

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 247  
5404359

BETWEEN

AJESH SUDH  
Applicant

A N D

GEORDIS WILSON NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Applicant in person  
David Jenkins, Advocate for Respondent

Investigation Meeting: 4 June 2013 at Auckland

Date of Determination: 12 June 2013

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Sudh) alleges that he was unjustifiably dismissed from his employment with the respondent (Geordis). Geordis resists that claim.

[2] Mr Sudh was employed by Geordis as a customs broker. As such, he assisted clients of Geordis with their interface with New Zealand's regulatory authorities (especially Customs) when shipping goods into New Zealand. The work requires accuracy, knowledge of regulatory obligations, and absolute integrity.

[3] Geordis says that Mr Sudh made a "*serious error*" which resulted in New Zealand Customs auditing his work and finding a large number of errors (more than a third of the entries checked). New Zealand Customs opined that Mr Sudh's work was "*not up to any acceptable standard*". Geordis alleged that Mr Sudh was argumentative with New Zealand Customs officials in relation to the errors and that

the combination of Mr Sudh's attitude and his original mistakes seriously undermined Geordis' credibility with New Zealand Customs.

[4] Further, as a consequence of its concerns about the whole issue, New Zealand Customs launched an audit of a large international client of Geordis who Mr Sudh had been working with extensively. That audit gravely undermined Geordis' relationship with its client; while it is speculative, the possibility of losing that client was very real.

[5] As a consequence of the foregoing issues, Geordis initiated disciplinary action against Mr Sudh. This was initiated through a meeting between Mr Sudh and two senior managers of Geordis on 29 October 2012. The nature of that meeting is in dispute. Mr Sudh maintains it was an operational meeting to resolve issues around the errors that Customs had found, yet it resulted in him receiving a written warning dated 30 October 2012, which he protested about.

[6] By letter dated 1 November 2012, Mr Sudh expressed surprise that disciplinary action had been commenced, alleged there had not been a fair process, and pointed out that the meeting of 29 October was not, in his view, "*a disciplinary meeting*". The letter concludes with the following three paragraphs:

*May I ask you to please withdraw this letter immediately?*

*Your action has already jeopardised our agreement of the meeting of 29/10. I will not be pursuing amending Customs Declarations unless you withdraw your "first written warning".*

*Hope good sense will prevail.*

[7] Mr Sudh maintained his threat not to complete the work contemplated to remedy the errors that he had made and consistently refused to do the work required. Conversely, Geordis considered Mr Sudh's claim that the initial written warning was improper and ultimately withdrew it in the letter of dismissal. That letter of dismissal is dated 9 November 2012.

[8] Mr Sudh maintained at the Authority's investigation meeting that his letter of 1 November 2012 raised a personal grievance but that point was not accepted by Geordis with the latter maintaining that the first occasion on which it had become aware of a personal grievance was with the filing of the statement of problem in the Authority on 5 December 2012.

[9] Rather than immediately withdrawing the first written warning, Geordis chose to summon Mr Sudh to a disciplinary meeting to be held on 6 November 2012. The issues that Mr Sudh was to confront at that meeting were an unauthorised absence from the workplace on 1 November 2012 and the errors found by New Zealand Customs, which the Authority has already alluded to. Mr Sudh refused to attend the disciplinary meeting.

[10] Following on from that refusal, Mr Sudh was asked to see Geordis' managing director, Mr Hugh Mackay. Mr Mackay asked Mr Sudh first to engage with the employer's disciplinary process and second to fix the errors that New Zealand Customs had found. Mr Sudh refused both requests. Mr Mackay then indicated that he was considering suspending Mr Sudh; Mr Sudh commented on that suspension and it was finally made in the context of Mr Sudh being told that a failure to follow a lawful and reasonable instruction would be considered to be serious misconduct and could result in dismissal.

[11] A further disciplinary meeting was set for 8 November 2012. Mr Sudh complains about this letter also, alleging that it incorrectly refers to only two allegations when in fact there are more. Notwithstanding that complaint, Mr Sudh attended the disciplinary meeting set for 8 November 2012, claimed that the number of allegations had increased from those referred to in the letter of 5 November 2012 and had his employment terminated effective that day, and confirmed by letter dated 9 November 2012.

[12] The parties attended mediation but were unable to resolve their differences by agreement and the matter then proceeded to the Authority in the usual way.

### **Issues**

[13] The Authority needs to consider and resolve the following questions:

- (a) What was the status of the 29 October 2012 meeting?
- (b) Did the letter of 1 November 2012 raise a personal grievance?
- (c) Can Mr Sudh refuse to engage in the disciplinary process?
- (d) What happened at the suspension meeting?

- (e) Did Geordis explain the allegations?
- (f) Could an employer dismiss in these circumstances?

**What was the status of the meeting on 29 October 2012?**

[14] Mr Sudh maintained in his evidence to the Authority that the meeting was an operational meeting to discuss the outcome of the New Zealand Customs investigations and that it was not a disciplinary meeting. He therefore claims that he was caught off guard, and was treated unfairly, as a consequence of receiving a first written warning as a result of that meeting.

[15] The personnel who attended the meeting were Mr Sudh and two senior managers at Geordis, one of whom was Paul Jelichich who gave evidence to the Authority. Mr Jelichich was involved in the Geordis end of the interface with New Zealand Customs. He told the Authority that he had said to Mr Sudh at the 29 October 2012 meeting that the results of Customs' activities could well be serious and that Mr Sudh might "*lose his Customs PIN number*". Mr Jelichich explained to the Authority that customs brokers, of which Mr Sudh was one, had a personal identification number (PIN) which enabled them to access the Customs website. Without that PIN number, they could not perform their role at all.

[16] It follows that if Mr Sudh was told that he could lose his PIN number as a consequence, he would have been put on notice that the matter was indeed serious.

[17] However, Mr Sudh says that the purpose of the meeting on 29 October 2012 was to sort out the mess created by the errors which Customs says he made. That view is to some extent supported by Geordis' letter of 30 October 2012 where, in the fourth paragraph, the following text appears:

*As agreed in the meeting you will complete the following by COB [close of business] Friday 2 November 2012:*

- *Amendments to the entries on the stats units mentioned in the spreadsheet from New Zealand Customs*
- *Spreadsheet with detailed information on your amendments to Adele and Paul*
- *Overview on all shipments audited in spreadsheet on the values, country or origin, intoterms and stat units*

*All files are to be passed over to Adele for review before amendments are submitted to New Zealand Customs.*

[18] That excerpt suggests an agreement around the rectification of errors and not the initiation of a disciplinary process.

[19] Conversely, the next passage in the letter has the opposite effect:

*As per previous discussions regarding your lack of accuracy occurring in your Customs entries, previous amendments and the above matter that New Zealand Customs have brought to our attention please take this as your first written warning.*

[20] The letter goes on to demand better attention to detail from Mr Sudh and indicate an ongoing review of his performance would be undertaken. As the Authority has noted, this passage suggests that there was already an understanding that Mr Sudh needed to improve his performance because it refers to “*previous discussions regarding your lack of accuracy*”.

[21] While the Authority might have been persuaded that the meeting was disciplinary in character because on the one hand that was the evidence that Mr Jelich gave to the Authority and on the other there is some support for that view in the letter just referred to, clearly Geordis was anxious about the matter and in its final communication with Mr Sudh effectively removed the first written warning, and by implication, confirmed that the nature of this first meeting between the parties on 29 October 2012 was operational rather than part of a disciplinary process.

[22] Clearly, Geordis was concerned throughout this episode to address the errors that had been made and fix them, and address the behaviour which had caused the errors in the first place. That it got those two issues muddled in this first meeting does not invalidate the whole process. As the Authority has already noted, it might have been persuaded that this first meeting was the beginning of the disciplinary process but given that the employer is no longer persuaded that is the case, the usefulness of the Authority making that finding rather falls away.

[23] In a practical sense the, it is appropriate that the Authority acknowledge that Geordis accepts that this first meeting on 29 October 2012 may have proceeded with a mixed message, and accordingly the outcome of this first meeting cannot be seen as part of the disciplinary process.

[24] The Authority must observe that Mr Sudh attempted to rely on the policies and procedures of the employer throughout his evidence and to expect a slavish adherence to those policies and procedures. The reality was that, while the employer had been developing policies, they were not finalised and were not part of the employment of any employee, including Mr Sudh. There is nothing in the employment agreement which refers to the employer's policies and procedures, and nothing which confirms acceptance of those policies by Mr Sudh.

#### **What was the status of Mr Sudh's letter of 1 November 2012?**

[25] Mr Sudh maintains that his letter of 1 November 2012 was the raising of a personal grievance while Geordis resists that and says that the first it was aware there was a personal grievance was when it received the copy of the statement of problem which was filed in the Authority on 5 December 2012.

