IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 257
5326225

	BETWEEN	RUSSELL STEEL Applicant
	AND	STEELPIPE LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Garry Pollak for Applicant Sherridan Cook and Louise Holden for Respondent
Investigation Meeting:	17 February 2011
Submissions:	23 February and 4 March 2011 from Respondent and 1 March 2011 from Applicant
Determination:	17 June 2011

DETERMINATION OF THE AUTHORITY

A. Steelpipe Limited's actions in deciding to dismiss Russell Steel were not unjustified. Mr Steel's personal grievance application is declined.

B. Costs are reserved.

Employment Relationship Problem

[1] By determination AA 515/10 (17 December 2010) the Authority declined Russell Steel's application for interim reinstatement. The Authority has now investigated Mr Steel's personal grievance application, which sought a finding that Steelpipe Limited (SL) was unjustified in its decision to dismiss him on 22 October 2010.

[2] Mr Steel worked as a senior sales engineer for SL. While on a regular sales

trip in the South Island Mr Steel visited Mike Small, the director and co-owner of Blastcraft, a Timaru firm that supplied painting services for SL steel pipe products and projects. While talking with Mr Small, Mr Steel unwittingly pressed a 'speed dial' button on his mobile phone. That button was allocated to connect with the landline office telephone number for Mr Steel's manager, Athol Carr in Auckland. Mr Carr answered the call and, unable to get Mr Steel's attention by speaking loudly and whistling, ended up listening for about 20 minutes to the conversation between Mr Steel and Mr Small.

[3] During the call, and shortly after, Mr Carr made some notes about what he heard Mr Steel say to Mr Small. He then reported those comments to SL senior managers. At the request of Mr Hawkes Mr Carr prepared a written report – referred to in the evidence as his "*statement of complaint*" – which set out his account of what he overheard on the telephone call and including some passages he said were direct quotes of what Mr Steel said to Mr Small. Mr Hawke then set in train steps for a disciplinary investigation that included a meeting held on 22 October at which Mr Hawkes dismissed Mr Steel for serious misconduct.

[4] Mr Steel considered his dismissal was unjustified. In his personal grievance application to the Authority Mr Steel sought remedies of reinstatement, lost wages and compensation for stress and humiliation.

[5] In reply SL stated Mr Steel's dismissal was justified. It said the overheard comments inappropriately criticised SL operations manager Keith Young, criticised the quality of SL services and products, and included Mr Steel making suggestions on how Mr Small could settle a commercial dispute between SL and Blastcraft on terms less favourable than those sought by SL and which Mr Steel was not authorised to discuss with Mr Small. SL said Mr Steel's comments were serious misconduct, breached both express and implied terms of Mr Steel's employment, and, after hearing from Mr Steel, Mr Hawkes fairly decided to dismiss him.

The investigation

[6] The parties had not resolved this matter in mediation. For the purposes of the Authority's investigation Mr Steel, Mr Carr, Mr Hawkes, and SL chief executive

officer Peter Alexander lodged written witness statements. Under oath, each witness confirmed their written statement and answered any questions asked by the Authority member and the parties' representatives. Affidavits by each of these four men, lodged earlier in relation to the interim reinstatement application, also formed part of the evidence before the Authority.

[7] Mr Steel's wife, Susan Steel, had lodged an affidavit but was not required to attend the investigation meeting.

[8] In response to a witness summons issued by the Authority Mr Small travelled from Timaru to attend the investigation meeting held in Auckland. Under oath he gave oral evidence in response to questions from the member and the representatives.

[9] After the meeting the representatives lodged written closing submissions addressing issues of fact and law.

[10] As permitted under s174 of the Act this determination does not record all the evidence and submissions received. Rather it sets out findings of fact and law, and expresses conclusions on the matters for determination. The findings and conclusions were reached after reviewing all the written and oral evidence, along with background documents, and reflecting on the arguments put by counsel in their closing submissions.

[11] I regret the demands of other Authority matters delayed the issuing of this determination and thank the parties for their patience.

Issues

[12] The issues for investigation and determination for the Authority were:

(i) whether a fair and reasonable employer would have concluded what Mr Steel was overheard saying to Mr Small on 13 October 2010 was serious misconduct; and

(ii) whether SL's conclusions were reached after a fair investigation and fair consideration of Mr Steel's explanation, including consideration of alternatives to dismissal; and

(iii) if SL's actions were unjustified, what remedies should be awarded?

Were Mr Steel's discussions with Mr Small serious misconduct?

[13] I accept, as more likely than not, that Mr Carr's "*statement of complaint*" accurately reported key points of the conversation he overheard between Mr Steel and Mr Small. Mr Steel did not take any real issue with the accuracy of the reported comments at the time of his disciplinary meeting – except to correct one word. Mr Small, after being sent Mr Carr's report and asked for his comments, confirmed to Mr Alexander on 20 October 2010 that it recorded "*pretty much*" what was discussed and stated that the "*nuts and bolts are correct*". In an email sent that day Mr Small stated "*the basis of the conversation is probably correct although perhaps some of the wording is not exactly correct as I remember it*".

