

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 215/10
5149640

BETWEEN KEN SAMUELS
 Applicant

AND LEWIS EQUIPMENT
 COMPANY LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Blair Edwards, Counsel for Applicant
 Gary Conway, Advocate for Respondent

Investigation Meeting: 21 September and 18 December 2009

Submissions received: 22 January 2009 from Applicant
 11 March 2010 from Respondent

Determination: 6 May 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Ken Samuels, says he has been unjustifiably disadvantaged and unjustifiably dismissed by the respondent, Lewis Equipment Company Limited (“Lewis” or “the company”). He seeks \$20,000 compensation and lost remuneration.

[2] The respondent has filed a counter claim. Mr Conway, the General Manager of the respondent, sought damages from Mr Samuels, totalling \$61,647.51. It is alleged that the respondent incurred loss as a result of the damage to the slew bolts which was due to Mr. Samuels using the Stealth 8 and over torquing the bolts.

[3] Mr Samuels has been employed in the crane business for thirty years. On 8 December 2007 he started employment with Lewis (who took over his previous employer, Verticon) as Service Manager. He was dismissed on 9 October 2008.

[4] The parties did not have a signed employment agreement and no job description had been provided for Mr Samuels.

Employment Warning

[5] On 25 August 2008 Mr Samuels was asked to go upstairs for a meeting. He was not told what the meeting was about nor was he given the opportunity to obtain a representative. Present at the meeting was Mr Conway and Mr Rick Willows, the Global Operations Manager. He was given a number of allegations, which he denied. He was told he would be issued with an employment warning.

[6] The major allegation and the one which Mr Conway said was the catalyst for issuing the written warning was that Mr Samuels had used purchase orders to buy non approved items, namely jasmine tea.

[7] On 12 June 2008 Mr Conway had had a physical altercation with the then Operations Manager, Mr Shane McBirney. Mr Samuels was alleged to have helped Mr McBirney come onto Lewis premises to remove his property without asking permission. He had approached a new employee, Mr Gavin Johnson, and told him about getting a tool allowance and that Mr Johnson should ask for one. He had told a Mr Malitai that Mr Peat had resigned when he had been instructed to keep it confidential. Many of these assertions were disputed by Mr Samuels.

[8] Mr Samuels did not have a proper opportunity to provide responses. He had not been given notice of the meeting and had had no opportunity to obtain a representative. The employment warning was unjustified.

Dismissal

[9] The dismissal relates to Mr Samuels working on a Lewis crane hired to Hawkins, which was being erected for Hawkins by a sub-contractor, GT Rigging Ltd. Mr Samuels, at the request of GT Rigging, after he finished work with Lewis on Saturday 6 September 2009, went to the crane erection site taking an Avanti 5 torque

wrench owned by Lewis with him in order to torque the bolts on the crane. Unfortunately, the bolts elongated.

[10] Mr Conway dismissed Mr Samuels for serious misconduct. He said the reason for the termination was the actions on 6 September.

[11] Mr Conway said he had phoned Mr Samuels late in the afternoon and found out the bolts were stretching. He said he did not know Mr Samuels had the Avanti 5. Mr Samuels maintains that Mr Conway did know as he told him he was using it in the course of a telephone call. I have Mr Conway's cell phone records for 6 September. They show he made one call to Mr Samuels in the late afternoon. Mr Samuels says there were two phone calls, the first earlier on in the day. At the time of the first call Mr Conway had asked how it was going and Mr Samuels told him it was ok and that he had the Avanti 5. I asked for phone records for the workplace for 6 September but these were not supplied. I accept Mr Samuels' evidence that there were two phone calls from Mr Conway.

[12] Despite his later protestations that Mr Samuels was on the site illegitimately Mr Conway agreed that when he spoke to Mr Samuels and was told the bolts were stretching he told Mr Samuels to carry on and find out what the problem was. Mr Conway did not tell Mr Samuels there was a problem with his being on the site nor did he issue an instruction to leave.

[13] The matter seems to have become problematic when Mr Conway became aware of the extent and cost of the bolt elongations.

[14] On 7 September Mr Samuels, on the instructions of Mr Conway, removed the damaged bolts. There were attempts to ascertain how and why the problem had occurred, which included telephoning the United States.

[15] Mr Conway eventually came to hold the view that a different tool, a Stealth 8, had originally been used to torque the bolts and that that had caused the damage.

[16] Mr Conway maintains that Mr Samuels' assertion that the Avanti 5 caused the bolts to stretch is false. The bolt damage could only have been caused by the Stealth 8 spanner belonging to GT Rigging. In his Statement in Reply he said that Mr

Samuel's statement about the use of the Avanti 5 was "*a cover-up to protect people from the inevitable bill for these damages.*" The Statement also says "*The bolts have clearly been over torqued and Ken Samuels involved.*"

[17] In his closing submissions Mr Conway said Mr Samuels had caused his dismissal through deliberate deception and dishonesty. This was because Mr Conway believed that Mr Samuels may not have been the person who mistreated the bolts but nevertheless he believed "*Ken Samuels decided to cover for his mates and had held that line.*"

[18] In his closing submissions Mr Conway asserted that Mr Samuels had caused his dismissal through deliberate deception and dishonesty. This was because Mr Conway believed Mr Samuels may not have been the person who mistreated the bolts but "*Personally I believe Ken Samuels decided to cover for his mates and had held that line.*"

[19] On 11 September Mr Conway told Mr Samuels he had taken the Avanti 5 without permission. Mr Samuels was upset by this allegation and visited his doctor who gave a medical certificate, which he gave to Ms Hodge, Mr Conway's secretary; and told Mr Moore about the doctor's diagnosis of stress.

