

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Grant White (Applicant)
AND Heinz Watties Limited (Respondent)
REPRESENTATIVES Jills Angus Burney, for the Applicant
Gary Tayler, for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Napier, 16 June 2005
SUBMISSIONS 5, 19 & 29 July 2005
DATE OF DETERMINATION 9 September 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. The applicant, Mr White, commenced his employment with the respondent, Heinz Watties Limited (Heinz Watties), as a forklift driver at its Hastings food processing plant in 1998. He is a member of the New Zealand Engineering, Printing and Manufacturing Union (EPMU). He is covered by the Heinz Wattie's [NZ] Limited Principal Collective Employment Agreement (the CEA) and the Heinz Wattie's Limited Employment Contracts Common Conditions & Procedures Manual 1 December to 15 August 2002 (the manual).
2. In July 2004 Mr White was given notice dated 29 July 2004 to attend a disciplinary meeting to discuss an allegation of causing unauthorised downtime. He was given notice that if the allegations were proven they could amount to serious misconduct. He denied the allegations. The shift leader, John Farrow decided to discipline Mr White with a final written warning (6 August 2004). The measures were put in writing (letter produced).
3. The parties attended mediation on 11 August 2004 to discuss the discipline handed out. Agreed terms were signed by both parties to settle the matter on 12 August 2004.

4. On 12 August 2004, Mr White was advised by Jason Price, the production manager, that there was a disciplinary matter that involved Mr White not reporting an incident that occurred on 5 August that needed investigation.
5. Mr White decided on 13 August not to request the mediator to record the agreed terms. Mr White says this was because he had become aware of new allegations of serious misconduct associated with his involvement in the accident on 5 August 2004. In particular he was told:
 - He caused an accident by not looking in the direction of travel while reversing;
 - He failed to comply with company procedures by not completing an incident form after the incident;
 - He swore at and abused the other driver of the forklift also involved in the incident.
6. Lynette Blackburn, human resources advisor, wrote to Mr White that there would be an investigation for allegedly causing the incident, not filling out an incident report and abusing a fellow worker in respect of the incident. He was also informed of his right to have representation. The matter was identified as potentially serious and could possibly involve dismissal. The letter was available to Mr White and his representative before the disciplinary meeting held on 16 August 2004. He was also provided with a copy of an investigator's report into the accident that was dated 9 August 2004.
7. The investigator's report was prepared by Lester Colvin, an accident investigator for Heinz Watties following an investigation held on 9 August that included Mr White for his input. The subject of the report was a forklift accident that occurred in the sterilisation area on 5 August 2004 involving Mr White and Teece Smith, another forklift driver.
8. Mr Smith says that Mr White was stationary at the time, and that it was when he was half way past Mr White's forklift that Mr White reversed back without looking, and Mr White did not toot his horn. Mr Smith says he was then abused by Mr White. It was not until the Authority's investigation that Mr Smith divulged that he swore back at Mr White. Mr Smith supplied his version of what happened after the accident and was helped by his supervisor in preparing it. Despite being requested for a report, Mr White did not complete one until providing his information at Mr Colvin's investigation.
9. Mr Colvin's investigation report included Mr White's description of the accident and his answers to questions that were put to him. The report also included a description of the

incident from information provided by Teece Smith. Mr Smith said that Mr White backed into him without tooting his horn before reversing. He also alleged that Mr White abused him. Mr White denied swearing at Mr Smith.

10. During Mr Colvin's investigation Mr White's reason for not completing the accident report was because he was too busy. He accepted that he was reminded by John Farrow to complete a report. At Mr Colvin's meeting Mr White drew a diagram of the incident. Mr White had completed accident reports in the past. Accordingly Ms Blackburn "*concluded he was well aware of the requirement to complete the report and it was not accepted that he was too busy especially since it was also concluded that Mr White had time to try and find electricians after the accident when he drove his forklift on to the rail landing. Mr White would have known that the incident on 5 August was the subject of an investigation*".
11. Mr White turned up to work on 16 August and commenced his duties on the forklift. However he says he was told to carry out other duties because of the disciplinary action. Then he agreed to stay at home until the matter was sorted out.
12. There was a meeting held on 16 August. The applicant's representative, a Union organiser for the EPMU (John Young), objected to Lynette Blackburn the site HR manager and Mr Price asking Mr White questions about the incident. Mr Young also allegedly strongly disagreed with the meeting process. Consequently the meeting adjourned and the company wrote to Mr Young seeking his cooperation with the company's investigation meeting process. The company's letter informed him that the investigation had been re-scheduled so that the manager could properly conduct the disciplinary investigation process into the allegations. The applicant was cautioned that if there was no cooperation then inferences could be taken from his failure to cooperate.
13. Another meeting was held on 17 August 2004. Mr White was asked for an explanation about the events on 5 August. He was asked to explain why an incident report had not been completed as required. He was provided with a copy of the accident reporting procedures, although he knew of the requirements.
14. Mr White said that he had been too busy to complete the form. Mr White said that at the time of the accident he looked right over his shoulder and tooted. Also he explained that he could not see because there was an LPG tank blocking his view on the back of the forklift. Mr White was also requested for any further information. He told them that there had been

witnesses to the incident and the meeting adjourned to allow the company to conduct further investigations.

15. Mr Price discussed the matter with Mr JJ Vijeon, an electrician working on the site, to follow up Mr White's explanations. Mr Vijeon, and another electrician, Brett Pretorious, told the Authority that they heard a *bang* but did not hear anything else and carried on what they were doing. Mr Price says that at the time he physically checked the line of sight from the forklift involved, to confirm whether the forklift's LPG tank obscured Mr White's vision as he claimed. He says he found that this did not cause Mr White's vision to be obscured. He also says that he tried to identify any other witnesses. He says that he was not able to verify Mr White's version of events with Mr Vijeon. Mr Vijeon told Mr Price that he and another electrician were too far away at the time of the incident to hear anything that might have been said. This was corroborated in the Authority's investigation.
16. The findings were then put to Mr White and Mr Young including that Mr White had changed his story, there were discrepancies in his information and that Ms Blackburn believed Mr Smith. Also they were told that there was the possibility of Mr White being dismissed. Mr Price and Ms Blackburn did not accept Mr White's explanation and believed Mr Smith.
17. The next meeting occurred on 19 August 2004. Mr White and Mr Young were informed that the accident alone was minor but the three issues taken together amounted to a serious incident: not reporting the accident; misrepresenting events and the verbal abuse combined amounted to a serious incident. Ms Blackburn raised with Mr White and Mr Young that the company would consider options including placing Mr White in another role but not driving forklifts. This was rejected outright. There was an adjournment while the managers, Mr Price and Ms Blackburn, considered their decision. When the meeting reconvened, the applicant was advised that he was dismissed for serious misconduct.
18. Mr White says that he was dismissed over the telephone by Mr Price on 18 August 2004. Mr White conceded that this did not happen at the Authority's investigation meeting and that his evidence contained omissions about the sequence of meetings.
19. A personal grievance was raised by the applicant. The reasons for the dismissal were provided in a letter dated 5 November 2004 from David Robb to John Young that included Heinz Watties' conclusion that Mr White's conduct involved a loss of confidence and trust it had in Mr White.
20. The issues are as follows:

- Was it open to the employer to come to an honestly held belief that Mr White caused the accident and deliberately and wilfully failed to fill out the required accident report?
- Did Mr White abuse Mr Smith?
- Could a fair and reasonable employer conclude that Mr White's actions constitute serious misconduct? At issue is the degree of seriousness.
- Was the decision to dismiss Mr White within the range of options open to a fair and reasonable employer?

21. Most of the factual issues were sorted during the investigation meeting. Any remaining factual issues will be dealt with below as required.

Deliberation and discussion

22. The applicant does not have a personal grievance for the following reasons.

23. The applicant did settle an earlier matter although it was not recorded by a mediator under section 149 of the Act. The fact remains that a settlement was reached before the applicant decided not to have it recorded. The employer was entitled to separate any issues it had about Mr White and pursue a separate enquiry over an entirely separate matter. Nothing else turns on this, I hold.

24. It is not the role of the Authority to substitute its view for that of the employer. The role of the Authority is to scrutinise the employer's decision and how it was reached to meet the requirement of fairness.

25. Applying *W & H Newspapers Ltd v Oram* [2000] ERNZ 448 I am required to consider whether or not a fair and reasonable employer could come to an honestly held belief that there was serious misconduct. There was an accident. The applicant was not dismissed for solely being responsible for the accident but that in addition he failed to fill out an accident report and that this was determined to have been wilful and deliberate. He knew the requirement. He was requested to fill it out and only gave his explanation during the company's investigation of the accident. Mr White's explanation at the time that he forgot was not accepted. The conclusion was open to Heinz Watties at the time. His failure to report created a conflict later about whether or not he swore at Teece Smith that required resolving.

26. Mr Smith reported in the accident report that Mr White had abused him. Ms Blackburn believed Mr Smith because checks made by Mr Price did not corroborate Mr White's version of the events and Mr Smith had provided a report on the accident at the time. Mr White did not complete an accident report as required until he provided his denial at the company's investigation of the accident. Heinz Watties was entitled to rely upon the accident investigation report and its own conclusions about Mr White.
27. Mr White's evidence before the Authority attempted to seek vindication of his role in the accident. Unless Mr White had a grievance the evidence that I must assess relates to the information available to the employer at the time it made its decision. It has satisfied me that the allegations were not answered satisfactorily by Mr White and that Mr Price and Ms Blackburn had reason to believe Mr Smith. In such circumstances Mr White does not have a personal grievance.
28. Even if Mr White did have a personal grievance, as he claims, the evidence he gave before me was not helpful because it was not correct, for example saying that he was dismissed over the telephone when he was not. His evidence before me was inconsistent, incomplete and inaccurate. He changed his version of events and added explanations that he could reasonably have been expected to have made at the time instead of waiting until the Authority's investigation. Further examples included:
- Providing different reasons for not completing an accident report as required,
 - Inconsistent evidence about reasons why his representative took it upon himself to answer questions instead of speaking for himself,
 - He did receive the letter (exhibit 10) and it was read out to him by Lynette Blackburn putting him on notice of the allegations. Initially he said he only ever knew of two allegations.
 - His evidence about the timing of his representative's involvement was not accurate.
29. There was sufficient evidence for Heinz Watties to conclude that Mr White caused the accident and abused Mr Smith, who I found reliable because of the frankness of his evidence and that he disclosed that he swore back at Mr White, although he did not disclose this to his employer at the time. He told the Authority what Mr White said and his reaction to it makes it probable Mr White did swear. This seems to be the first time that anyone actually asked Mr Smith what Mr White said. My conclusion is that if I had to assess Mr White's actions

they would be blameworthy and found to have contributed to causing his grievance. Importantly he failed to provide an accident report that could have avoided any of the credibility disputes now involved. Furthermore he was requested to provide a report and his reasons for not doing so at the time simply seem to be implausible. Any remedies would have been discounted entirely.

30. On the basis of the information in front of the employer at the time I am satisfied that Heinz Watties could have come to the conclusion it did, and because there was serious misconduct involved, it was open to dismiss Mr White.
31. Mr White had a representative that he reasonably could rely upon to ensure his rights. He was informed of the allegations and had an opportunity to explain and mitigate his actions. He was informed of the seriousness of the allegations and that if they were proven could result in him losing his job. I am satisfied that on balance Mr White was treated fairly.
32. In conclusion I hold that the different charges arising from the same incident (the accident on 5 August) meant that it was open to the employer to conclude that all the charges taken as a whole clearly amounted to serious misconduct. It was open to the employer to conclude that Mr White's behaviour led to a loss of trust and confidence.
33. Mr White's claim is dismissed.
34. Costs are reserved.

P R Stapp
Member of Employment Relations Authority