[14] The words which concerned Mr Hawke included the following:

(i) Mr Small talked of a claim by SL against Blastcraft for around $300,000 and Mr Steel made the statement "*we would cut a deal both ways*"; and

(ii) Mr Steel told Mr Small that SL had "*massive concrete lining and welding problems*"; and

(iii) Mr Steel said Mr Small should say no to certain jobs proposed by SL; and

(iv) Mr Small said Blastcraft was pressured by SL to complete a job for an Australian client – which was referred to as "*the Aussie pipes*" – and Mr Small said he had kept notes of calls about it. Mr Steel replied that he kept notes of calls too but his operations manager Keith Young "*never keeps notes*".

(v) Mr Steel then said Mr Small could "*get*" Mr Young over who was responsible for problems on the Aussie pipes job. He continued: "*Get rid of Keith, he is your single biggest obstacle. If you have taken notes attack Keith or he will crush you. If you can get rid of him you will be doing everyone a favour as he is the cause of quality issues throughout the place*".

[15] On the basis of this reported conversation, Mr Hawke called Mr Steel to a disciplinary meeting to answer allegations that he had committed serious misconduct by:

(i) misrepresenting SL's interests and acting without its authority in dealings with Mr Small; and

(ii) misrepresenting the actions of Mr Young to Mr Small and attacking "*Mr Young's integrity and reputation without basis or justification*".

[16] Mr Steel's defence to those allegations, either at the disciplinary meeting or at the Authority's investigation, may be paraphrased as follows:

(i) the conversation was not for business purposes and neither Mr Steel nor Mr Small spoke in their respective representative capacities for SL and Blastcraft; it was a personal discussion between two friends; and it occurred outside work time and was not a work meeting; and

(ii) Mr Small had initiated the discussion on points of concern and Mr Steel acted properly in acknowledging concerns and reassuring Mr Small; and

(iii) Mr Steel had insufficient knowledge of the commercial dispute between SL and Blastcraft (about who would pay the costs of remedying defective work on pipes supplied in a project for Watercare) to provide Mr Small with any information which would genuinely harm SL's business interests; and

(iv) quality issues on the Watercare job and another project discussed by Mr Small and Mr Steel were legitimate concerns; and

(v) Mr Steel accepted the comments he made to Mr Small about Mr Young were inappropriate but believed this could be adequately resolved by an apology and there would be no ongoing negative effect on Mr Young's working relationships with Mr Steel and Mr Small; and

(vi) Mr Steel's conduct did not come within the criteria for serious misconduct stated in his employment agreement and those terms did not allow for his summary dismissal in the circumstances.

[17] I find none of those explanations would have satisfied a fair and reasonable employer and such an employer would have been entitled to conclude, on the basis of the information available to SL, that Mr Steel's actions in his conversation with Mr Small on 13 October 2010 were serious misconduct. I do so for the following reasons.

[18] The evidence of Mr Steel and Mr Small established that they had become firm friends through their business dealings over 13 years. When Mr Small was in

Auckland for business or Mr Steel was in Timaru on his regular sales trips, the two would often meet for "*a few beers and a meal*". On 13 October 2010 Mr Steel had called into Mr Small's office in the late afternoon to make arrangements to go out that evening. The discussion they had at that time was not scheduled for any formal business purpose as Mr Steel had arranged to meet with Mr Small on the following morning to talk about business matters.

[19] Although the discussion on 13 October may have been outside Mr Steel's usual working hours, I do not accept any objective observer would agree its content was merely personal or social. Mr Steel's comments went well beyond what he described as "*venting*". All of the conversation during the 20 or so minutes overheard by Mr Carr concerned matters of business between SL and Blastcraft.

[20] Mr Steel's contention that he spoke not as a representative of SL but as a friend of Mr Small is not persuasive. He would not have been able to call into Mr Small's offices in Timaru but for the requirements of his role to make regular sales trips to the South Island. His very purpose for being there was to advance the business interests of SL.

[21] Even if he had spoken to Mr Small only as a friend, he was then a friend to whom Mr Steel gave the 'inside running' on SL's affairs and which Mr Small could then seek to use for Blastcraft's financial benefit at SL's expense. Specifically that was to suggest that SL's claim for $300,000 from Blastcraft for remedial costs on the Watercare job might be reduced by up to a half and to suggest that Mr Small could "*attack*" Mr Young as a means of not having to bear responsibility for problems that arose on the 'Aussie pipes' job. Those comments went beyond Mr Steel reassuring Mr Small about the importance of the business relationship between SL and Blastcraft. They were advice from Mr Steel on tactics Mr Small could use so Blastcraft could benefit at SL's cost.

