

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Blair Paul Claydon (Applicant)  
**AND** Recreational Turf Services Limited (Respondent)  
**REPRESENTATIVES** Warwick Claydon, Advocate for Applicant  
Garry Pollak, Counsel for Respondent  
**MEMBER OF AUTHORITY** R A Monaghan  
**INVESTIGATION MEETING** 10 March 2003  
**SUBMISSIONS RECEIVED** 24 March and 7 April 2003  
**DATE OF DETERMINATION** 15 April 2003

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

Blair Claydon says he was unjustifiably dismissed by his former employer, Recreational Turf Services Limited (“RTSL”). RTSL says the dismissal was justified because of Mr Claydon’s poor timekeeping and his failure to provide an adequate explanation for this.

**Background**

RTSL had a contract to maintain the cricket grounds at Eden Park. During the summer sports season of 2001-2002 this included preparing and maintaining the grounds for the third test between England and New Zealand scheduled for 30 March to 3 April 2002. The test was regarded as a showpiece for the company, not least because it would be televised internationally.

The company employed Blair Claydon as a groundsman trainee with a view to offering him an apprenticeship. Mr Claydon’s employment began on 25 February 2002. The terms of his employment were contained in a document entitled ‘Common Terms and Conditions’, which set out core terms and conditions for all employees. There was also a written individual employment agreement for Mr Claydon, which included a three-month trial period. The document made no mention of apprenticeship.

The individual employment agreement also provided that normal hours of work would be 40 per week, as required between Monday and Sunday inclusive, with normal core working hours being from 7.00 am to 3.30 am on Monday to Friday. Clause 7.1 provided further: “It is agreed and understood that your actual hours of work will be such as are necessary to effectively carry out the responsibilities of your position”. I take that provision as a reference to the fact that from time to time the workload was high and relatively long hours were worked to meet it. This was balanced by quiet periods when

relatively little work was required. In addition the remuneration provisions in the individual employment agreement allowed for a reasonably generous salary for a trainee with no experience, and expressly included a loading in respect of hours of work.

I mention this because, during a post dismissal meeting, Mr Claydon's father attempted to make an issue of hours of work. That approach did not assist in the circumstances of this case, and I take it no further.

March 2002 was a very busy time. Mr Claydon had reported to work late on several occasions that month, but the matter was not pursued with him in a disciplinary sense. However his immediate supervisor, Wayne Holmes, emphasised the particular importance of being on time for the days on which the cricket test was to be played. One of the reasons he did so was because he knew Mr Claydon was planning to attend a 21<sup>st</sup> birthday party during the weekend of the test, 30 and 31 March. Moreover, work was to start at 6 am because of the work required in preparing the wicket.

Mr Claydon was late to work on 30 March. He told Mr Holmes that he had slept in, after having spent time at Auckland Hospital visiting his brother who had been injured in an accident. Mr Holmes and Warwick Sisson, senior manager sports field, accepted the explanation.

That afternoon Mr Claydon took more time off to visit his brother. He was authorised to do so, but Messrs Sisson and Holmes were concerned about the amount of time he took. In principle Mr Claydon was permitted to use the time while the players were on the pitch, which was likely to be down time for the ground staff. As long as play was not interrupted this would give Mr Claydon about an hour and a half, and Mr Sisson's evidence was that he expressly authorised Mr Claydon to take an hour and a half for that reason. Since there is no great distance between Eden Park and Auckland Hospital, an hour and a half should have been adequate for Mr Claydon's purposes.

I was not persuaded by Mr Claydon's attempt to minimise the length of time he took, and to deny that he was absent for more than an hour and a half. The question before the Authority was how much more than an hour and a half was taken, and there was also a question about Mr Claydon's explanation of why he took the extra time.

On the evidence I consider it likely that Mr Claydon departed shortly after 1.30 pm, when the players' lunch break ended. Play was delayed because of rain at about 1.52 pm, which is consistent with Mr Claydon's evidence that he returned shortly after he had left, and offered to help place the covers on the wicket. He said he was told he was not needed so he left again. Mr Sisson doubted Mr Claydon would have been permitted to leave in those circumstances. Nothing turns on the point other than it being a possible explanation of the uncertainty surrounding the precise time of Mr Claydon's departure.

Mr Claydon should have returned some time between 3 and 3.15 pm. His evidence was that he was back at 3.25 or 3.30 pm. At a stretch that would mean he was back on time. However Mr Sisson said Mr Claydon was not back by the time the tea break was taken, which the match record shows was at 3.50 pm. The record also shows play was delayed because of rain at 4.17 pm. This is consistent with Mr Claydon's evidence that when he returned to work he was not required for the rest of the day, and with Mr Sisson's evidence that Mr Claydon was approximately an hour late. I therefore consider it likely that Mr Claydon was approximately an hour late.

