

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 78/09
5122803

BETWEEN

PHILLIP WILLIS
Applicant

AND

FONTERRA COOPERATIVE
GROUP LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Rani Amaranathan and Aimee Gallagher for Applicant
Bill Pepperell for the Respondent

Investigation Meeting: 3 June 2009 at New Plymouth

Determination: 5 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Willis filed a statement of problem on 11 August 2008 for unjustified dismissal. At the time he was represented by a lawyer, Mr Patrick Mooney.

[2] He claimed that his dismissal was unfair because Fonterra did not reasonably believe his response to allegations made by another worker about being in a place that he was not permitted to enter without proper authority and the disciplinary action was disproportionate to the offence. It was further claimed that the procedure was unfair because of inadequate notice, he was not able to choose his own support person and it was not made clear that his employment was in jeopardy.

[3] Fonterra dealt with the matter by using in-house personnel. Fonterra denied the claims in a statement in reply filed on 1 September 2008.

The progress of the application in the Authority

[4] The matter had been to mediation prior to the application being filed in the Authority. On 14 October 2008 I held a telephone conference and arrangements were made by consent for an investigation meeting to be held on 19 November 2008 at New Plymouth.

[5] The parties agreed to provide witness statements of evidence simultaneously and complete the documentation. Mr Mooney filed Mr Willis's written statement of evidence on 11 November 2008, but informed the Authority that he had sent it to Mr Willis on 4 November because Mr Willis was in Perth. The parties agreed to an adjournment of the investigation meeting scheduled on 19 November 2009, and this was granted on 6 November 2008 with further mediation to follow. A follow up telephone conference was held on 13 February 2009, and subsequently the parties' representatives confirmed 3 June 2009 for the investigation meeting. The parties attended further mediation on 26 March 2009.

[6] Fonterra's written witness statements of evidence were filed in the Authority on 12 May 2009.

[7] On 29 May 2009 the Authority requested confirmation from Mr Mooney and Mr Pepperell that all the material had been handed in and exchanged for the investigation meeting and to enable me to complete my preparation. Mr Pepperell usefully informed the Authority that Mr Willis had instructed new counsel. Mr Mooney had not withdrawn and did not immediately reply. The new lawyers then contacted the Authority on 29 May, and Mr Mooney advised the Authority that he was no longer acting.

[8] On 29 May 2009 the new solicitors, (Rani Amaranathan and Aimee Gallagher), acting for Mr Willis requested an adjournment because (1) they did not know the date of the investigation meeting was set for 3 June 2009, (2) Mr Willis says he was not aware of the investigation meeting, (3) Mr Willis now lives in Perth and could not attend at short notice, and (4) Mr Willis's file was being held by Mr Mooney over an outstanding issue.

[9] Mr Mooney, in reply to questions from me, says that he advised Mr Willis of the 3 June date and he spoke to Mr Willis in person at New Plymouth. Mr Mooney confirmed there was an outstanding issue before releasing the file, but he did forward email copies of the respondent's evidence and statements so that Mr Willis could discuss the matter with his new lawyers. The file has subsequently been forwarded.

[10] On 2 June 2009 the Authority received a further submission for an adjournment from the applicant personally. He has alleged Mr Mooney failed to communicate adequately with him and did not tell him the actual date for the investigation meeting. He has requested an indulgence to enable him to get cheaper representation. He has asked for his new lawyer to have time to prepare.

[11] On 3 June I was advised after the investigation meeting that the applicant's new solicitors had enquired about the possibility of being heard by telephone in regard to the application for adjournment. This was not possible because it was too late.

[12] The respondent has not opposed the adjournment, but has signalled its concern about any delay and the costs and wanted closure.

Application for adjournment

[13] I was not prepared to grant the adjournment. My reasons are as follows.

[14] I do not accept that Mr Willis did not know about the investigation meeting because of the following reasons:

- First, Mr Mooney says that he told Mr Willis of the date, and I rely on Mr Mooney acting on instructions that would have included him filing the application in the Authority and participating in the telephone conferences and confirming the date.
- Secondly, the 3 June 2009 investigation meeting date was confirmed by both parties' representatives prior to the notice of investigation meeting being despatched on 23 February 2009.
- Thirdly, further mediation occurred after the first adjournment and after the notice of investigation meeting had been sent to both parties' representatives so there is a link to the 3 June date. There is

information on file that the parties attended mediation on 26 March 2009 and they continued to attempt to settle the matter on and about 6 May 2009 through their representatives. This could have only been to avoid the need for the Authority's investigation meeting on 3 June 2009.

[15] I am entitled to rely on the applicant's representative's confirmation of the date of the investigation meeting. Any communication arrangements between Mr Mooney and Mr Willis were a matter for them. However, I am satisfied that it was entirely reasonable to believe that Mr Willis should have known the actual date of the investigation meeting.

[16] In assessing the documentation I find that it is more than likely Mr Willis has not been entirely open about the information he has disclosed. This is relevant to the new lawyers' information that they did not have sufficient time to prepare for 3 June 2009. It is reasonable to expect that they should have been told at least by 14 May 2009, when they requested the file from Mr Mooney, that the matter had been filed in the Employment Relations Authority as long ago as 11 August 2008. It is not clear that Mr Willis told his new lawyers that there had been an application made because Mr Willis and his new lawyers have not said as much. Furthermore they have requested the adjournment because the lawyers say they did not know the date of the investigation meeting and Mr Willis said that he did not know the date of the investigation meeting.

[17] First, I accept that Mr Willis's new lawyers did not know of the date because they say so and they have relied on instructions from Mr Willis. Also, the Authority learnt of a change in lawyers when the request was made for the parties to confirm all the material had been sent in.

[18] Second, it was reasonable to expect that Mr Willis would have fully informed his new lawyers that the employment relationship problem had been filed in the Authority. If so, they could have followed up the matter with the Authority earlier than 29 May 2009, and obtained information about the status of the application and to obtain any documents if they were having difficulties in getting Mr Willis's file.

[19] Third, Mr Willis's new lawyers have had time since 14 May to obtain documents from the Authority if they had known about the application. They were provided with the Fonterra witness statements to help prepare and no details have been provided why they could not represent Mr Willis at the investigation meeting other than not being available and returning to work on 3 June 2009.

[20] Mr Willis provided insufficient details to support his claim that he needed to get cheaper representation that required an adjournment, when he presumably should have had his eyes wide open as to costs and likely outcomes. I note that he has instructed a firm of solicitors like he had engaged Mr Mooney, also a lawyer.

[21] Finally, and only as a residual consideration, I was not prepared to leave this matter clouded by uncertainty, and the respondent was entitled to some closure. I am required to deal with matters speedily pursuant to clause 4 of the Employment Relations Regulations 2000, and this matter has already been delayed sufficiently.

[22] The time for preparation has been relied upon for the adjournment, but I find that the amount of time for any preparation would be minimal given that most of the information has been available and could quickly be reviewed, and that the Authority's role involves an investigation, and not a trial. I do not accept that Mr Willis's new lawyers have had insufficient time to prepare and make appropriate arrangements to attend since they became involved on 14 May 2009.

The applicant's failure to appear or be represented at the investigation meeting

[23] Mr Willis was not present and was not represented at the investigation meeting. I relied on the information from him and his lawyers that he was in Perth and nobody would be attending and when they failed to do so, it was clear there would be no appearances. Mr Willis's new lawyers' reasons for being unable to attend were that they were not scheduled to return to work until Wednesday 3 June and would not be able to be present. I concluded that there has been no good cause why Mr Willis could not have made arrangements to attend his investigation meeting and make arrangements to be represented.

[24] This is a wholly unsatisfactory situation. It is of Mr Willis's own making.

[25] I accept that all Mr Willis's lawyers are being open and honest with me and are relying on instructions from Mr Willis. Unfortunately what Mr Willis may have told his new lawyers and what the facts are could be part of the problem he now faces.

[26] I can only presume Mr Mooney filed the application on Mr Willis's instructions in 2008, and confirmed the 3 June 2009 date for the investigation meeting with Mr Willis's agreement. I am entitled to rely on that.

[27] I believe that Mr Willis knew about the investigation meeting date. His new lawyer says that they only have just found out about the investigation, and that is possibly so. Mr Willis would have known that his application had been filed in the Authority when he instructed them, as early as 14 May 2009, because there had been an earlier date which had been adjourned and the parties went to further mediation and his representative confirmed the 3 June 2009 date and provided a written statement of evidence with Mr Willis's knowledge. It is reasonable to expect that Mr Willis informed his new lawyers that an employment relationship problem and a statement of evidence had been filed in the Authority, which he must have known about. A prudent representative would then have checked with the Authority about what the status of the file was.

[28] I am left with the lingering impression that Mr Willis has not been fully open with me, and his lawyers. I am satisfied that Mr Willis knew an investigation meeting had been scheduled for 3 June 2009, and while he is in Perth, he has not provided a sufficient explanation for his non-appearance. If he has had any difficulties with his previous lawyer that is not a good cause to fail to attend an investigation meeting. He could have done more to deal with his affairs and make arrangements to be present for the investigation meeting and to enable his new lawyers to prepare and make arrangements to have somebody attend. I reject any suggestion that he has had short notice of the investigation meeting.

[29] Therefore, I conclude there was no good cause for his failure to be present or be represented. Thus, it was my decision to proceed and act fully in the matter as if he had duly attended or been represented: clause 12 Schedule 2 of the Employment Relations Act 2000.

Determination

[30] It is common ground that Mr Willis was dismissed and Fonterra accept responsibility to justify the dismissal.

[31] Mr Willis's failure to attend meant that he was not available to be questioned on his evidence, whereas the respondent's witnesses were present. I accept their evidence and find that Mr Willis was dismissed for breaching Fonterra's "*permit to work policy and procedures*" and on the grounds of serious misconduct. I am satisfied that all the allegations relied on were put to Mr Willis and that he had an opportunity to reply with the knowledge that if the allegation was established he faced the possibility of dismissal. Fonterra's investigation was followed up with a disciplinary meeting, and subsequently Mr Willis was informed of the findings and the decision of an intention to dismiss him. Mr Willis was represented at the meetings, and his union official says he never raised any complaint or issue until Fonterra's intention was given to him. Before any decision was confirmed Mr Willis was given an extension of time to get further input using another union official and Mr Mooney. They were given the opportunity to attend and make submissions. Further submissions were made.

[32] When I assessed Fonterra's witnesses' evidence and compared it with Mr Willis's information I think it is very probable that Mr Willis has been selective and that he left out information that he reasonably should have included, such as the circumstances on 3 March 2008 when Fonterra's intention to dismiss him was put to him, and that there was an extension of time given to him to make further submissions and obtain other advice from his union and or another representative. That opportunity was taken up and Mr Willis was dismissed on 17 March 2008, not as he says on 3 March 2008.

[33] Fonterra's evidence justifies its decision to dismiss Mr Willis when the decision maker reached an honestly held belief to believe the complainant over the issue about where Mr Willis was working as a matter of credibility, and that it acted fairly. The grounds for dismissal related to serious misconduct and I accept that it

was open to the employer to dismiss Mr Willis and not to decide on a lesser penalty given the permit procedure and policy and the employment agreement.

Orders of the Authority

[34] Mr Willis does not have a personal grievance. His claim is dismissed.

[35] I now turn to costs. Fonterra has dealt with in this matter internally using its own in-house personnel and this would have saved on the cost. I want to add that the approach taken by Fonterra to deal with this employment relationship problem, without engaging expensive professional representation, is to be commended. I reserve costs for any claim if Fonterra has incurred any costs, but I am signalling that a likely outcome would be for costs and disbursements to lie where they fall.

P R Stapp
Member of the Authority