[22] I accept Mr Small's evidence that he initiated the conversation with questions to Mr Steel about his concerns over SL's claim for the Watercare remedial work and how to deal with problems over the 'Aussie pipes' job. Mr Steel's evidence was that he had not been aware of the claim over the Watercare job and that his suggestion that a deal might be 'cut both ways' could not bind SL in any way. There is some doubt

that he knew nothing of the matter, but if that were so, having heard Mr Small mention the amount that SL sought, Mr Steel should not have suggested how that claim could be compromised.

[23] Mr Steel's excuse that he was seeking to reassure Mr Small about the importance of the business relationship to SL is negated by his suggestion to Mr Small that Blastcraft should have refused SL's requests to work on certain projects and encouraging Mr Small to seek to "*get rid of*" an SL manager. Viewed objectively, it was conduct which went beyond a situation where a sales representative might 'advocate' within his or her business on behalf of a particular customer or supplier as a means of maintaining a good relationship and developing longer term business connections. While what is appropriate in each situation involves a matter of judgement by the representative, the line is crossed, as here by Mr Steel, where such actions risk causing real cost to commercial interests of the business that the representative is employed to serve.[1]

[24] Mr Steel's conduct was plainly disloyal and contrary to SL's business interests. Mr Steel accepted in answer to a question during the Authority investigation that he was "*the face*" of SL while away on his sales trips and I find that a fair and reasonable employer would consider what he said to Mr Small was a serious breach of the trust placed in him on those occasions. Criticising the quality of SL's products to someone outside the company in the context of business disputes over liability and to identify a manager who Mr Small should seek to "*attack*" and "*get rid of*" was in clear breach of Mr Steel's duty of faithful service to SL.

[25] Those breaches of duty were also clearly within the scope of the terms of Mr Steel's employment agreement allowing for dismissal for serious misconduct where:

> *… the Employee is guilty of any serious breach or non-observance of the conditions of this agreement;*
> *The Employee is guilty of any gross negligence in the performance of their duties or obligations; …*

[26] Providing the information to Mr Small that Mr Steel did, and encouraging him to pursue measures for Blastcraft's benefit at SL's cost, were serious breaches of the

[1] *Tisco v Communication & Energy Workers Union* [1993] 2 ERNZ 779, 782 (CA).

duties of trust, confidence and fidelity that were part of his conditions of employment. Mr Steel's comments to Mr Small were also careless of his duties to SL, with a real risk of damaging its interests in resolving commercial liability issues with Blastcraft, and could reasonably be seen as grossly negligent of his duty of faithful service to his employer. They also appear to breach the express term of confidentiality which required Mr Steel to "*keep all information relating to the Company's business … strictly confidential at all times expect to the extent that disclosure is necessary for [him] to perform [his] obligations under this agreement*" and "*not use or attempt to use any such information for … the benefit of any other person or organisation*". Mr Steel's comments about supposed (but unproven) problems with concrete linings and welding on some pipes and Mr Young's record-keeping were business information arguably given in breach of those obligations.

The decision to dismiss

[27] Breach of the duties of trust and fidelity may give rise to a dismissal but the decision by an employer to dismiss for such breaches is not inevitable. A decision to dismiss must still meet the statutory test of justification. The considerations have been explained this way by the Court of Appeal:[2]

> *Whether the conduct is sufficiently serious to warrant instant dismissal is a matter of fact and degree which must be judged against the circumstances of the individual case. One way of putting the essential question is to ask whether in the light of the employee's conduct it is reasonable to expect the employer to continue to employ the employee. There is a continuum which runs from cases sufficiently serious to warrant instant dismissal through cases which justify termination on giving appropriate notice or wages in lieu of notice to those which do not justify any form of dismissal but simply a warning. Where the particular case lies on the continuum will obviously depend on all the circumstances. The question is one of fact.*

[28] In giving the written reasons for his decision to dismiss Mr Steel, by letter dated 22 October 2010, Mr Hawke said he did not find Mr Steel's responses credible or persuasive, had lost trust and confidence in him, and was "*particularly disappointed*" Mr Steel had sought to avoid responsibility for his actions "*by attempting to cast aspersions on Athol Carr's integrity and good character*". Mr

[2] *Big Save Furniture v Bridge* [1994] 2 ERNZ 507, 517 (CA) per Tipping J.

Hawke also said he had no option but to dismiss Mr Steel without notice because Mr Steel had rejected the opportunity – once told of the dismissal decision – to resign. The remainder of this determination considers whether those conclusions were reached fairly.

Was SL's disciplinary investigation fair?

[29] I find there were no significant procedural failures in how Mr Hawke conducted SL's disciplinary investigation of its allegations regarding Mr Steel's conduct. Mr Steel had adequate notice of the meeting, an opportunity to get assistance from a representative, was represented by a lawyer in the disciplinary meeting, had access to the information available to the employer (including specifically Mr Carr's statement of complaint setting out the allegedly overheard comments), and had an opportunity to be heard. Mr Alexander's notes show Mr Steel was asked whether he had anything more he wanted to discuss and replied he was "*happy I've put all I have to say on my side of the story*".

[30] Mr Steel later suggested he was not quite well enough to have taken part in the meeting but accepted he never advised Mr Hakwe of that concern or requested any further delay of the disciplinary meeting for that reason. Neither was there any evidence he exhibited some obvious impairment at the disciplinary meeting that should have prompted Mr Hawke or Mr Alexander to inquire about whether the meeting should proceed.

[31] He was placed on paid leave from the date of his return to SL's Auckland offices on 18 October until the disciplinary meeting. As SL conceded in its closing submissions, Mr Hawkes probably should have given Mr Steel an opportunity to comment on the proposed suspension before it was imposed, however I agree the suspension did not affect SL's ability to justify the dismissal as it was for a short duration on full pay.[3]

[32] In the disciplinary meeting Mr Steel did not take issue with the content of Mr Carr's statement of complaint except for one correction in the notes of the comments about the prospect of splitting liability for the Watercare remedial costs – through his

[3] *Kereopa v Go Bus Transport Limited* (EC Auckland, AC 25A/09, 18 September 2009) at [29].

representative he said the word "*we*" should read "*they*".

[33] Both Mr Hawkes and Mr Alexander made a note of the following comment made by Mr Steel in the disciplinary meeting (and which he accepts was accurately recorded): "*I admit what I said I shouldn't have said. I apologise*". He also asked for the opportunity to apologise to Mr Young, with whom he considered he could repair his working relationship.

[34] However Mr Hawkes came to the view that Mr Steel's apology was not genuine. He did so because Mr Steel's representative questioned Mr Carr's motivation for the complaint and suggested that Mr Carr had a drinking problem. While it was she rather than Mr Steel who made that comment, Mr Hawkes took Mr Steel to agree with it and Mr Steel did nothing in the meeting to suggest he did not. Mr Hawkes was also concerned that Mr Steel insisted he was correct about problems with the quality of SL products and that his discussion with Mr Small was a "*personal conversation*" in which he was "*talking off the cuff*".

[35] While it would have been ideal for Mr Hawkes to give Mr Steel the opportunity to comment on his impression that Mr Steel's apology was not genuine, I accept as fair and reasonable Mr Hawkes' conclusion that Mr Steel, despite 39 years of service, still appeared not to really understand the boundary between what he could and could not say in his business dealings with Mr Small. I accept that was a valid conclusion because it remained Mr Steel's position in his evidence to the Authority. In his affidavit, for the interim reinstatement application, he said: "*I could not believe I was being dismissed after all of those years over a private conversation*". It was a position he repeated in his evidence at the Authority investigation meeting.

[36] Mr Steel's long service meant alternatives to dismissal should be fully explored but I accept this was difficult given his apparent lack of any real insight about what he had done wrong and the reasonable apprehension of what he might do in the future if he continued his role with SL. His long service was a factor going both ways – he should have known better than to demean SL's products and managers and to give inside information to a supplier about how it could act to its advantage at SL's cost. By the criticism he had made of Mr Young and Mr Carr, Mr Steel had seriously impaired the prospects of restoring a working relationship with either senior

manager – whether he remained in a sales role or moved to an operational role. A written warning would have provided SL with no security in the many situations where Mr Steel represented the company unsupervised.

[37] Having made the decision to dismiss Mr Steel, and told him of it, Mr Hawkes then offered the option of a 'soft exit' whereby Mr Steel could resign rather than have SL proceed to end the employment relationship by summary dismissal. In the particular circumstances I accept that was a fair proposal, made to cushion the blow to Mr Steel of the decision. It was not put prematurely or with an intention to coerce him and was not made after a dismissal decision that was itself unjustified.

Determination

[38] For the reasons given, I have concluded SL's decision to dismiss Mr Steel, and how that decision was reached was not unjustified. Accordingly Mr Steel's personal grievance application is dismissed.

Costs

[39] Costs are reserved. The parties are encouraged to agree any matter of costs between themselves. If they are not able to do so and a determination of costs by the Authority is required, SL may lodge and serve a memorandum as to costs by no later than 28 days from the date of this determination. Mr Steel would then have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this timetable without prior leave being sought and granted. If a determination is necessary the parties could expect costs to be awarded on the basis of a notional daily rate and the principles summarised in *PBO Limited v Da Cruz* [2005] ERNZ 808.

Robin Arthur
Member of the Employment Relations Authority