

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 279
5358465

BETWEEN GAVIN DREW
 Applicant

A N D PACT GROUP
 Respondent

Member of Authority: Christine Hickey

Representatives: Jenny Guthrie, Counsel for Applicant
 Fiona McMillan, Counsel for Respondent

Investigation meeting: 1 October 2012 at Dunedin

Submissions Received At the investigation meeting

Date of Determination: 19 December 2012

DETERMINATION OF THE AUTHORITY

A Gavin Drew does not have a personal grievance for unjustified dismissal.

B Costs are reserved.

Employment relationship problem

[1] Gavin Drew was employed by Pact Group as the Grounds and Maintenance Supervisor. Mr Drew's direct supervisor was Ferdi Koen.

[2] Pact is a registered charitable trust which operates residential facilities for *people with intellectual disabilities and people experiencing or recovering from mental illness*. Pact had arranged to cut down some trees. Its clients assisted in collecting and moving the resulting firewood to a Pact site at Hazlett Road where the

firewood was left to dry out. Pact planned to have its clients chop the firewood into smaller pieces and put it into bags. It planned to sell the wood as a fundraiser.

[3] Mr Drew assisted with moving the firewood to Hazlett Road near the beginning of 2011. He also helped Mr Koen to deliver a load of firewood to the house of another employee of Pact, Margaret. Mr Drew knew that Margaret was not purchasing the wood but that it was delivered by agreement with Mr Koen to make up for a poor load of wood sold to her by Pact the previous year.

[4] It is agreed by both parties that at some point during the early part of 2011 Mr Drew asked Mr Koen whether he could buy a load of the firewood. Mr Drew says that Mr Koen told him that he would have to find out the price for it and would have to get back to him. Mr Koen says that he told Mr Drew he could not sell it by the load.

[5] Mr Drew and Mr Koen agree that in about March or April 2011 Mr Koen told Mr Drew that he could take a few pieces of wood for himself. The wood was not offered for sale but by way of a favour to Mr Drew who needed to heat his house.

[6] In early June 2011, Mr Koen noticed that the wood pile at Hazlett Road seemed to have shrunk considerably. He commenced an investigation into the missing firewood. He interviewed a number of people. Some of those interviewed told Mr Koen that Mr Drew had taken some of the firewood home.

[7] A disciplinary process was entered into. Mr Drew admitted having taken two lots of firewood for his own use but contended that Mr Koen had given him permission to do so and that Mr Koen was going to get back to him with a price.

[8] Mr Koen denied ever telling Mr Drew that he could buy some firewood and that he would get back to him with a price. Mr Drew was summarily dismissed for dishonesty, which Pact considered to be serious misconduct.

[9] Mr Drew claims that he was unjustifiably dismissed. He seeks remedies of 13 weeks' lost wages and payment of \$10,000 in compensation for hurt, humiliation and injury to feelings.

[10] At the investigation meeting and in submissions Mr Drew also claimed that he was unjustifiably disadvantaged by Pact during his employment. Mr Drew seeks a contribution to his legal costs.

[11] Pact considers that it was justified in dismissing Mr Drew for serious misconduct. Pact also considers that the process it followed culminating in dismissal was fair.

Issues

[12] The issues the Authority needs to consider are:

- (i) Was Mr Drew's conduct that which a fair and reasonable employer could conclude was serious misconduct?
- (ii) Was the process leading to dismissal that of a fair and reasonable employer in all the circumstances?
- (iii) Could a fair and reasonable employer have made the decision to dismiss Mr Drew in all the circumstances?
- (iv) Was Mr Drew unjustifiably disadvantaged?
- (v) If the dismissal was not justified, then what remedies should be awarded and are there issues of mitigation and contribution?

Could Mr Drew's conduct in taking the wood amount to serious misconduct?

[13] The allegation that Mr Drew dishonestly took wood from his employer for his own use is a grave one. Given the seriousness of the allegation Pact had to be satisfied to a high degree of probability that Mr Drew had taken the firewood in the knowledge that he was doing so dishonestly.

