decision was communicated to him only five minutes after the meeting ended. Ms Hearfield's evidence is that this was done about 15 minutes after the end of their meeting. I prefer Ms Hearfield's evidence. Either way, there was little for further consideration. Once Mr Robertson's denial was rejected, dismissal was the likely outcome. The untrue denial was readily apparent during the meeting with Mr Robertson. That meant Mr Robertson knew that he had caused the damage but did not report it. There is nothing else to indicate that the decision to dismiss Mr Robertson was predetermined. As would any employer acting fairly, Ms Hearfield investigated the incident, gave Mr Robertson an opportunity to explain in light of the possibility of dismissal and then gave unbiased consideration to but rejected the denial.

[16] As noted the investigation showed that Mr Robertson hit the hopper with the bin causing the damage complained of, knew that he had done so but did not report the incident. Mr Robertson breached his reporting obligations, created a safety risk at the timber yard and annoyed the client, all while he was subject to a final warning. A reasonable employer would have dismissed Mr Robertson, as did Ms Hearfield.

Conclusion

[17] Mr Robertson was justifiably dismissed.

[18] Costs are reserved. Any application must be made within 28 days in the usual manner and the other party may then file and serve a memorandum in reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority