

to be heard on these additional allegations, none of which had been put to him during the employment.

[3] Accordingly, Mr Brown was granted interim reinstatement but on a garden leave basis. In considering the overall justice of the case and the interim determination, I had this to say about those other matters and Mr Brown's position in respect to them:

... I am satisfied that Mr Brown ought to have the opportunity to respond appropriately to the serious post-dismissal allegations that are made against him and the only proper way in which that can happen is on the footing that Mr Brown is returned to the employment, albeit on an interim basis. I accept there is a risk that the employer may consider that the post-dismissal behaviour leads to further disciplinary consequences for Mr Brown which may, in effect, complicate the substantive issues. However, I think that risk worth taking to give Mr Brown a proper opportunity to respond to the matters he is accused of and which he is yet to properly respond to.

[4] In fact those words were prescient because on 23 June 2009 (that is approximately a month after the interim determination issued) Mr Brown was dismissed again for misconduct and promptly thereafter on 30 June 2009 further proceedings were filed in the Authority seeking interim reinstatement again, alleging an unjustified dismissal and seeking permanent reinstatement as well.

[5] At the subsequent telephone conference to manage the ongoing process with the parties' representatives, it was agreed that the Authority would not have a further investigation meeting to deal with the second interim reinstatement application but would deal with that matter in association with the substantive investigation on the footing that if Mr Brown was successful in his most recent application to the Authority, he would be reinstated to his position with effect from the date of his second dismissal.

Issues

[6] The Authority will need to consider the two separate dismissals and the relevant evidence of the circumstances in each case.

[7] Accordingly, it is the Authority's intention to review the issues by dealing with the following questions:

- (a) What relevant background exists?

- (b) What happened on 9 April 2009?
- (c) Was the first dismissal the action of a fair and reasonable employer?
- (d) Did Mr Brown sexually harass other staff?
- (e) What are the circumstances about the second load of firewood?
- (f) Is the second dismissal fair?

What is the relevant background?

[8] It is plain on the evidence that Mr Brown had a longstanding arrangement with the previous owners of Avon, to cut up into kindling and remove from site slithers of wood which came off a machine called the Edgeline straightener, together with bent and reject mouldings. This material apparent built up over time and became both a fire hazard and a dangerous clutter around high speed saws and machines. Mr Brown's evidence on this point (which I accept) was that the previous owners were keen to both remove the potential fire hazard and get rid of the clutter around the machines and accordingly he was encouraged to remove this material. He says that he cut it up, bagged it, used some of it as kindling for his personal use but sold most of it.

[9] There was another class of wood effectively of a different shape which is referred in the evidence as *off cuts*. As I understood the evidence, *off cuts* were, as a consequence of their physical shape, unable to be cut into kindling but they were nonetheless a hazard in the same way as the slithers of wood I described earlier and for the same reasons.

[10] Mr Brown's evidence on this point (again accepted by me) was that before the present owners took over Avon, each staff member had an entitlement to take the off cuts *for their own use*. Mr Brown's evidence is that there was a heavy demand for them in winter time, but in the summer time they simply had to be disposed of. Mr Brown says that some of these off cuts would have been made available to old age pensioners. Mr Brown told me that the kindling and the off cuts were typically bagged up separately. He says the kindling was always *put into clear plastic bags*. Conversely, the off cuts *have always gone into the fertiliser, horse feed fibre type bags that I provided*.

[11] Clearly then when the business was owned by the former owners, there were arrangements in place which Mr Brown personally took advantage of. He took some kindling for himself and he sold other kindling. Staff could take the off cuts for their own use and did so. Those arrangements were specifically approved by the previous owners of Avon.