[20] The allegations that were put to Mr Samuels on 19 September were that he had used the Avanti 5 and the company car without proper authority and that taking Lewis equipment without proper consent was a serious breach of company policy.

[21] Mr Samuels was not represented at the meeting of 19 September, at which the medical certificate Mr Samuels had for stress was also discussed and Mr Samuels was advised that stress was a workplace hazard, he should not be at work and needed to get medical clearance.

[22] Mr Samuels said he had asked Mr Charlie Moore, the Operations Manager, about taking the tool. There was a dispute about whether Mr Moore was Mr Samuels' manager. Mr Conway said Mr Moore earned less than Mr Samuels and that he – Mr Conway – was Mr Samuels' manager. Mr Conway's notes of the meeting, which Mr Samuels disputes, indicate that Mr Samuels said he had walked past with Mr Moore

with the spanner and thought that was enough. In the absence of any clear policy Mr Samuels regarded Mr Moore as his manager.

[23] On 26 September Mr Conway sent a letter to Mr Samuels asking him to attend a formal meeting to discuss a number of issues. These were:

- Use of the company car for personal purposes
- Removing company property without authority
- Using the car and equipment for third parties without authority
- Partaking in the erection of a tower crane with Lewis tools without proper authority implicating Lewis
- Failing to notify his manager that he was medically unfit to work and continuing to work
- Not responding to an urgent request for assistance
- Failing to resume duties on 23 September as per the medical certificate and choosing to see his doctor one day later
- Failing to provide a written statement regarding his actions on 6 September.

[24] On 30 September Mr Samuels notified a personal grievance and on 1 October a meeting was held with Mr Samuels and his legal representative.

[25] Mr Conway wrote to Mr Edwards saying he had carefully considered Mr Samuels' explanations and found them unsatisfactory, but would wait to get a written explanation before making a decision.

[26] On 6 October Mr Edwards provided a written response and attached a statement from Mr Samuels. In brief, he said Mr Samuels' actions had been authorised by Mr Moore and Mr Conway had been informed on 6 September regarding the Avanti 5. The medical certificate had been given to the secretary and Mr Moore had been told about the stress diagnosis. Mr Samuels had been unable to get a doctor's appointment earlier than 24 September. Mr Samuels had not received any messages regarding urgent work. Furthermore, he was off work that weekend and not on call and had changed his mobile phone at that time. Mr Edwards noted that although reference was made to company policies and guidelines, none had been supplied and he requested copies. No such documents were ever made available.

[27] Mr Samuels said as far as he was concerned he was helping Lewis to get the crane erected.

[28] In the letter of dismissal Mr Conway listed Mr Samuels' explanations and said they were unsatisfactory and on that basis concluded that Mr Samuels had committed serious misconduct, his behaviour had had very serious consequences and that he was summarily dismissed.

[29] At no stage during the disciplinary process did Mr Conway put to Mr Samuels the fact that he believed Mr Samuels was aware that the Stealth 8 had been used and had caused the damage to the bolts and that Mr Samuels had deceitfully covered that up.

[30] It was evident at the hearing that the reason for the dismissal was fundamentally the belief held by Mr Conway about the cause of the damage and his view that Mr Samuels had connived in covering up the cause of the damage.

[31] On that basis, the dismissal was unjustified. The allegation was not put and Mr Samuels had no opportunity to address it.

Remedies

[32] Mr Samuels gave evidence of the upset caused by the issuing of the warning and his dismissal. The compensation award is a global award for both personal grievances. Mr Samuels' is to be paid \$5,000 pursuant to s 123 (1) (c) (1).

[33] There was some evidence regarding loss of earnings but actual figures were not supplied. Mr Samuels is to be paid the difference between his earnings at Lewis and earnings with his new employer for the three month period after his dismissal.

[34] If the parties are unable to reach agreement on the amount leave is reserved to refer the matter back to the Authority.

Contribution

[35] I am required to consider whether the actions of the applicant contributed to the situation that gave rise to the personal grievance.

[36] Mr Samuels' actions in going on to the crane erection site and taking with him the Avanti 5 did contribute to the situation. Mr Samuels had signed off from his employment with Lewis and had gone to the site at the request of GT Rigging. Had Mr Samuels not done this the situation would not have arisen.

[37] I further need to consider whether the actions were blameworthy. I find that Mr Samuels did seek the permission of Mr Moore, the Operations Manager, to go to the site and to take the Avanti 5. Even if he had not, Mr Conway clearly condoned Mr Samuels' presence on the site and his use of the tool on 6 September. Mr Samuels was not seeking to benefit himself; he was endeavouring to assist with the erection of a Lewis tower crane.

[38] At the hearing Mr Conway produced a contract between Hawkins and Lewis regarding the erection of the crane. This provides that Hawkins took the responsibility for the erection. However, Mr Samuels had not been made privy to this document or its contents.

[39] There will be no reduction of remedies on the grounds of contributory conduct.

Counterclaim

[40] Mr Conway accepted that Mr Samuels' use of the Avanti 5 had not damaged the bolts. The only basis for a counterclaim can be that Mr Samuels connived in a cover up of the cause of the damage. The evidence does not establish that. The counterclaim fails.

Costs

[41] Costs were reserved. If the parties are unable to agree the issue of costs the applicant is to file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant.

Dzintra King

Member of the Employment Relations Authority