[14] Mr Drew admitted having taken two lots of firewood for his own use but says that Mr Koen gave him permission to do so. He says that he believed that Mr Koen would get back to him with a price for the larger load of wood and that he would then pay for it.

[15] Mr Drew was employed on an individual employment agreement. Annexed to Mr Drew's IEA was Pact's staff misconduct policy. The policy describes certain

types of misconduct, including *dishonesty of any description* and *unauthorised possession of ... property belonging to us* as the kind of misconduct that *will always be viewed as sufficiently serious to justify summary dismissal*.

[16] At the investigation meeting Mr Paul Chamberlain, Director of Corporate Services, told me that Pact takes the requirement for honesty of its employees very seriously. Pact employees work with clients who are vulnerable and work in and around the clients' homes. Because of that Pact requires honesty of its employees and any dishonesty would lead to a Pact employee being dismissed.

[17] Pact held a disciplinary meeting on 29 July 2011 to give Mr Drew an opportunity to respond to the allegation that he had *removed firewood without authorisation*. At the meeting Mr Drew said:

It's very simple. I asked Ferdi for wood; I asked for a price, so he knew I had taken fire wood...

I only took 2 loads...

Ferdi said I can have one Ute of wood from Hazlett Road. It wasn't a full load it was little bit in the trailer...

I noticed that it's a lot of wood gone...

I did take a Ute cause Ferdi said I can. It was some bits in a trailer. I didn't steal it. I'm not a liar, not a thief...

Ferdi gave me a good deal...

Ferdi said on two separate occasions that I can take it...

[18] Mr Koen did not run the disciplinary meeting but was called in to it once Mr Drew said that Mr Koen knew that he had taken firewood. At the meeting Mr Koen said:

Gavin rang me and asked me if he can grab a few pieces of fire wood, he asked me once or twice I said it's not my wood to sell, it's Glenn's (this happened a few months ago). The only time we spoke about firewood he asked me for a couple of bits to start his fire as he didn't have any wood just yet and he stated he'd run out of gas.

However, when I spoke to Bob, Bob stated that Gavin took 2 large loads.

I asked Bob how much wood Gavin took; he said at least 2 large ute loads. Gavin never made any arrangements with me about buying wood and only ever asked for a couple of bits to get his fire going ...

You said to me that you were out of gas that day and asked if you can grab a few pieces of wood to get you through the night.

Steve and Margaret from the office were also asking me if they can buy firewood, I said no it is not for sale. Why would I make an exception for you?

Conversation was about a few bits (I was thinking about 8-10 pieces), you asked me about the price, I said to you it is not for sale. I didn't approve 2 x loads to Te Whare either. Why would I offer to sell this wood to Gavin when it was not for sale?

[19] It is the larger load or loads of firewood taken by Mr Drew for his own use at home that is in contention. Pact accepts that Mr Koen had told Mr Drew he could take the smaller amount of firewood when he needed it.

[20] When deciding whether Mr Drew should be dismissed Pact had notes of interviews with the clients and staff that Mr Koen had conducted. It considered that evidence along with Mr Drew's and Mr Koen's statements given in the 29 July 2011 meeting.

[21] Some of those interviewed confirmed that Mr Drew was open about taking the wood. For example, other Pact employees, Bob Hurr and Sam Christensen told Mr Koen that they had seen Mr Drew with a *truck canopy* or *trailer load* of wood taken from Hazlett Road and that Mr Drew told them *I got myself a good deal on the firewood.*

[22] The test for whether a dismissal is justifiable is contained in section 103A of the Employment Relations Act 2000 (the Act): was the decision to dismiss one which a fair and reasonable employer could have made in the particular circumstances at the time the decision to dismiss was made?

[23] Mr Drew submits that at no time did he deny taking the wood and made no secret that the wood was for him. He submits that points to his honest belief that he was entitled to take the wood for his own use.

[24] Pact's view was that it did not dispute that Mr Drew was open about taking at least one load of wood. The issue it needed to decide was whether Mr Drew had a reasonably held belief that he was entitled to take the wood because Mr Koen had given him permission.

[25] Mr Drew says that when Mr Koen was at his house, he noticed that the wood that Mr Drew was using was very smoky. Mr Koen asked Mr Drew where he had got the wood and he told him he had got it from Hazlett Road. Mr Koen told him that he was wasting the wood and not getting any real heat out of it and that he should go and get a few pieces of dry wood from the top of the wood pile at Hazlett Road.

[26] Mr Koen agrees that there was a time at which he was in the lounge at Mr Drew's house and noticed that he was burning wet firewood. He asked Mr Drew where he got the wood and Mr Drew said it was from Hazlett Road. Mr Koen denies that he told Mr Drew at that time that he could get some dry wood. He maintains that some time earlier he had told Mr Drew to take a few pieces for his own use when Mr Drew told him he had no firewood and no gas for heating.

[27] The incident when Mr Koen noticed Mr Drew was burning wet wood happened some weeks before Mr Koen began an investigation into the disappearance of wood. Mr Koen says:

I did not give this much thought as at the time I was more concerned with the drinking going on during working hours. ... I had already told Gavin he could have a few bits that time he ran out of gas.

[28] Mr Drew says that Mr Koen did not take any action at that stage, or for several weeks, over alleged dishonest taking of wood because he had given Mr Drew permission to take the wood.

[29] However, Pact's view is that Mr Koen would not have started an investigation and initiated disciplinary proceedings against Mr Drew if he had told Mr Drew he could purchase some firewood and given him permission to take a load home.

[30] I accept Mr Koen's evidence that when Mr Drew told him he was using some wood from Hazlett Road he assumed it was wood he had given him permission to take some time earlier.

[31] Pact was entitled to prefer the evidence of Mr Koen over that of Mr Drew and to conclude that Mr Koen would have had no need to commence an investigation into where the wood had gone if he had given Mr Drew permission to take a load or loads of wood. Therefore, it was open to Pact to conclude that Mr Drew's expressed belief that he had permission to take the wood for his own use was not a reasonably held belief. It was also open to Pact to conclude that Mr Drew's admission that he took the

wood along with Mr Koen's denial that he gave him permission to do so amounted to an act of dishonesty on Mr Drew's part.

[32] At the time Pact made its decision a fair and reasonable employer could have concluded that Mr Drew's dishonesty in taking a load of wood for his own use amounted to serious misconduct.

Was the process leading to dismissal that of a fair and reasonable employer in all the circumstances?

[33] Applying the justification test in section 103A(3) of the Act requires the Authority to consider a number of factors in determining whether a dismissal has been carried out in a procedurally fair manner. Factors include whether the employer:

- a. Sufficiently investigated the allegations, having regard to available resources;
- b. Raised its concerns with the employee before dismissal;
- c. Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- d. Whether the employer genuinely considered the employee's explanation before dismissal.

[34] Section 103A(5) says that the Authority may not determine a dismissal to be unjustifiable solely because of defects in the process of dismissal if the defects were minor and did not result in the employee being treated unfairly.

Was the allegation sufficiently investigated?

[35] Mr Koen instigated an investigation into the disappearance of the firewood. Mr Drew and Bob Hurr were with Mr Koen that day. Mr Koen commented that the wood pile had shrunk considerably. He asked both of them if they knew anything about it. It is disputed whether Mr Drew said anything at this stage about having taken a load of wood for himself. However, when interviewed later Mr Hurr told Mr Koen that Mr Drew had said that he had taken wood. Mr Drew said he told Mr Koen that he believed that staff and residents from Te Whare, a Pact client residence nearby, had also been using the wood.

[36] Mr Koen says that Mr Drew remained silent that day about whether he had taken wood himself.

[37] Mr Koen began an investigation and interviewed a client and some staff members about whether they knew anything about the wood being taken. He discovered that some wood had been used by Te Whare. In addition to Mr Hurr and Mr Christensen's evidence Will Moore, a client of Pact, gave Mr Koen a statement that he and Ben, another client, had helped Mr Drew to load wood onto a trailer.

Was the allegation of dishonesty raised with Mr Drew and was he given a reasonable opportunity to respond before the decision to dismiss was made?

[38] Mr Murtagh ran the meeting and Maryna Bilousova, from the human resources department, took notes. The allegation was raised with Mr Drew and he was given the opportunity to respond in the meeting of 29 July 2011. He was accompanied and represented at the meeting by his union organiser, Ann Galloway.

[39] I am satisfied that Mr Drew had a reasonable opportunity to respond to the allegation that he had dishonestly taken wood and did so in the meeting.

Did Pact genuinely consider Mr Drew's response before making its decision to dismiss?

[40] After the disciplinary meeting Mr Murtagh consulted Mr Chamberlain. He told Mr Chamberlain that he was of the view that the allegation of dishonesty *had been substantiated, that it amounted to serious misconduct, and that dismissal would be appropriate in the circumstances.*

[41] Mr Murtagh and Mr Chamberlain agree that Mr Chamberlain made the ultimate decision to dismiss Mr Drew.

[42] On 1 August 2011 Mr Chamberlain wrote to Mr Drew that Pact's preliminary view was that *his conduct was sufficiently serious to justify termination of his employment.* He listed his reasons as being that:

- a. Mr Drew's and Mr Koen's versions of events were inconsistent and that Pact preferred Mr Koen's evidence;
- b. there was a significant period of time between permission given to take a few bits of wood and when the larger load/s of wood were taken and

it was not credible that Mr Drew believed there was ongoing permission to take wood at will, and

- c. Mr Drew's offer to pay for the wood is inconsistent with a lack of a clear belief the wood was taken with permission.

[43] Mr Chamberlain asked Mr Drew to respond to his preliminary conclusion if there were *any flaws in our reasoning or other matters you believe we should have taken into account, or raise any arguments as to why you should not be dismissed.*

[44] Ms Galloway and Ms Guthrie both wrote to Mr Chamberlain raising a number of matters on Mr Drew's behalf. On 5 August 2011 Mr Chamberlain responded to Ms Galloway's letter and addressed the issues she had raised. Mr Chamberlain confirmed Pact's decision that Mr Drew was to be summarily dismissed. I consider that Pact did consider Mr Drew's explanation before making its decision to dismiss him.

Could a fair and reasonable employer make the decision to dismiss Mr Drew in all the circumstances?

[45] Mr Drew submits that the process leading to his dismissal was unfair because Mr Koen was overly involved. He submits that Mr Koen:

- a. made the allegation against Mr Drew;
- b. only investigated Mr Drew's taking of wood and not anyone else's;
- c. conducted the investigation *writing statements for others to support his allegation;* and
- d. *relied on his own evidence to terminate Gavin's employment.*

[46] Mr Drew submits that it is unfair that *on the basis of Ferdi Koen's evidence, [I] was dismissed for stealing wood.*

[47] It is correct that Mr Koen initiated the investigation and carried it out. He also wrote notes of his interviews during the investigation. However, Mr Koen alone did not initiate the disciplinary process and formulate the allegation that Mr Drew *removed firewood from Pact's Hazlett Road property without authorisation.* He did so in consultation with his manager, Glenn Murtagh and with Mr Chamberlain.

Mr Murtagh conducted the disciplinary meeting and only called Mr Koen in when Mr Drew alleged that he took the wood with Mr Koen's permission.

[48] It is not correct that Mr Koen only investigated Mr Drew's taking of wood. He alerted Mr Chamberlain and Mr Murtagh to the fact that wood had been disappearing. Mr Chamberlain suggested that residents of Te Whare may have been taking wood for heating. That was followed up on when Mr Murtagh sent an e-mail to all staff to alert them to stop taking wood if they had been doing so. It was established that Te Whare had used some wood for heating. Mr Chamberlain says that Harry the service co-ordinator for Te Whare did take wood but the circumstances were completely different to that of Mr Drew in that Harry took the wood for Pact's clients' use and not for his own personal use or gain.

[49] In addition, Mr Koen was not the decision maker. Mr Murtagh made a recommendation and Mr Chamberlain made the decision to dismiss Mr Drew. They were entitled to prefer Mr Koen's evidence over that of Mr Drew and did so based on the reasoning that if Mr Koen had given Mr Drew permission to take the wood it was unlikely that he would have commenced an investigation into the disappearance of the wood.

[50] I do not consider that Mr Drew was disadvantaged by Mr Koen's involvement in the process. I do not consider that Mr Koen was overly involved in the process leading to the decision to dismiss Mr Drew.

[51] During the investigation meeting and in submissions Mr Drew alleges that Mr Koen misled the disciplinary meeting by his mention of Margaret not being allowed to buy wood. In fact, Mr Koen had with Mr Drew's assistance delivered a load of wood to Margaret's home. Mr Chamberlain wrote in his 5 August 2011 letter terminating Mr Drew's employment that:

Ferdi would be subject to disciplinary action if it was proven that he had sold or given a quantity of wood away outside his delegated authority.

[52] Mr Chamberlain was made aware, for the first time, at the investigation meeting that Mr Koen had given a load of firewood to Margaret. However, he accepted Mr Koen's explanation for that and says that Mr Koen was acting within his delegated authority.

[53] Mr Drew continues to maintain that he had a genuine belief that he was able to take a load of wood and that Mr Koen would get back to him with a price. I accept that is his genuinely held belief. However, my job is to look at what his employer knew at the time it made the decision to dismiss him and at all the circumstances surrounding that decision.

[54] The decision-makers for Pact, Mr Murtagh and Mr Chamberlain, did not know at the time they made their decision that Mr Koen had delivered a load of wood to Margaret's house. Mr Drew could have brought that up at the meeting on 29 July 2011 but he did not. Pact was not able to take that into consideration when it made its decision to dismiss Mr Drew.

[55] I consider that in all the circumstances Pact's decision to dismiss Mr Drew was one of a range of responses a fair and reasonable employer could have made. I also consider that Pact carried out a thorough and fair process in its investigation, inquiry and decision-making. Therefore I find that the decision to dismiss Mr Drew was justifiable.

[56] Even if I had found that Pact had unjustifiably dismissed Mr Drew when I looked at what remedies he would have been entitled to I would have had to consider whether he had contributed to the situation giving rise to his personal grievance. I would have found that even if Mr Koen had told Mr Drew he'd get back to him about a price that Mr Drew's action in taking a full load of wood before he knew what the price would be contributed considerably to the situation which gave rise to his personal grievance.

Was Mr Drew unjustifiably disadvantaged by Mr Koen's actions?

[57] At the investigation meeting there was evidence from Mr Koen and Mr Drew about a ute provided for Mr Drew's work with Pact having been taken off him so that he could not longer use it outside of work hours. Submissions were made that Mr Koen's actions in deciding to take the ute off Mr Drew and deciding not to discipline another worker, Sam, for suspected drinking and driving were of disadvantage to Mr Drew.

[58] There was no claim of unjustified disadvantage included in the Statement of Problem. I do not have any evidence that it was raised as a personal grievance within 90 days of the date on which the:

action alleged to amount to a personal grievance occurred or came to the notice of the employee.

[59] The grievance was not raised within 90 days as required under section 114 of the Act, and Pact has not consented to it being raised outside of the 90-day period. Mr Drew has not made an application to the Authority for leave to raise a grievance out of time. Therefore, I cannot make a determination in relation to a claim of unjustified disadvantage.

Costs

[60] Costs are reserved. Mr Drew is legally aided. The parties are encouraged to reach agreement on costs. If that is not possible, given the time of year, I allow the respondent until 25 January 2013 to file a memorandum on costs and give the applicant 28 days after that to file a memorandum in response.

Christine Hickey
Member of the Employment Relations Authority