[12] When the present owners took over, Mr John McWhirter was appointed General Manager and at the end of the financial year immediately following his appointment, (March 2008) a stock take was carried out. Mr McWhirter's evidence before the Authority was that that stock take revealed a shortfall of \$260,000 in stock. Mr McWhirter spoke to Mr Brown about the matter. As Production Manager, Mr Brown was responsible for ordering in timber and for the management of the timber while it was on site. There were a number of explanations for the short fall, none of which are germane to the Authority's investigation.

[13] What is germane to the Authority's investigation though is that an outcome of the engagement between Mr McWhirter and Mr Brown was that Mr McWhirter indicated to Mr Brown that he wanted the practice of Mr Brown taking wood off site for his own use, to cease. Mr McWhirter's evidence (which I accept) was that this process effectively gave Mr Brown an incentive to generate waste wood because he was making money out of selling it (as I described above). Mr McWhirter told me that he regarded this as a conflict of interest because on the one hand Mr Brown was required to minimise waste wood as much as possible (as I described above for reasons of fire and general safety) while on the other he was incentivised to generate waste wood because he could sell it and make money from it.

[14] Mr McWhirter's evidence then is that he gave Mr Brown an instruction in April 2008, in the context of this general discussion after the stock take, that Mr Brown was not to take any more wood and Mr McWhirter was satisfied that Mr Brown understood the instruction and that Mr Brown committed to obeying it. I accept the truth of that evidence.

[15] In June 2008 Mr McWhirter said that he was given information that Mr Brown was still taking wood off site for his own use. In consequence, two memoranda were issued in August 2008 in similar terms, making it clear to all staff (including of course Mr Brown) that wood was not to be taken off site save when it had been purchased by a staff member and proof of that purchase was available. Mr McWhirter's evidence is

that he continued to speak directly with Mr Brown himself on the matter to reiterate the change in policy. Mr McWhirter said that he did this because he was not satisfied that Mr Brown had *got the message*. Mr McWhirter reiterated to Mr Brown that Avon's requirements were that the waste wood was to be packed in bags (which Mr McWhirter had delivered and supplied to Mr Brown) and that wood was to be sold not by Mr Brown but by Avon to defray expenses. In terms of the policy enunciated in August 2008, it was of course possible for staff to buy the wood but they needed to do that on a proper basis by arrangement with the employer.

[16] Subsequently these arrangements were again reiterated in a whole staff meeting on 27 March 2009 and a note was put in Mr Brown's pay for the period ending 17 April 2009. By that latter date, of course, Mr Brown was already in difficulty over the employer's policy, but the fact the employer took this step evidences their commitment to conveying the message.

What happened on 9 April?

[17] 9 April 2009 was the last working day before the long Easter weekend and Mr Brown was on annual leave for the part working week after the Easter weekend. It is common ground that at the close of business on 9 April 2009, Mr Brown left the workplace with his utility full of a load of bagged wood. The only question is whether Mr Brown had taken proper steps to obtain the consent of Avon before leaving the workplace.

[18] There are two different versions of events on this day. Not only is there is a difference about what was said in a critical meeting but there is even a dispute about whether two parties (one of them Mr Brown) met each other at a particular time or not.

[19] Mr Brown's evidence is that he decided to purchase 25 bags of off cuts of the 60-80 bags of off cuts which he recalls being on site at that time. He says he went to Mr McWhirter's office at about 2.50pm on that afternoon. He spoke to Mr McWhirter about a number of matters (not including the purchase of the firewood). He says that Mr McWhirter had to take a telephone call and as a consequence, Mr Brown left Mr McWhirter. Mr Brown went downstairs to Mr Jason Batten to speak to him about a number of matters. Mr Brown says that he raised the issue of the firewood and asked Mr Batten to *raise an invoice for 25 bags of firewood*.

Mr Brown said that he had his wallet in his hand. There was some uncertainty he says about the price. Mr Brown said that given that uncertainty, nothing was finalised but critically, Mr Brown claims it was agreed that Mr Brown would pay whatever the figure was on his return on Monday 20 April 2009.

[20] Then Mr Brown says that he went about his duties locking up and doing the final security check. He says that he had to telephone Mr Batten about a matter that he had forgotten but then loaded the firewood by himself and left the premises. He said he could actually only fit 24 bags onto his Ute and he left the premises about 4pm.

[21] Mr Batten's evidence is quite different. He agrees that Mr Brown spoke to him about a range of matters in his office and he even agrees that Mr Brown raised the issue of firewood. However, Mr Batten is adamant that he told Mr Brown that he did not wish to get involved and that Mr Brown should see Mr McWhirter.

[22] Mr Batten then had to leave the workplace and on his way out he says he saw Mr Brown loading his truck with firewood. Mr Batten said that he spoke to Mr Brown in the yard and reiterated that Mr Brown should see Mr McWhirter. Mr Brown, he says, said that he would take it up with Mr McWhirter. When Mr Batten got back from his off site visit (he had been to the bank) he received a telephone call from Mr Brown (consistent with Mr Brown's evidence of course) and Mr Batten said that Mr Brown again told him that Mr Brown would sort his wood out with Mr McWhirter.

[23] Finally, I note that Mr Batten's evidence is that on the morning of 20 April 2009 when Mr Brown returned to duty after his short period of annual leave, he referred to the fact that he had been stood down pending an investigation about possible theft of firewood and he said to Mr Batten *you are the only one who can help me now*.

[24] It falls to the Authority to decide which recollection of events is to be preferred. Mr Brown says there was one conversation with Mr Batten in the latter's office in which he and Mr Batten agreed that he would pay for the wood on 20 April when he returned after a short period of annual leave. Mr Brown denies that he had a second conversation with Mr Batten in the yard when the latter was going to the bank. Conversely, Mr Batten says that no such agreement (about Mr Brown paying on

20 April) was ever made and that he referred Mr Brown to Mr McWhirter. Mr Batten is also clear that he spoke face to face to Mr Brown on two occasions, once in his own office and once in the yard and that the message was the same on each occasion.

[25] I was impressed with Mr Batten when he gave his evidence and I could not think of any reason for him to prevaricate about the matter. If Mr Batten had indeed agreed to deal with the matter on 20 April, as Mr Brown suggests, then it would be simple for him to have confirmed that. Mr Batten would be very clear that in failing to confirm that arrangement, he was effectively consigning Mr Brown to an uncertain future and at very best, the prospect of dismissal. There seemed no particular animosity between the two men and no reason that I could discern for Mr Batten to lie.

[26] On the other hand, Mr Brown's evidence was not as impressive, on this point or indeed on other points of significance. I thought Mr Brown lacked insight into his own behaviour and if his story about the wood is to be believed, it does rather suggest a cavalier attitude to the employer's new requirements. Quite clearly the rules had changed with the ownership and it would seem nothing short of foolhardy to try to play fast and loose with the new arrangements for the taking of firewood. A sensible person would not remove wood from the site without a clear agreement of the employer so to do.

[27] Mr Brown, of all people, would have been well aware of the employer's enthusiasm for the new arrangements. It was made painfully clear to him on numerous occasions since the change of ownership that the rules had changed and yet in those circumstances, at best, his evidence is that he removed wood from the premises without any documentary evidence that he had Avon's blessing to do that. Leaving matters up in the air (on the basis that he would pay on 20 April 2009) as he claims was agreed with Mr Batten, must be seen as a high risk strategy, if that is in fact what happened.

[28] For these reasons, I conclude that Mr Batten's evidence is to be preferred and that Mr Brown's recollection of events is mistaken. I do not think there was a settled agreement with Mr Batten that Mr Brown would pay for the wood on 20 April 2009. I am influenced to reach this conclusion because in general I thought Mr Batten's evidence was trustworthy, because I thought Mr Batten's recollection of the conversation he had with Mr Brown on 20 April 2009 was telling and because I

thought Mr Batten's refusal to get involved in wood purchases in any way was consistent with the other evidence. Clearly, Mr McWhirter had taken a personal interest in this wood business, was anxious about it and had tried very hard to convey the company's changed position. In those circumstances, I think Mr Batten's evidence that he simply did not want to be involved is likely to be accurate and that of course is consistent with his evidence that he refused to engage with Mr Brown in relation to the latter's request.

Was the first dismissal fair?

[29] It follows from the foregoing section of this determination that I conclude that the first dismissal of Mr Brown was a decision that a fair and reasonable employer would make in the circumstances of the case as they existed at the time and after the conducting of a proper investigation.

[30] The whole fulcrum of Mr Brown's position on this first dismissal relies on his contention that he had an arrangement with Mr Batten and given my finding that I do not believe him, it follows that the rest of his argument falls away. I think this conclusion is supported by the fact that it was Mr Batten who drew to Mr McWhirter's attention the fact that the firewood had been taken off site by Mr Brown. In that regard, I accept the submission made on Avon's behalf by Mr Nathan that it does not follow logically that Mr Batten would have drawn to Mr McWhirter's attention that Mr Brown had removed firewood improperly if Mr Batten and Mr Brown had some kind of arrangement.

[31] At the change of ownership of Avon, there was a change of policy in relation to the taking of firewood. That was discussed with Mr Brown by Mr McWhirter in April 2008. When it was suggested to Mr McWhirter that Mr Brown was still taking firewood (which Mr Brown denied) Mr McWhirter had further personal discussions with Mr Brown on more than one occasion and there were reiterations of the new policy by memoranda in August 2008. There was a staff meeting on 27 March 2009 at which the policy was reiterated again by Mr McWhirter. Mr Brown was in attendance at that meeting. Then less than 14 days later, Mr Brown removed a load of wood from the yard on 9 April 2009.

[32] Once Mr Brown had returned from annual leave, he was suspended from duty and a disciplinary meeting was convened on 27 April 2009 at which Mr Brown gave

an explanation for the matters complained of. Avon then sought to talk to other staff who might have relevant information on the matter. Mr Brown was provided with the statements of other staff on 2 May and he provided his response to those other statements on 5 May. A decision to terminate his employment summarily was made and notified to Mr Brown on 8 May 2009.

[33] It is not necessary for me to detail the process adopted by Avon in attending to this disciplinary inquiry. It suffices to record that both parties were advised throughout by able counsel and I do not understand it to be claimed that the process adopted by Avon was anything other than the sort of process that a fair and reasonable employer would adopt in conducting inquiries about a matter of this kind. Certainly, on the basis of the evidence before the Authority, it is my considered view that the process Avon adopted was a fair and reasonable one.

[34] Having concluded then that Mr Brown is mistaken in his conviction that he made an arrangement with Mr Batten to pay for the firewood on his return from annual leave, it is self evident that Mr Brown's actions in removing the wood from the premises was in breach of the clearly enunciated policy of the employer. By clause 5.1 of the operative employment agreement between the parties, Mr Brown bound himself to abide by all notified policies or procedures of the employer. A conclusion that this action constituted serious misconduct for which dismissal should be the penalty was, I hold, available for Avon to make.

Did Mr Brown sexually harass other staff?

[35] As I have already noted, Mr Brown's second dismissal from Avon's employment was effected because Avon found as a fact that Mr Brown had sexually harassed a number of female staff also employed by Avon. In addition, the second dismissal was also based on Avon's factual finding that Mr Brown had inappropriately taken another load of firewood from the workplace.

[36] The allegations of sexual harassment all surfaced after the first dismissal. In essence, when it became known to other staff that Mr Brown had been dismissed by Avon on the first occasion, Mr McWhirter gave evidence that one of his female staff members (Jacinta Roosing) made an unsolicited comment to him to the effect that she would be pleased not to have to avoid Mr Brown in the future.