[26] Of course, raising a personal grievance does not need to be in any particular form, but it does require certain fundamentals to be conveyed. Perhaps the most obvious of those fundamentals is the requirement that, looked at dispassionately, an independent, uninvolved party would acknowledge that the communication constituted the raising of a grievance. While the use of the term personal grievance is not mandated by the law, as the Authority has observed in a previous case: *"the use of that term does focus the mind of the employer recipient"*<sup>1</sup>.

[27] In the present case, Mr Sudh has not referred to a personal grievance. However, he has notified the employer of the nature of the complaint, he has told the employer what steps he wants the employer to take to resolve matters and he has even managed to refer, albeit faintly, to the prospect that the matter might need to be referred to *"a Court of law"*.

[28] While some of the elements required to notify a personal grievance are present, looking at the letter in its totality, the Authority is unable to conclude that it constitutes the raising of a personal grievance, as Mr Sudh maintains. This is first because the tone of the letter does not appear to the Authority to unequivocally establish that a personal grievance is raised. Rather, the letter appears to be a protest about a particular step which Geordis has taken.

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<sup>1</sup> *Vinod Jaura v. Ministry of Social Development* [2013] NZERA Auckland 122 at para.[14]

[29] The view the Authority has formed of the letter is confirmed by the explicit threat at the conclusion of the letter that Mr Sudh will not be undertaking the remedial action required (to fix the Customs problems) until the employer's first written warning is withdrawn.

[30] Even accepting for the sake of argument that Geordis got that first written warning absolutely wrong, and the Authority's own view is that that puts the matter far too strongly, Mr Sudh's behaviour in refusing to do what he is paid to do by Geordis is not good faith behaviour and a thoroughly inappropriate stance for either party to an employment relationship to take.

[31] Section 4 of the Employment Relations Act 2000 (the Act) must inform all employment relationships and the behaviour of the parties in them and a threat by one party to refuse to perform its obligations under the employment agreement unless the other party did or refrained from doing some other action, is simply completely inappropriate.

[32] On balance then, given the clear threat in Mr Sudh's letter of 1 November 2012, the Authority is not persuaded that it can appropriately be considered as the raising of a personal grievance. Even if the Authority's conclusion is mistaken in that regard, Mr Sudh has certainly gone too far in threatening his employer with consequences, if he does not get his own way. Aside entirely from Mr Sudh's obligations to behave in good faith, by seeking to threaten his employer in this way, he places himself at risk of disciplinary consequences, which is precisely what happened.

### **Can Mr Sudh refuse to engage in the disciplinary process?**

[33] As a consequence of Mr Sudh's conviction that the employer's first written warning was wrong headed, he not only threatened the employer that until the warning was withdrawn he would not perform the corrective action agreed, but he also refused to attend the first disciplinary meeting proposed by Geordis, after the exchange between the parties concerning the first written warning.

[34] In *Radius Residential Care Ltd v. McLeay* [2010] ERNZ 371, Judge Ford concluded that the refusal of an employee to engage with an employer during the disciplinary investigation contributed to the employee's dismissal and that the duty of the parties under s.4 of the Act (the good faith section) "*extends throughout the*

*entirety of an employment relationship including during the course of any disciplinary proceedings”.*

[35] His Honour goes on to say that the Court could not accept a refusal by an employee to communicate with an employer in a disciplinary context is “*appropriate*”.

[36] In the same general connection, Chief Judge Colgan said in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 in the context of talking about an employer’s duty in a redundancy situation, that the employer must be able to establish it had complied with its statutory obligations of good faith in s.4 “... *because a fair and reasonable employer will comply with the law*”. It seems to the Authority to follow that the proposition could apply equally well to the employee: that is, that a fair and reasonable employee has an absolute obligation to be “*active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative*”: s.4(1A)(b) of the Act.

[37] On that footing then, the Authority is satisfied that by refusing to attend the disciplinary meeting he was summoned to for 6 November 2012, Mr Sudh was not complying with the law because a good and fair employee will engage actively and constructively with their employer, even in a disciplinary context.

