

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Neil Smith (Applicant)
AND Masterprint Limited (Respondent)
REPRESENTATIVES Tony Wilton for Applicant
Hannah Sorensen for Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION New Plymouth, 12 September 2006
MEETING Further submissions received by 25 October 2006
DATE OF
DETERMINATION 27 November 2006

DETERMINATION OF THE AUTHORITY

Introduction

1. The applicant, Neil Smith, claims that he was unjustifiably dismissed for serious misconduct by the respondent (Masterprint). He also claims that he was not paid his full entitlement to holiday pay at that time.
2. By contrast, Masterprint considers that Mr Smith was justifiably dismissed for insubordination, smoking on workplace premises and abuse of fellow staff members. It also claims that the holiday pay in question was not owed by it, but by a former employer of Mr Smith, as it did not take over its holiday pay responsibilities.

The Facts

3. Mr Smith is an experience printer. He had worked for Masterprint Printers Limited in New Plymouth for a number of years. That business was, however, not operating well and thus the business, rather than the shares in the company that ran it, was sold to Masterprint in late 2002. Masterprint is a quite separate company, controlled by Mr Lawrence Barclay of Auckland.

4. While Masterprint had no obligation to re-engage the staff from Masterprint Printers Limited, it decided nevertheless to take on all of Masterprint Printer Limited's staff. The sale and purchase agreement included, however, a clause that Masterprint Printers Limited was responsible for all payments due to employees, including holiday pay, whether or not they accepted employment with Masterprint.
5. The engagement of staff extended to the managing director of Masterprint Printers Limited, Mr Barry Carline. Mr Carline, acting on behalf of Masterprint, presented a new employment agreement to Mr Smith and told him that it was the same as his old employment agreement. In effect it was, but Mr Smith took from that that his holiday pay entitlements would remain. I find that this was an incorrect assumption on his part. As a result it is possible that Mr Smith should have been paid some holiday pay by Masterprint Printers Limited. He has, however, never sought to recover any money from Masterprint Printers Limited, which was struck off the company register earlier this year.
6. I accept that workers at Masterprint did not become absolutely clear about this issue until August 2003, when a meeting was held with all staff to inform them of the correct position. In the preceding nine months staff had been allowed to take leave in advance, even although they had not worked for twelve months with Masterprint. I hold that it was open to Masterprint to allow staff to take leave in advance without this meaning that they had somehow become obligated for the holiday pay obligations of Masterprint Printers limited. As a matter of law those obligations were owed by Masterprint Printers Limited and I find that Masterprint made no representations to Mr Smith that would stop it from relying on that position. The claim for holiday pay is therefore dismissed.
7. While Mr Smith got on well with the previous management (i.e. Mr Carline and Masterprint's operations manager), the same could not be said of his relationship with the directors of Masterprint, Mr Barclay and Mr Ormond Greensill. Mr Smith was the print supervisor until April 2005, but withdrew from that position over differences about how much he should be paid. He and Mr Barclay could not subsequently agree on a new employment agreement to reflect this turn of events.

8. Mr Smith then went on leave between 14 April and 2 May. Mr Barclay decided to take stock of matters after a number of reports about Mr Smith's behaviour surfaced in around early May. First, he was informed by Mr Richard Hutterd, a co-worker of Mr Smith, that one of the reasons for his resignation was Mr Smith's slackness, refusal to follow rules about smoking and abuse of other staff, females in particular. Second, Masterprint regularly engaged a consultant engineer, who as part of his feedback informed it, in May, that the standard of care of a machine Mr Smith was responsible for was very poor. He also mentioned that he had noticed Mr Smith reading a newspaper when there was clearly other work to be done.
9. Masterprint operates a system of house rules. The house rules deal with issues of misconduct and serious misconduct. Any employee who breaches any of the house rules may be subject to disciplinary action, which may result in the termination of the employee's employment. Under the hearing of "Misconduct" transgressions which constitute misconduct and are the subject of disciplinary action include the deliberate use of derogatory or abuse language cause offence to another person while on company property or in a company vehicle; smoking in any areas other than those provided for in the company's smoking policy; and refusal to carry out the lawful and reason instructions of a supervisor.
10. Mr Barclay believed Mr Smith may have breached all of these house rules. He decided to further investigate his concerns about Mr Smith by in effect asking all employees to write to him raising any concerns they had about Mr Smith. In all he received statements from six other employees complaining about Mr Smith's behaviour. These were accurately summarised in a letter to Mr Smith's union from Masterprint's present representative Ms Sorensen, in a letter dated 11 May 2005:

"Specifically Mr Smith's failure to perform his employer's reasonable requests, his refusal to perform those tasks when reminded to do so, which amounts to insubordination. In addition we wish to discuss Mr Smith's continued smoking on work premises and his abuse of other employees."

11. I note here that it was very clear that a number of the issues of concern to Masterprint had previously been raised with the Operations Manager by other staff, but he had not dealt with Mr Smith over these matters. Consequently none of them had been raised previously directly with Mr Smith.

12. Mr Smith first became aware of the fact that his employer had serious concerns about his work when he met with Mr Barclay on 2 May. Mr Barclay told Mr Smith that he had issues over his work practices and work ethic and he wanted a meeting with him that afternoon. I do not accept, as Mr Smith claims, that at this meeting Mr Barclay ranted and raved at him. I do not consider it likely that Mr Barclay would have behaved in that manner. In this regard I have accepted Mr Barclay's evidence where it conflicts with that of Mr Smith, partly because of external circumstances, but also because Mr Smith's evidence is categorised by complete denials of any responsibility for anything that occurred, even to the point of claiming that staff were put up to give false evidence under oath at the Authority's investigation meeting. In other areas where there were conflicts in the evidence, I have relied on the context of each situation to make my findings on the balance of probabilities.
13. By the time the parties were able to meet Mr Barclay had collected six written statements in addition to the verbal complaints referred to above. Masterprint decided, however, that it was not going to provide Mr Smith with copies of the written allegations, in part at least because some of the workers had raised concerns about their identity being divulged to Mr Smith. I find that this had a clear impact on the disciplinary meeting.
14. Mr Smith attended the meeting with his union organiser, Mr Alan Gardner. Masterprint was represented by Mr Barclay, Mr Greensill and Ms Sorensen. At the meeting the generality of Masterprint's concerns with Mr Smith were raised with him.
15. The first issue to be discussed was Mr Smith's smoking in the workplace. Mr Smith denied smoking in the workplace after being directed not to, but subsequently admitted it, stating that he had seen others do so and therefore felt that he could do so too. At the end of the discussion Mr Smith accepted that he was not allowed to smoke in the workplace.
16. It was then put to Mr Smith that he had refused to follow the directions of both the Assistant and the Operations Manager. He denied that. He then denied declining to work on other machines when he was not busy. He also denied failing to maintain his machine.