[37] In Mr McWhirter's evidence before the Authority, he detailed the process that he adopted in inquiring into the sexual harassment allegations which as I have just identified, was effectively referred to literally in passing by one of his female staff members when he communicated to that person the decision Avon had taken to dismiss Mr Brown the first time.

[38] What happened next, in a peripheral sense, was that I temporarily reinstated Mr Brown to his employment at least in part on the footing that I felt he was entitled to be able to respond to the allegations of sexual harassment which had arisen subsequent to his first dismissal.

[39] In essence, each of five female staff members made specific complaints about unwanted contact with Mr Brown and he, after his interim reinstatement, responded to each of those allegations. Mr Brown complained that the allegations are somewhat "diffuse" and that, in particular, there was little specificity about dates and times. Counsel for Mr Brown made the submission that these allegations had been blown out of all proportion to allow Avon to dismiss Mr Brown a second time, effectively confirming the first dismissal. The submission is also made on Mr Brown's behalf that at no stage during the employment save at the very end of it, was Mr Brown ever spoken to about this behaviour and yet it appeared to be widespread and apparently continued over some many years.

[40] I accept the force of some of these criticisms. In particular, it is troubling that Mr Brown was never spoken to about these matters. It was clear from the evidence that a reasonable number of people in the workplace knew about the complained of behaviour and yet it seems that, whether matters were ever communicated to management or not, certainly Mr Brown was never spoken to. It follows that Mr Brown can say, with some justice, that he did not understand the behaviour complained of to be offensive and that so far as he was concerned, his motives were always innocent. Certainly, it was a feature of Mr Brown's defence of his position that none of the behaviour complained of had, from his standpoint, a sexual connotation.

[41] Having noted that the behaviour now complained of ought to have been the subject of an earlier complaint such that Mr Brown could have been remonstrated with earlier, it certainly cannot be the Authority's function to complain about the failure of an employer to act when the employer is unaware of the existence of the

problem. In that regard, I accept without reservation Mr McWhirter's evidence that he simply did not know about the sexual harassment complaints about Mr Brown until he was alerted to them by one of his female staff after the first dismissal. What is clear is that as soon as Mr McWhirter was seised of the issue, he raised it and sought to deal with it.

[42] I am not satisfied either that the complaints made against Mr Brown are so general as to be unable to be responded to and the principal reason I reach that conclusion is that on the evidence, Mr Brown had no difficulty whatever in responding to the allegations made. As counsel for Avon correctly identifies, Mr Brown seems to have been able to remember most of the incidents and to make comment on them.

[43] The Authority's focus must be on looking at the evidence by the decision maker and identifying whether that person has adopted a proper process and made reasonable and informed judgments which were available to be made on the factual matrix in place.

[44] The decision maker was of course Mr McWhirter. In his evidence before the Authority, he carefully described the process that he undertook. He referred to evidence from male staff members who had observed Mr Brown committing some of the acts complained of. Then there were the individual allegations of the female staff, each of whom described inappropriate and unwanted touching by Mr Brown. A third source of evidence which Mr McWhirter identifies concern an earlier referral of complaints about Mr Brown's behaviour to the previous owners of the business, but no evidence that any steps were actually taken.

[45] Mr McWhirter's conclusion from this collection of evidence was that there were a collection of complaints from five female staff about inappropriate touching, that there was some corroborative evidence for that and there may have been some inappropriate response to similar (or the same) complaints by the previous owners of the business.

[46] Mr McWhirter next referred these allegations to Mr Brown and he prepared responses. Mr McWhirter's considered view of those responses is that they tended to minimise the conduct complained of but in the main made no denial that the conduct complained of had actually happened. Mr Brown's position seemed to be that while

the events in discussion had happened, there was no impure motive on his part and in particular no sexual connotation to any of his actions.

[47] At paras.15 and 16 of Mr McWhirter's brief of evidence he analyses how he concluded that Mr Brown had been guilty of sexually harassing female staff and that that behaviour constituted serious misconduct which must result in dismissal. I have carefully reflected on Mr McWhirter's logic in relation to this matter and I am satisfied that the decision that he made was the decision of a fair and reasonable employer after the conduct of a proper investigation. In particular, I think Mr McWhirter drew proper inferences from the facts and was entitled to be unconvinced by Mr Brown's explanations. As Mr McWhirter said, Mr Brown did not deny the majority of the events complained of but simply sought to cast them in an innocent light. Mr McWhirter said that if there had been but one incident that argument might have been tenable but given that there were a number involving a number of different women and a number of different acts complained of, the explanation wore a bit thin.

[48] Furthermore, in terms of the consideration of penalty, Mr McWhirter did consider whether there was a possibility of re-deploying Mr Brown in another role but found there was not one that he was able to offer. This was particularly an important aspect because two of the female complainants had indicated to Mr McWhirter that they would not be able to work with Mr Brown again given the sexual harassment allegations.

What about the second load of firewood?

[49] This allegation, like the allegations of sexual harassment, arose after the first dismissal. Again the allegation is said to have surfaced before Mr Brown was reinstated after the first dismissal and it arose in a similar fashion to the sexual harassment claims, namely it was mentioned in passing by a staff member when Mr McWhirter advised that staff member of the dismissal of Mr Brown on the first occasion.

[50] The essence of the allegation was that immediately after the staff meeting in March 2009 when Mr McWhirter had spoken to staff about the new rules around taking firewood (in an attempt to again reiterate the employer's position) Mr Brown

was alleged to have removed another load of firewood for his own use and in breach of the policy that Avon had enunciated.

[51] Mr McWhirter says that he was told that the staff member who saw the load of wood being removed was unable to identify exactly when it was but was certain that it was between the staff meeting in March and the Easter break and was equally confident that it was not the load of firewood for which Mr Brown had already been dismissed.

[52] Again, in his evidence before the Authority, Mr McWhirter described his investigation. He referred first to corroborative evidence of the allegation from other staff who remembered either seeing the firewood or assisting the loading of it, or both.

[53] Mr Brown absolutely denied that he had taken any other load of wood in 2009, that is other than the load for which he was originally dismissed. Mr McWhirter, given the contrary evidence of his initial informant and the evidence of other staff who remembered assisting the loading of a truck full of firewood, concluded that Mr Brown's explanation was not creditable and accordingly he formed the view that this allegation also had been made out.

Was the second dismissal fair?

[54] I conclude that it was available to Mr McWhirter to decide that Mr Brown had committed serious misconduct because of a series of proven examples of sexual harassment and because of another case of removal of firewood without proper authorisation.

[55] I consider that the thought processes undertaken by Mr McWhirter in making his conclusions were the sorts of reflective inquiries that a fair and reasonable employer would make in reaching the judgments required. I also consider that the determination to dismiss rather than deal with the matter in some other less permanent fashion was available to Mr McWhirter to make in all the circumstances and that that was the decision that a fair and reasonable employer would make in all the circumstances of the case having conducted a proper inquiry.

[56] I have already commented on the inquiry process which Mr McWhirter undertook and I am satisfied that this process was thorough, fair and balanced.

Determination

[57] I am satisfied on the balance of probabilities that Avon's decision to dismiss Mr Brown for serious misconduct on each of two occasions, were each of them decisions that a fair and reasonable employer would make after the conduct of a proper inquiry. I am satisfied that the inquiry in each case was careful, fair and measured, that Mr Brown was given a proper opportunity to be heard and that the decision to prefer the evidence of others to the evidence proffered by Mr Brown was on the facts, available to conclude.

[58] That being the Authority's conclusion, Mr Brown's substantive claim fails and it follows that he is not entitled to any remedies.

Costs

[59] Costs are reserved.

James Crichton
Member of the Employment Relations Authority