This conclusion is reinforced because, after visiting his brother, Mr Claydon went home to Bucklands Beach to have a shower. Bucklands Beach is some distance from Eden Park and the return trip would have taken a significant amount of time.

Mr Sisson spoke to Mr Claydon when he returned, asking why he was an hour late. Mr Claydon explained that he had gone home to have a shower, and Mr Sisson told him he had not been authorised to do that. Mr Sisson also expressed his annoyance at Mr Claydon's lateness and his failure to return to work immediately. He reinforced the need to be on time.

On 31 March Mr Claydon was late to work again. This time he had a car accident while driving home at about 4.30 am. It appears he was uninjured, and he arranged for his car to be towed away before ordering a taxi to take him to a friend's house where he hoped to be able to borrow another car. His evidence was that at about 5.45 am he telephoned Mr Holmes at his cellphone number to say he would be late for work, but Mr Holmes denied receiving such a call. This was not supported by such telephone records as could be obtained, and on the evidence overall I am not persuaded the call was made. The friend's mother drove Mr Claydon to work, and her evidence was that she dropped him off at Eden Park at about 6.15 am.

When he arrived Mr Claydon spoke first to Mr Holmes, and explained he had been in an accident. He then spoke to Mr Sisson. Since Mr Sisson had not had an opportunity to speak to Mr Holmes about the car accident - so did not know about it - he remained annoyed by what then appeared to be constant and unsatisfactorily explained lateness. Mr Claydon's evidence about what happened next was:

"As I was walking from the No 1 pitch, Warwick Sissons, ... said to me:

'Next time you're late, don't bother coming to work. You won't have a job here.'

I tried to explain to him about the circumstances of my car accident. He cut in saying:

'I don't want any excuses.'

Mr Sissons walked off. He then came back and indicated that I would be given a warning if I was late again on a normal working day.'

Mr Sisson denied that Mr Claydon attempted to explain that he had a car accident, and said he later found out from someone else about the accident. Mr Holmes' evidence was that he mentioned it to Mr Sisson later that day.

Mr Claydon did not report to work on 1 April. Nor did he report for work on 2 April. No one was able to contact Mr Claydon directly to find out where he was, but contact was made with his mother on 2 April. It was she who arranged for Mr Claydon to phone Mr Holmes, which he did in the early-mid afternoon of 2 April.

Mr Claydon's reason for not reporting to work was that he had slept in on 1 April as a result of tiredness and anxiety about the accident. I have no doubt he was tired. He must have had very little sleep that weekend, and he neglected to mention the contribution of his attendance at the 21<sup>st</sup> birthday party. I do not accept it was the downbeat affair Mr Claydon attempted to suggest it was. When he awoke on 1 April Mr Claydon realised he would be late to work, but because of Mr Sisson's warning he concluded there was no point in reporting for work at all. He said in his statement of evidence "The recall of those words put me off contacting the company or reporting late. I did not like Mr Sissons's previous treatment of me."

Mr Holmes arranged to meet with Mr Claydon at Eden Park at 2 pm on 2 April. Mr Sisson joined them and the three had a detailed discussion in the office. Messrs Sisson and Holmes denied that Mr Claydon made any mention of the accident, saying he was asked to explain his absence several times and could reply only 'I don't know'. He gave the same response when asked why he had not contacted anyone on 1 April or the morning of 2 April. I found the evidence of Messrs Holmes and Sisson more reliable on the point, and I accept it.

While Mr Claydon went outside to apologise to his colleagues for his absence, in the light of its effect on them, Mr Sisson sought further advice from the company's human resources director. Mr

Sisson then told Mr Claydon a disciplinary meeting would be arranged. No time was finalised at that point, but Mr Claydon was asked to ensure his cellphone remained on, so that he could be contacted regarding further arrangements. The request was made because of the difficulties already experienced in contacting Mr Claydon. When Mr Sisson subsequently tried to contact Mr Claydon on his cellphone to arrange a meeting, he was again unable to do so.

Because from his point of view he had not been contacted about a meeting, Mr Claydon reported for work on time on 3 April. Mr Sisson was surprised to see him, and asked why he was there. According to Messrs Sisson and Holmes Mr Claydon said he wanted to have the meeting, and was not dissuaded even in the light of Mr Sisson's advice that his employment could be terminated and he should have a representative with him. Mr Sisson went as far as to suggest that Mr Claydon talk to his parents first. Mr Claydon denied all of this in evidence, and said Mr Holmes met him and told him to go to Mr Sisson's office. Mr Sisson then dismissed him, before saying the meeting could be repeated in the presence of a witness if Mr Claydon wished.

Again I prefer the evidence of Messrs Holmes and Sisson. I did not find Mr Claydon's evidence about many key issues of fact to be credible. As for Messrs Holmes and Sisson, subject to relatively minor reservations and taking into account the oral evidence, I did not have the overall concerns about credibility regarding these areas that I did about Mr Claydon's.

During the 3 April meeting Mr Sisson summarised Mr Claydon's absences during the test match, and pointed out that Mr Claydon knew the importance of attending on time during the test. Mr Sisson also repeated his description of the adverse effect of Mr Claydon's absence. Mr Claydon did not offer any explanation of his absences on 1 and 2 April. While I accept that did not necessarily mean there was a lack of interest or concern on his part, he had put himself into a position where he needed to say something in his own defence but he did not do so.

In the absence of an explanation for the failure to attend on 1 and 2 April, Mr Sisson advised Mr Claydon that he could not be relied on and was dismissed. It may be that he made the statement Mr Claydon said he did about repeating the meeting in the presence of a witness, but the statement must be read in the above context. It was gratuitous and not of itself determinative of the fairness of the procedure used in implementing the dismissal.

Mr Claydon did not report for work again. On 4 April he obtained a medical certificate stating he would be unfit for work until 8 April, although his dismissal was summary in any event.

## **Determination**

Mr Claydon's case relied on failures to follow the procedure required for a justified dismissal.

One such failure was that Mr Claydon was said to be an apprentice and RTSL was obliged to follow the procedure set out in the Code of Practice for modern apprentices etc, promulgated under the Modern Apprenticeships Act 2000. The problem with that is Mr Claydon was never an apprentice. He was employed for a trial period as a trainee with a view to entering into an apprenticeship, but that did not of itself make him an apprentice. None of the procedures set out in the Modern Apprenticeship Act were followed, and no apprenticeship training agreement, as defined in the Act, was entered into.

There was also a submission that RTSL failed to follow the procedures set out in its house rules. The house rules listed conduct amounting to serious misconduct for which instant dismissal may follow, as well as conduct regarded as less serious misconduct for which a warning may follow. The warning procedure allowed for three warnings, with dismissal to follow for a fourth offence. If

any misconduct was considered serious enough, it 'may proceed to a higher level of penalty'. The present problem does not require me to determine the meaning of 'A third written warning could constitute termination of employment', but I recommend that RTSL reword the procedure so it is less cryptic and less likely to be misleading in future.

The rules listed the following under 'less serious misconduct':

- '7. Poor time keeping, including arriving late for work, or from lunch and/or tea breaks.
- 14. Failing to report to designated supervisor, any lateness or other absence from normal starting time, without good reason. Do not leave a message with telephonist or another person.'

Mr Claydon was fortunate not to have been warned about his timekeeping prior to 1 April. Aside from this his failure to report for work on 1 or 2 April, without contacting his employer about why, was more than capable of bringing his conduct to a level where 'a higher level of penalty' could reasonably be considered. In addition, nothing in the house rules prevents the application of the well-established legal principle that at heart the test of the justification for a dismissal is essentially what it was open to a reasonable and fair employer to do in the particular circumstances. Finally, the 'common terms and conditions' of employment provide at clause 11.1.3 that if termination of employment is immediate for 'good cause' no notice or payment in lieu of notice is required. I therefore do not believe there was a breach of the company's house rules.

Turning to the more general requirements of procedural fairness, Mr Claydon acknowledged he knew he was probably facing disciplinary action. Aside from this acknowledgement I have found that he was expressly told as much, and that he could be dismissed. I have also found that he did not take advantage of the opportunity he was given to have someone present during the final meeting. I therefore do not accept there was any procedural unfairness in those respects.

In addition Mr Claydon was well aware of the company's concerns, particularly in respect of his absences on 1 and 2 April, but failed to offer an explanation. He must take the consequences.

Indeed there was no satisfactory explanation for the absences, and Mr Claydon could not point to an unblemished record in mitigation of any penalty the employer might consider imposing. Mr Claydon was not entitled to rely on his sleeping in on 1 April to justify his failure to report for work at all on 1 and 2 April. Nor was he entitled to rely on Mr Sisson's threat that, if he were late again, he would not have a job. He said himself that Mr Sisson then referred to giving a warning for any further lateness and I consider any explanation based on Mr Sisson's threat to be no more than opportunistic. As for the cause of his tiredness, while he may have been suffering the after-effects of his accident I have already indicated why I do not believe that explanation is a complete one.

I therefore conclude there was good cause for the dismissal, and it was justified. Mr Claydon does not have a personal grievance.

### **Costs**

Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

**R A Monaghan**  
**Member, Employment Relations Authority**