

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Robert Williams (Applicant)  
**AND** The Supply Chain Limited (Respondent)  
**REPRESENTATIVES** Tony Wilton, Counsel for Applicant  
Stephen Langton, Counsel for Respondent  
**MEMBER OF AUTHORITY** Helen Doyle  
**INVESTIGATION MEETING** 1 August 2006  
**DATE OF DETERMINATION** 15 September 2006

**DETERMINATION OF THE AUTHORITY**

***The Employment Relationship Problem***

[1] The applicant, Robert Williams, was employed as a warehouse operator at the respondent's distribution centre at Hornby, Christchurch for about 17 years.

[2] Following a disciplinary process Mr Williams was summarily dismissed from his employment on 16 January 2006 for being in possession of company property without authorisation.

[3] Mr Williams' says that his dismissal was unjustified. He seeks reimbursement of three months lost wages, compensation of \$2500.00 and costs. Initially Mr Williams sought reinstatement to his previous position with the respondent but Mr Wilton advised that claim for reinstatement has been withdrawn.

[4] The respondent, The Supply Chain Limited, ("the Supply Chain") is a subsidiary of Progressive Enterprises Limited. Mr Williams worked at one of two distribution centres that Progressive Enterprises run in the South Island. Company products are processed through the distribution centre before being transported to supermarket stores throughout the South Island.

[5] The Supply Chain says that Mr Williams was justifiably dismissed on the grounds of serious misconduct.

***The Collective Employment Agreement***

[6] Mr Williams was a member of the NZ Engineering, Printing and Manufacturing Union ("EPMU"). His work was covered at the material time by the Supply Chain collective employment agreement, South Island Distribution Centre - 05 September 2005 to 30 July 2006 ("the agreement").

[7] Appendix II of the agreement contained the Supply Chain's code of conduct. The code of conduct provided under the heading Property that:

*Unauthorised removal or unauthorised possession of The Supply Chain property or the property of other persons is not permitted.*

[8] Appendix III of the agreement contained a disciplinary procedure. It provided a definition of serious misconduct by listing certain conduct that constituted serious misconduct and may result in termination of employment. Amongst other conduct it provided:

*Being in possession of company property without authorisation unless as a requirement of your employment.*

### ***The conduct for which Mr Williams was dismissed***

[9] In late 2005 the Supply Chain became concerned that discarded packaging was being found in the repack area of the Hornby Supply Centre. The discarded packaging indicated that products were being removed from their packaging by persons within the facility. This concern was reported to Reece Polglase who is employed by Progressive Enterprises Limited as a regional prevention manager.

[10] It was decided to install a covert video camera in the repack area to identify who may be responsible. The cameras were present for three weeks during December 2005 and the video footage was recorded on a computer hard drive.

[11] Mr Williams was filmed on 18 December 2005 accepting one kneepad which was company product, from another employee. Mr Williams could be seen talking to the other employee but he could not recall when asked later what they said to each other.

[12] The other employee had removed some kneepads from their packaging and had put two kneepads on under his overalls, one on each knee. Mr Williams put the one kneepad he was given on under his overalls and walked away.

### ***The disciplinary process***

[13] Mr Williams was invited to a disciplinary meeting on 10 January 2006 by letter dated 6 January 2006 to discuss an allegation that he had taken or used company products. He was suspended on full pay until the disciplinary meeting.

#### ***10 January 2006***

[14] Mr Williams attended the meeting on 10 January 2006 with the union delegate from EPMU, Darren Johnson and the regional secretary of EPMU, Ged O'Connell. Joe Leitch, the selection and dispatch manager at the Supply Chain, attended with Mr Polglase. Mr Polglase took the notes and ran the meeting.

[15] The notes from that meeting confirm that Mr Williams was advised of the allegation and referred to the relevant work rule about company property. Mr Williams viewed the video footage with his representatives. He accepted that it was him on the video.

[16] The explanation in terms of the filmed conduct was that Mr Williams was offered a knee pad and in a moment of stupidity put it on. Within 30 minutes or less he realised how silly it was and took it off and left it by the green bin. There was an apology offered to the Supply Chain for the behaviour and acknowledgement that it was a bad mistake to make. Mr Williams was aware it was conduct that was not in accordance with the company rules.

[17] Mr Williams did not accept that he intended to steal the kneepad and said that he did not remove it from the workplace. He accepted that his actions had altered the usability of the kneepad. There was a discussion about the fact that Mr Williams had worked for the Supply Chain for 17 years, had no previous warnings and was a good reliable worker. It was accepted that there would be some disciplinary action. Mr O'Connell said that he did not accept that the trust between the company and Mr Williams had been damaged to the extent that the relationship could no longer continue.

[18] The meeting was adjourned for the company to consider the explanation and arrangements were made to meet the next day on 11 January 2006.

### ***11 January 2006***

[19] Mr Williams attended the meeting on 11 January 2005 with Mr Johnson and Mr O'Connell. Mr Leitch and Mr Polglase attended for the Supply Chain. Mr Polglase advised Mr Williams they had concluded his actions constituted serious misconduct. Mr O'Connell made some further submissions in response about the circumstances of the conduct and a disciplinary penalty.

[20] There was also discussion about enquiries undertaken by Mr Leitch who looked for the kneepad in the area Mr Williams said he discarded it. He did not find the knee pad. Mr Leitch had also spoken to people in the credit bay area where discarded product would be processed and recorded. Both of the staff members said that they had not seen kneepads come through and kneepads were not recorded as having been processed. In those circumstances Mr Leitch and Mr Polglase said that it could not be established where the kneepad eventually ended up. Mr Williams was told at the meeting that Mr Polglase and Mr Leitch could not say that the kneepad went out the gate and in the absence of other information they could not confirm that the kneepad was discarded.

[21] A short adjournment was taken and then the meeting resumed and Mr O'Connell made some further submissions about what a fair and reasonable employer would do in the circumstances. Mr Polglase and Mr Leitch then said that they wanted to adjourn the meeting to consider the decision and what the appropriate disciplinary penalty was until 16 January 2006.

### ***16 January 2006***

[22] Mr Williams attended the meeting with Mr Johnson and Mr O'Connell. Mr Polglase and Mr Leitch attended for the Supply Chain. Mr Williams was asked if he had anything further to say. He did not and then there was a brief adjournment before Mr Williams was advised of the decision to terminate his employment for serious misconduct effective immediately.

### ***The Issues***

[23] The justification of this dismissal is to be determined in accordance with the new test of justification set out in section 103A of the Employment Relations Act 2000. This requires an objective determination of what a fair and reasonable employer would have done in all the circumstances.

[24] The statutory test for justification in section 103A has been the subject of analysis in the Employment Court judgment of Shaw J in *Hudson v Air New Zealand Limited* (unreported, AC 30/06, 30 May 2006).

[25] The following questions require determination:

- (i) Did Mr Williams' actions amount to serious misconduct?
- (ii) Would a fair and reasonable employer have dismissed Mr Williams in all the circumstances?
- (iii) If the dismissal was unjustified, was there any contributory conduct on the part of Mr Williams which should reduce any remedies awarded?

***Did Mr Williams actions amount to serious misconduct?***

[26] Mr Williams was represented throughout the disciplinary process. He understood the allegation he was facing and had an opportunity to give an explanation to Mr Polglase and Mr Leitch why he was in possession of company property. He accepted that it was him on the film. His explained that he put the knee pad on in a moment of stupidity and then had taken it off within the company premises. His explanation was considered and further investigations as to the whereabouts of the kneepad were undertaken. Mr Williams and his representatives were given an opportunity to make submissions with respect to the disciplinary penalty.

[27] I have considered whether there was any unfairness because the other employee who gave Mr Williams the knee pad was not spoken to during the investigation. At the time of the investigation the other employee was on holiday and not due back until late January 2006. Mr Polglase and Mr Leitch thought it would be unfair to keep Mr Williams waiting until then for a decision and balanced this with the admission by Mr Williams. I am not satisfied that failing to talk to the other employee would have made a difference to the outcome in the circumstances where there was an admission about the conduct. When the other employee returned from holiday and viewed the film footage he resigned without notice and left the premises. The other employee was also represented by EPMU.

[28] I am satisfied that the investigation into Mr Williams conduct was full and fair and met the requirements in the collective agreement.

[29] I find that a fair and reasonable employer would consider that the conduct by Mr Williams of putting a kneepad belonging to his employer on under his overalls amounted to unauthorised possession of company product.

[30] Mr Williams was aware that it was a breach of the company rules to be in possession of company product unless required for the purposes of his employment. The knee pad was not recovered and could not be found in the area where Mr Williams said that he put it. A fair and reasonable employer would have found the conduct amounted to serious misconduct.

***Would a fair and reasonable employer have dismissed Mr Williams in all the circumstances?***

[31] The judgment delivered by Williamson J in *Wellington Road Transport Union of Workers v Fletcher Construction Company Limited* [1983] ACJ 653 at 666, (1982) ERNZ Sel Cas 59 at 70 was referred to by Shaw J in *Hudson* where Williamson J said:

*In each case the Court considers all the circumstances. In a list not meant to be exhaustive ... the Court considers: the conduct of the worker; the conduct of the employer; the history of the employment; the nature of the industry and its customs and practices; the terms of the contract (express, incorporated and implied); the terms of any other relevant agreements; and the circumstances of the dismissal. The Court also has regard to good industrial practice which includes some consideration of the social and moral attitudes of the community.*

[32] I turn firstly to consider the conduct of Mr Williams. He admitted taking the kneepad and putting it on under his overalls. He knew that it was in breach of the work rule to be in the unauthorised possession of company product. He accepted that it was a bad mistake although done in a moment of stupidity.

[33] The knee pad was never recovered and there was nothing to substantiate that it was processed and recorded as thrown out in the credit bay area where such damaged or unusable items would normally be recorded.

[34] There had been a passage of time between the incident on 18 December and the subsequent investigation into the whereabouts of the knee pad. It was reasonable though for Mr Leitch and Mr Polglase to take into account, as they did, that the kneepads were an unusual item at the distribution centre and therefore such an item would have been easier to recall than say a chocolate bar. Mr Leitch and Mr Polglase were also advised by Mr Williams's representatives during the investigation (document 7) that Mr Williams had *secreted the kneepad away so it would not come back to him*, after it could not be found following the first investigation meeting.

[35] Mr Leitch and Mr Polglase, in my view reasonably, concluded that the kneepad could not be recovered following Mr Williams unauthorised possession of it and it was therefore a complete loss.

[36] Mr Wilton submits that Mr Williams conduct was not at the serious spectrum of misuse of company product and the conduct was more in the nature of sky larking. I have concluded that the conduct was serious misconduct but agree that there could be more serious situations involving company product.

[37] The value of the knee pad was probably destroyed when the other employee opened the packaging but the misconduct was Mr Williams taking and then attaching the kneepad to his leg.

[38] I did not find the usual elements of skylarking present in this case from my viewing of the footage. I may have formed a different view if the kneepad had not been concealed under Mr Williams' overalls. Mr Williams apologised for his action and he was a long serving and trusted employee who had worked for 17 years and had no previous disciplinary sanctions.

[39] That seriousness of the misconduct has to be considered in line with the circumstances of the Supply Chain. It is a company that supplies products to supermarkets. It has 18,500 employees and a regular stock loss problem. The company takes stock loss and shrinkage very seriously and there are meetings about such things held with staff on a regular basis.

[40] The Supply Chain carried out a full and fair investigation and carefully considered Mr Williams work history and the conduct. Mr Leitch said that the decision as to disciplinary penalty was very difficult. Alternatives to dismissal were considered but ultimately Mr Leitch and Mr Polglase concluded they no longer had the required trust and confidence in Mr Williams.

[41] Mr Williams' length of service was the reason for the length of the deliberations as to disciplinary penalty being longer than usual. This service also counted against Mr Williams because it was considered that as a result of his service he would know the rules. Prior to the incident Mr Williams had been held in high regard and looked up to by his peers. On this basis it was felt that he should have stopped the incident rather than contribute towards it. I am of the view it was open to a fair and reasonable employer to consider his length of service in this way.

[42] The need to consistently apply the work rule as to unauthorised possession of company property was considered as part of the decision making process by Mr Leitch and Mr Polglase. They did not want to set a precedent that unauthorised possession of company product would result in *just* a final written warning. This was because of the national loss problems the company had and that all employees, including Mr Williams, are aware that unauthorised possession of product is unacceptable and may result in summary dismissal.

[43] I am of the view that this case is distinguishable from the unreported judgment of *Teao v Stormonts Bakeries Co Ltd* 19/12/95 AEC 133/95 where it was held that it was not fair to visit upon every employee found to have been in unauthorised possession of company property the ultimate sanction of summary dismissal as a general deterrent to others. In that case the work rules did not contemplate that every unauthorised removal of the employer's property would constitute a serious breach and Mr Teao was entitled to take the bread he took but failed to record his purchase.

[44] I do not find the same sort of rigid approach to unauthorised possession of company product was applied by the Supply Chain to that found to have been applied in *Teao*. This is supported in my view by the thorough process and the five days consideration of the circumstances before making a decision to dismiss. Unlike Mr Teao, Mr Williams was not entitled to take the kneepad.

[45] Mr Williams could have simply walked past the other employee in the repack area. Instead he stopped and talked to the other employee who was placing kneepads on his knees under his overalls in circumstances that were not in accordance with work rules. Mr Williams knew about the rule. Mr Williams then accepted a knee pad himself. There was an opportunity for him, even after he had put the knee pad on under his overalls, to hand the knee pad into the credit bay and say that it was no longer usable. That would have gone some way toward putting things right. He did not take that opportunity. His service and good record was given the careful consideration it deserved to be given and taken into account.

[46] I find that after carrying out a full and fair investigation into Mr Williams' misconduct summary dismissal was an option available to the Supply Chain for the unauthorised possession by Mr Williams of the knee pad. I find that a fair and reasonable employer would have summarily dismissed Mr Williams in all the circumstances of this case.

### **Costs**

[47] I heard submissions from Mr Wilton and Mr Langton about costs at the end of the investigation meeting. The meeting was able to be conducted within half a day including submissions. Mr Wilton advised at the time of lodging the applicant's evidence that the applicant accepted the employer's notes were an accurate account of what took place at the disciplinary meetings. This saved a considerable amount of time. Taking that sensible approach into account I

am of the view that an award less than the usual daily rate for investigation meetings in the Authority is called for. I consider a suitable award for costs to the respondent is \$1200.00 and I so order.

Helen Doyle  
Member of Employment Relations Authority