#### **What happened at the suspension meeting?**

[38] The Authority heard from Mr Mackay, the managing director of Geordis in New Zealand, who conducted the suspension meeting with Mr Sudh. Mr Mackay was a persuasive witness. Having been told by his senior managers that Mr Sudh was refusing to attend a disciplinary meeting set down for the following day, Mr Mackay determined to engage with Mr Sudh personally. He sought to persuade Mr Sudh first of all to engage with the employer’s disciplinary process, and secondly to withdraw his threat that he would not fulfil his employment obligations until the employer had withdrawn the first written warning.

[39] Mr Mackay got neither of those assurances from Mr Sudh and accordingly indicated to Mr Sudh that he needed to contemplate placing Mr Sudh on suspension while those matters were investigated and progressed.

[40] Although Mr Sudh does not plead this particular issue explicitly, for the avoidance of doubt, the Authority is satisfied that Mr Sudh was given a proper opportunity to be heard on the suspension before it was imposed and that the employer otherwise complied with its obligations in relation to the suspension.

[41] Ironically, it was the imposition of the suspension on Mr Sudh that encouraged him to engage with the employer in its disciplinary process because Mr Sudh did attend the second disciplinary meeting he was summoned to, the one held on 8 November 2012, although Mr Sudh complains about the adequacy of that meeting as well.

### **Did Geordis explain the allegations?**

[42] Mr Sudh maintains that the number and extent of the allegations kept changing and that he was not sure what he was answering. Geordis denies this claim and maintains that the allegations were always clear. Mr Sudh pointed to various typographical errors in some of Geordis' communications to him and while they are acknowledged, the Authority is not persuaded that any of them have any bearing on the matters before the Authority.

[43] Nor does the Authority accept Mr Sudh's contention that he was somehow confused about the allegations he was confronting. He claims the letter summoning him to the 8 November 2012 disciplinary meeting (which he did attend) referred to two allegations whereas in fact there were four discussed at the disciplinary meeting. In effect, Mr Sudh is saying he was advised of two allegations in the 5 November 2012 letter summoning him to the disciplinary meeting, but when he got to the meeting there were four allegations.

[44] This is simply nonsense. The 5 November 2012 letter begins with an opening paragraph identifying the nature of the broad allegations he faced (and had always faced from the beginning of the process), but identifies that in respect of one of those broad allegations, the failure to comply with a lawful instruction, there were two separate allegations, that is, two allegations of failing to comply with a lawful instruction.

[45] Then the letter goes on to list precisely what is alleged in four numbered points. Mr Sudh simply juxtaposes the two allegations of a failure to comply with a

lawful and reasonable instruction and the four numbered points, and accuses Geordis of adding to the allegations at the disciplinary meeting.

[46] The Authority is absolutely satisfied that Geordis' letter of 5 November 2012 correctly sets out its complaints about Mr Sudh's behaviour. A perusal of the letter would indicate to any reasonable person what it was that Geordis was complaining about and what it was seeking responses to.

### **Could an employer dismiss in these circumstances?**

[47] The Authority is satisfied that it is available to Geordis to dismiss Mr Sudh in the circumstances of this case because a fair and reasonable employer could conclude that Mr Sudh had been guilty of serious misconduct by refusing to participate in the employer's disciplinary process at first instance, by refusing to obey a lawful and reasonable instruction, and by being absent without leave on 1 November 2012.

[48] Interestingly, the employer accepted Mr Sudh's argument concerning the first written warning and withdrew not only the warning but also the complaint issue raised as a consequence of the Customs audit, from consideration. In effect, while the employer maintained that Mr Sudh was still responsible for the serious mistakes identified by New Zealand Customs, it withdrew that complaint from the issues justifying the dismissal, because of the possible flaw in the set up of the first meeting on 29 October 2012.

[49] Mr Sudh argued to the Authority that it was a bit tough of Geordis to use his day's absence without leave as one of the bases for dismissal. If that were all the employer relied upon, Mr Sudh might be right, but the other issues the employer relied upon were of more moment. His refusal to obey a lawful and reasonable instruction is a serious matter that goes to the heart of the employment relationship as is his refusal to engage with the employer so that the matter could be progressed.

[50] While it is no more than hypothetical speculation, it is difficult to avoid the conclusion that if Mr Sudh had acted in good faith throughout the engagement with Geordis, promptly fixed his errors and engaged willingly with his employer in its investigative and disciplinary process, the outcome might well have been different. But given Mr Sudh's approach to the matter, it is difficult to see how Geordis could have formed any other conclusion than the one it did.

**Determination**

[51] Mr Sudh's claim fails in its entirety for the reasons already advanced.

**Costs**

[52] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority