

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Julian Paul Blaker (Applicant)
AND B & D Doors (NZ) Limited (Respondent)
REPRESENTATIVES Paul Pa'u for the applicant
Paul White for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 8 February 2006
DATE OF DETERMINATION 16 February 2006

DETERMINATION OF THE AUTHORITY

Mr Blaker's claims

[1] Mr Julian Blaker was employed by the respondent, B & D Doors (NZ) Ltd, as an Installation Supervisor. He had held this position since August 2004. On 12 January 2006, Mr Blaker was dismissed. In the letter advising him of his dismissal B & D said that the reason for his dismissal was that Mr Blaker had:

- *taken company property without authorisation: and*
- *lied to company representatives during the company's investigation of that theft.*

Mr Blaker claims that his dismissal was unjustified. On 13 January 2006 he filed an application with the Authority seeking interim and permanent reinstatement, payment of lost wages, compensation for humiliation etc of \$15,000 and costs.

The events leading to Mr Blaker's dismissal

[2] On 7 December 2005 the company's National Operations Manager, Mr Steve Dean, was advised that a staff member had been seen loading aluminium off-cuts onto a trailer. Mr Dean observed for himself the trailer loaded with aluminium but due to other commitments was unable to investigate further immediately. Later that day Mr Dean noted that the trailer was now empty and approached Mr Blaker to ask about the aluminium. Exactly what was said during this conversation is disputed by Mr Blaker but formed an important part of the Company's subsequent investigation. On 9 December 2005 Mr Dean wrote a *summary of facts* which included the following statement:

Wednesday 7 December approx. 2.30 pm

I asked Mr Hugh Wrigley to accompany me to view the trailer for a second time to see if we could clarify the situation. When we arrived I noticed the trailer had been moved and was empty. Noticing department supervisor, Julian Blaker I asked him had seen anyone move the trailer. He said that at the request of another employee he had taken the material to the scrap dealer and then showed me the cash that he had received. Julian would not tell me who the other employee was until I said we knew H. put the material in the trailer. Julian then confirmed it was H. who requested Julian to take the material and also his intention was to give H. the cash. I asked Julian if we could discuss this with H. at 11.30 on Thursday morning which was acceptable he replied.

Wednesday 7 December approx. 2. 45 pm

I approached H. to ask if he is available at 11.30 Wednesday to discuss the material movements. H. replied he would be available but it was Julian who had asked him to collect the material and put it in the trailer. I said I prefer to discuss the events with Julian present and left the area.

Because of his unavailability for crucial meetings Mr Dean did not take a direct part in the investigation of Mr Blaker's conduct. The investigation, and Mr Blaker's dismissal, was carried out by Mr Kerry Heard, B & D Sales and Marketing Manager.

[3] On 9 December 2005, Mr Dean and Mr Heard wrote to Mr Blaker saying that they had received information which suggested:

- *Sometime during the afternoon on 7 December you apparently removed company property (aluminium) from our premises without authority.*
- *When asked if you knew where the aluminium had gone you replied to Steve Dean and Hugh Wrigley that you had received money in exchange for this company property.*
- *You expressed that your intention was to pass any money you received to H.*
- *The current whereabouts of the money is unknown.*
- *You confirmed that H. moved the aluminium from the recycle bin to the trailer.*
- *Our company vehicle was used to transport the aluminium without proper authorisation.*
- *You allege a third person who was apparently involved in the movement of the property.*

And:

At this stage the concerns I have relating to these issues:

- *Your involvement in the removal of company property without authorisation.*
- *The apparent use of our company vehicle without authorisation.*
- *The whereabouts of the cash apparently exchanged for company property.*
- *Who else if anyone was involved.*

The letter went on to suggest that the company was sure that there was an appropriate explanation and that they had formed no view on these matters. However the letter also advised that if Mr Blaker did not have a satisfactory explanation they would view these matters extremely seriously and that his employment would almost certainly be terminated. The letter also noted that Mr Blaker had received independent advice and asked that Mr Blaker respond no later than 5 p.m. on Monday 12 December. Following an exchange of correspondence between the company's solicitor (Mr Paul White) and Mr Blaker's solicitor (Mr Paul Pa'u) a meeting was held on 14 December 2005. This meeting was attended by Mr Blaker and Mr Pa'u, Mr Heard, Mr Edwin Richards and Mr White. At

this meeting Mr Blaker provided further information and explanation to the company. Following the meeting Mr Pa'u wrote to the company emphasising a number of points including:

During the course of the meeting, we made it abundantly clear that at all material times my client understood that the aluminium off-cuts which were in rubbish bins and were regarded as rubbish. He made it clear that the aluminium off-cuts that were removed from the rubbish bin were sold and the funds he received were for the installer's social fund.

You will also recall that during that meeting, my client reiterated that in the entire time he has been employed by the company, he has not received any written memo or instruction from his employer (either verbal or written), or been referred to any policy or procedure or any house rule advising that the aluminium off-cuts in these bins are regarded as company property and that the removal is regarded as the theft of company property or removal of company property.

And:

As I also pointed out, the company's silence on this issue is consistent with the general understanding, including the understanding of my client that rubbish is exactly that, rubbish.

[4] On 16 December Mr Dean met with H. to clarify H.'s understanding of the company's policy with regard to the removal of aluminium off-cuts. In his evidence Mr Dean said that he did this to check Mr Blaker's assertion that there was *widespread understanding that off-cuts could be and were removed by employees*. He said this did not accord with his understanding or that of other senior staff but he considered the Company needed to check this understanding with other employees. Mr Dean said that Mr H. was a good choice as he had been at the company for about 20 years and was also a union delegate. At the investigation meeting Mr Dean provided the Authority with minutes of the meeting which contained a summary of the questions he asked H and H.'s responses. These minutes record:

The following points were discussed for clarification.

- *Have you been requested to move aluminium off-cuts on previous occasions?*
H. – never instructed to move aluminium off-cuts by anyone before, or know of any other person who has moved aluminium off-cuts out of the designated containers.
- *Do you consider the off-cuts to be a hazard including scavengers taking items outside of working hours.*
H. acknowledged that the aluminium bins are not left outside so were not a hazard either in the workplace or to scavengers.
- *In your opinion do other employees understand the requirement to obtain prior approval before removing items from company premises.*
H. believes that staff understands the requirement to gain prior approval before removing items from company premises.

[5] Following his meeting with Mr Blaker on 14 December Mr Heard advised Mr Dean that Mr Blaker disagreed with the *summary facts* prepared by Mr Dean on 9 December 2005. As a result Mr Dean approached Mr Wrigley to confirm Mr Wrigley's' recollection of those events. Mr Wrigley responded to Mr Dean's request by e-mail stating:

I have read the summary of facts and agree that is correct as I heard it.

[6] Following these inquiry's B & D, through its solicitor, wrote to Mr Pa'u, requesting Mr Blaker attend a further meeting and stating:

8. B & D Doors considers that there are currently two issues to resolve

8.1 Julian's taking of aluminium extrusions and selling them on 7 December;

8.2 Julian lying to B & D Doors during the investigation of the above incident.

The letter noted that Mr Pa'u had been supplied with information gathered through the course of the investigation and went on to say that the company did not think that Mr Blaker's explanations to date were sufficient to justify his actions because:

- Mr Blaker's claim that there was a belief/practice within the company that aluminium extrusions can be taken did not accord with the company's understanding.
- Mr Blaker had previously asked before removing company property and was therefore aware that he was not entitled to do so without authorisation.
- Mr Blaker could not reasonably have believed that the aluminium was rubbish.
- It is reasonable for company to expect its employees would not remove valuable company property even if there was no specific written directive not to do so because it is common knowledge that unauthorised removal of another's property in any circumstances is theft.

This letter also advised that the company was considering Mr Blaker's apparent lying in the investigation of this incident.

[7] On 11 January 2006 Mr Pa'u wrote to the company setting out, in some detail, Mr Blaker's response to the companies concerns. On 12 January Mr Heard, Mr Richards and Mr White for the company, met with Mr Blaker and Mr Pa'u. Following this meeting Mr Blaker was advised of his dismissal.

Why Mr Blaker says his dismissal was unjustified.

[8] The above sets out an outline of the events which led to Mr Blaker's dismissal. There are several of aspects which Mr Pa'u says render Mr Blaker's dismissal unjustifiable. These can be summarised as follows:

1. Mr Blaker did not try and hide that he had removed and sold the off-cuts and that he had received money for it. When approached by Mr Dean his answers were immediate, unrehearsed and, in Mr Pa'u's submission, honest. He honestly believed that the-off cuts were rubbish and he was entitled to remove them and sell them.
2. The company has never suggested that Mr Blaker stole the items so that he could use the funds for his own personal benefit.
3. If Mr Blaker had intended to steal from the company he could have done so after hours rather than in plain view of staff and management during working hours and he would not have involved another staff member.
4. At the meeting of 14 December Mr Blaker provided a comprehensive explanation to the allegations. There was no discussion at that meeting that Mr Dean would be undertaking the inquiries on behalf of the company. . It was surprising that the decision maker, Mr Heard, did not speak to critical witnesses, Mr Wrigley and Mr H. regarding a very serious allegation of

lying. It was highly prejudicial to Mr Blaker that Mr Dean was allowed to investigate this matter because Mr Dean was effectively investigating himself. By allowing Mr Dean to conduct a part of the investigation, involving allegations of credibility involving himself, the company not only gave the appearance of bias but committed actual bias in the way in which it handled the investigation.

5. Mr Wrigley was the asked to confirm the recall of his superior, Mr Dean. This approach was neither fair nor reasonable. Mr Dean had already expressed his opinion that he did not believe Mr Blaker's explanation regarding theft and that he felt that, should the allegations be proven, dismissal should follow.

6. When presented with a statement from two installers the company checked with only one. That installer said that he was unable to comment regarding off-cuts. Mr Dean decided not to check with the other installer because he decided it would not have any weight to his investigation. This was never communicated to Mr Blaker and this attitude betrayed, in Mr Pa'u's opinion, the closed minded bias of the company.

7. The minutes of the meeting with Mr H. do not reflect what the company say they do i.e. that Mr H. said that there is no widespread belief that employees could remove off-cuts with impunity. The company failed to appreciate that Mr H. would not wish to further incriminate other employees and that he could be forgiven for wanting to cooperate with his employer.

8. Mr Heard was in all probability influenced by views expressed to him during the course of the investigation by the company's CEO and by Mr Dean.

9. According to Mr Pa'u the meeting of 12 January 2006 was neither fair nor reasonable. He says the meeting should have been adjourned to another date so that reasonable inquiries could be made, and proper consideration could be made of the submissions. Despite a number of strong arguments and criticisms raised in the 11 January letter and in lengthy oral submissions at the meeting on the 12th, the company simply wanted to conclude the matter on 12 January.

10. Mr Blaker had never previously been subject to any disciplinary process.

11..The issue of theft involved an honestly held belief on Mr Blaker's part that the items were not valuable in the sense that he made money from them, his explanations were consistent and unrehearsed and the funds were not for his benefit.

14. The lies were not serious. The company's approach to the alleged lies was inconsistent and implausible. The basis of the lying allegation was that Mr Blaker disputed the *Summary of Facts*, a summary supported by Mr Wrigley, and therefore Mr Blaker must be lying. On the other hand there were other parts of the summary which Mr Blaker disagreed with and on these matters he was not accused of lying.

B & D's response

[9] Mr White, on behalf of B & D, argues that this is a simple case. He says that Mr Blaker admitted removing company property and selling it. B & D conducted a full and fair investigation and reasonably concluded that Mr Blaker sold the company property without authorisation, and without a belief that he was authorised to do so. Mr White says that Mr Blaker's dismissal was justified in these circumstances. Mr Blaker, in trying to cloud the issues, provided two completely

different stories. When Mr Blaker was confronted with these inconsistencies he denied that he had ever provided the first explanation and in doing so lied to his employer. His dismissal, according to Mr White, was therefore justifiable on this ground also.

[10] Mr White says that Mr Blaker never disputed that he was not authorised to remove the off cuts but maintained that he believed he was authorised to remove them on the basis that:

- there was a widespread belief within the company that employees were entitled to remove the off-cuts.
- He had never been advised he was not entitled to remove the off-cuts.
- The off-cuts were rubbish: and
- Installers are allowed to dispose of old doors and off-cuts are no different

[11] The company investigated Mr Blaker's explanations and concluded that Mr Blaker did not honestly believe he was entitled to remove off-cuts. They say the company knows of no other occasion when an employee has removed off-cuts and the company has a long standing policy that no material is to be removed from the company's site without authorisation. Mr Blaker was unable/refused to provide details of other employees who had done this and was reluctant to allow the company to speak to other employees to verify the basis of his belief. Despite this Mr H. a long standing employee, indicated that there was no widespread understanding that off-cuts could be removed. The company also suggest that Mr Blaker must have known that the off-cuts were not rubbish, but are valuable, are stored in designated bins and sold by the company as scrap metal. Even if the off-cuts are considered rubbish Mr Blaker knew he needed authorisation to remove company property from the site. The removal of old doors by installers is irrelevant as the doors concerned are not the property of the company.

[12] Mr White says that at the meeting of 14 December, Mr Blaker provided a statement which was inconsistent with the statement he provided to Mr Dean when he was first questioned. The Company checked with Mr Dean, who took the added step of checking with Mr Wrigley before confirming that his original statement was accurate. Mr White argues that on the one hand a very senior employee (Mr Dean) had recorded a contemporaneous statement, confirmed by a witness; on the other hand Mr Blaker was seeking to justify a story that he was providing to support his unbelievable justification that he was entitled to remove company property. In summarising the company's position regarding the allegation of lying Mr White submits:

The status of Mr Dean in the company, his contemporaneous recording of details, the fact that he has no motive to manufacture a story about (Mr Blaker), and the fact that Mr Blaker's lawyer even sought to rely on Mr Blaker's immediate explanation as recorded by Mr Deanoverwhelmingly suggest that Mr Dean's account of what happened on 7 December is correct. Further, Mr Wrigley, who witnessed those events, confirmed that Mr Dean's account was correct. There is no room to conclude that Mr Blaker was not lying on 14 December.

[13] Mr White submits that the company conducted a fair and reasonable process in reaching its conclusions. He says the company conducted a full and fair investigation, Mr Blaker was given an opportunity to respond to all of the allegations, Mr Heard considered Mr Blaker's responses with an open mind before any decisions were made and Mr Blaker was advised of his rights to, and received, representation. Mr White says that even if there were procedural deficiencies in this process, which he denies, these were minor and did not alter the outcome.

[14] Mr Heard, Mr White says, had an honestly held and reasonable belief that Mr Blaker had been guilty of serious misconduct, both in regards to taking the aluminium off-cuts and lying during the investigation. Mr Richards, who also heard Mr Blaker's responses, concurred with Mr Heard's decision. Each of these actions separately constituted serious misconduct and destroyed B & D's trust and confidence in Mr Blaker as an employee. In these circumstances, Mr White says, a reasonable employer would have decided to discuss Mr Blaker.

Discussion

[15] It is not the role of the Authority to determine whether or not Mr Blaker had a seriously held belief that he was entitled to remove the aluminium off-cuts or that he lied to his employer. Rather the Authority must consider whether, following a fair, thorough and reasonable investigation the employer could reasonably reach the conclusions it did. Have considered all of the evidence and having had an opportunity to closely question all of the witnesses and considered the respective submissions I have come to the conclusion that the company was justified in dismissing Mr Blaker.

[16] Much of the evidence before the Authority in this case related to disputes over such things as the timing of meetings, if when and how information was placed before Mr Blaker for his consideration and response, and whether or not the company considered his responses and submissions with an open mind. Much of this argument is covered by a careful reading of the exchange of correspondence between the parties. I am satisfied that Mr Blaker, through Mr Pa'u was advised of all relevant information and offered a reasonable opportunity to respond. Despite Mr Pa'u's assertion that Mr Heard should have adjourned the meeting of 12 January and made further inquiries, I do not believe that failure to do so was prejudicial to Mr Blaker or an indication of predetermination on the part of Mr Heard. By that point in the investigation Mr Heard had received detailed written and oral submissions from Mr Pa'u and nothing that was raised on the 11th and 12th of January was new or crucial. There was nothing to gain, other than drawing out a difficult and stressful process, by delaying making his decision.

[17] I do not accept that asking Mr Dean to check his statement was prejudicial to Mr Blaker. On the contrary not to have done so would have been prejudicial. Whether Mr Dean or Mr Heard had spoken to Mr Wrigley is, in my assessment, immaterial. Either Mr Wrigley agreed with Mr Dean (his superior) or he did not. If he was of a mind to misrepresent the situation (and there is absolutely no evidence that he did) he was likely to have given the same response whichever manager had sort his comment. Equally I do not find that opinions expressed to Mr Heard by Mr Dean or by the company's CEO during the course of the investigation rendered the dismissal unjustified. Mr Heard was entitled to seek the views of senior staff as to the alleged *widely held belief* that staff could remove aluminium off-cuts. Both Managers told Mr Heard that they did not believe that such a belief was held and expressed the opinion that, as set out in the company policy, removal of off-cuts would, if proven, be considered serious misconduct. These are statements of fact and opinion and constituted the company position. – a position which was clearly put to Mr Blaker for his response.

[18] I accept the evidence of Mr Heard, whose decision it was to dismiss Mr Blaker, that his decision was made after careful consideration of all of the information before him. He said, and I accept, that at the commencement of his investigation he believed that Mr Blaker would be able to provide a reasonable explanation for his actions. It was only as he progressed through the process that he became convinced that Mr Blaker had deliberately and knowingly removed company property without authorisation. When confronted with the conflicting statements of Mr Blaker and Mr Dean, Mr Heard took the logical step of checking with Mr Dean. Mr Dean obtained written

confirmation from Mr Wrigley that his recollection of events was accurate. It was reasonable, under these circumstances, for Mr Heard to conclude that Mr Blaker was lying.

[19] Having reached the conclusion that Mr Blaker had committed serious misconduct it was reasonable for Mr Heard to also conclude that the appropriate sanction was dismissal.

Determination

[20] As set out above, I have found that B & D Doors (NZ) Ltd was justified in dismissing Mr Blaker. Mr Blaker does not have a personal grievance and is not entitled to the remedies he seeks.

Costs

[21] Costs are reserved and the parties are requested to attempt to settle this matter themselves. If they are unable to do so, B & D Doors may file and serve an application for costs. In that event Mr Blaker will be given 14 days to respond.

James Wilson
Member of Employment Relations Authority