17. The next issue to be discussed was Mr Smith's alleged abuse of female staff members. He was asked about whether he had used particular abusive terms about staff. He denied making any such comments. When Masterprint was asked who had made these allegations it refused to tell Mr Smith, stating instead that sufficient detail had been provided for him to be able to respond to the complaints. At this point Mr Gardener advised Mr Smith not to answer any further questions. I accept that at no time, however, did Mr Smith or Mr Gardener insist that they be provided with the written statements themselves. Given that they were refused the names of the complainants it is unlikely they would be given the written complaints themselves in any event.
18. This situation led effectively to a stand off in that Mr Smith was not prepared to provide any further response without being given further information. In addition, Masterprint's representatives had become extremely frustrated with what they saw as Mr Smith's refusal to co-operate with the investigation and the aggressive responses to the questions posed of Mr Smith.
19. An adjournment was then held for ten minutes while Masterprint decided what to do about Mr Smith's employment. During the adjournment Masterprint considered that all the allegations against Mr Smith had been made out, as it did not accept his denials and it preferred the statements written by others about Mr Smith's behaviour. It concluded that the breakdown in relationships between Mr Smith and others in the workplace made the workplace a very unhappy one. Masterprint was facing the prospect of further staff leaving and prosecution if further breaches of the smoke free legislation occurred. It did not any see any signs of contrition at all from Mr Smith (rather the reverse) and it did not believe that he was prepared to accept management's directions. Masterprint therefore decided to dismiss Mr Smith summarily.
20. The meeting then resumed and Mr Smith was informed that his employment was terminated with immediate effect. Mr Smith sought alternative employment, but was unable to find another job. Instead he took over the family business on 28 June because his wife was able to find alternative employment. He takes drawings of \$600 per week gross from the business, compared to his pay at Masterprint of \$860 a week gross plus overtime. The parties attended mediation and attempted through the

investigation meeting to resolve matters on their own terms, but all efforts were unsuccessful. It therefore falls to the Authority to make a determination.

The Law

21. What must be determined here is whether Masterprint's actions and how Masterprint acted was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. As part of this assessment the disciplinary process itself must be scrutinised. In *Porter v. The Board of Trustees of Westlake Girls High School* [1998] 1 ERNZ 377, the issue of how much detail of allegations must be provided to a worker in the course of disciplinary proceedings. At 388 the Court held:

“In general a fair inquiry into serious allegations against an employee will require full and fair disclosure to the employee of material evidence. Generally also, the identity of the person or persons making the complaint of serious misconduct will be a very material fact without which an employee will be at an unfair disadvantage, first knowing of the allegation and, second, in having an opportunity to respond to that. There may, however, be circumstances in which, although unfair to the employee, an employer is nevertheless justified in then withholding details of identities for good reason.”

This case was, on the evidence, I think one falling into that exceptional category but the question is not simply one of disclosure or non disclosure per se. If the identities of the complainants are justifiably to be withheld, it was incumbent on the employer, acting fairly and reasonably as it was obliged to, to have ensured that the process was fair in other respects.

In the reasons set out later, I am not satisfied that it did so. In addition to refusing to disclose the names of the student complainants or other particular details as might have identified them, the defendant unfairly deprived Ms Porter of the opportunity to know of the allegations against her.”

Determination

22. There are two particular reasons why I conclude that dismissal was not the option a fair and reasonable employer would have taken in Mr Smith's case. The first is that each of the offences that Mr Smith was found to have committed constituted misconduct under Masterprint's house rules. I know of no legal reason why the fact that Mr Smith was adjudged to have committed a number of separate offences of misconduct meant that the process of warnings for misconduct set out in the house rules should not have been followed. The warning process in the house rules is there

to give an employee an opportunity to improve his or her conduct before dismissal occurs. In this case it may have been that if Mr Smith had been given a warning, rather than summarily dismissed over his conduct, he would have changed his behaviour so as to meet the company's legitimate expectations.

23. The second reason is that Masterprint's investigation (i.e. how it acted) was not conducted fairly, in that insufficient detail of Mr Smith's alleged treatment of female workers was given. These were very serious allegations and therefore required Mr Smith to be proffered as much information as possible about the circumstances of each allegation. While Mr Smith was told of what he was alleged to have said, I find that the fact that he was not told who had made the allegations and when and where the incidents were said to have occurred, meant that it was virtually impossible for him to respond to the allegations. Masterprint is a firm with a limited number of female workers, and therefore it should have disclosed the names of the complainants, as had Masterprint given sufficient other details of the complaints it is likely Mr Smith would have been able to identify them anyway. In fact this is probably why those other details were not given to Mr Smith at the disciplinary meeting, which again demonstrates why Masterprint's approach was unfair. Furthermore, Masterprint took into account Mr Smith's and Mr Gardener's responses, namely to deny all the allegations and to refuse to answer any further questions, to question Mr Smith's motives when deciding to summarily dismiss him. In doing so it failed to realise that this situation was very much of its own making, at least in part, given its failure to provide sufficient details of the allegations. This compounded the unfairness of the investigation.
24. Given that Mr Smith was dismissed for a combination of complaints made out against him it follows that given that the most serious allegation could not have been made out the dismissal must be unjustified on this point as well. This is particularly so given that Mr Smith had no detail in advance of what the allegations were, including the allegations as to insubordination. With the exception of the smoking allegation this situation continued throughout the disciplinary meeting. Furthermore, a number of these matters had been going on for some time. In fact while they had only recently come to Mr Barclay's attention, many had occurred several months, and in some cases

years, earlier. These historical matters had in effect been condoned by the Operations Manager, who had had complaints raised with him but had not taken them up with Mr Smith. In all the circumstances it follows that Mr Smith's was unjustified.

Remedies

25. Mr Smith has lost remuneration for the 13 weeks after his dismissal of \$7,680. I therefore accept the claims made on Mr Smith's behalf. It is clear that he did try and find alternative work and made the best of what had happened to him by taking over the family business. I also accept that Mr Smith was, as he said, "*quite gutted*" by his dismissal. It occurred pretty much out of the blue and had significant impacts on his family and his financial situation. Subject to contribution I hold that the sum of \$10,000 compensation is appropriate.
26. Contribution can be assessed by way of blameworthy behaviour by Mr Smith, but in proportion to Masterprint's failures, which have already been sufficient to make Mr Smith dismissal unjustified. Having now ascertained the facts about Mr Smith's behaviour in a full and fair investigation, I conclude that there are three instances of contributory conduct by Mr Smith to be taken into account.
27. First of all he continued smoking in the workplace despite being told not to by his supervisor and in the full knowledge that smoking at work was unlawful. I do not accept his protestations to any other effect.
28. Similarly, I accept from the evidence of Masterprint's consultant engineer that Mr Smith had failed to properly maintain his printing machine. This is a serious matter because of the potential damage to the machine, which could have eventuated had the consultant not noticed the failure to grease the machine properly.
29. Third, I accept from the evidence of the female staff of Masterprint that Mr Smith has on occasion used rude and unpleasant language against them. Although, as noted above, Mr Smith does not seem to realise that his actions could cause offence, the fact is that they have and this is blameworthy behaviour that can be taken account of by the Authority.

30. That is not to say, however, that I have determined that Mr Smith behaved as badly as Masterprint concluded, or even that he intended to run down the staff concerned. It is equally likely that his behaviour was simply what he considered acceptable in a robust working environment. What became apparent from the investigation meeting was Mr Smith's inability to comprehend that what he saw as harmless jocular statements and behaviour were in fact statements and behaviour causing great offence to others, resulting in significant disharmony in the workplace. In this context Mr Smith might cause to reflect that time might have passed him by.
31. This behaviour must, however, be offset by the factors raised above, particularly the historical nature of some of the concerns over Mr Smith's behaviour and the condonation by Masterprint's Operations Manager, Masterprint's failures in the disciplinary process (which meant that Mr Smith did not get a fair opportunity to respond to the allegations made), and the fact that his conduct should have been categorised as misconduct not serious misconduct and therefore he should have been given an opportunity to improve his behaviour on notice.
32. I therefore conclude that remedies be reduced by 35%.

Conclusion

33. Mr Smith's claim for holiday pay is dismissed.
34. Mr Smith has been unjustifiably dismissed by Masterprint. I therefore order the respondent Masterprint Limited to pay to the applicant Neil Smith \$6,500 in compensation under s.123(1)(c)(i) and \$4,992 gross in lost remuneration.

Costs

35. Costs are reserved.

G J Wood
Member of Employment Relations Authority