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## Douglas v A & G Price Ltd AA 350/07 (Auckland) [2007] NZERA 822 (12 November 2007)

Last Updated: 23 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 350/07 5053622

BETWEEN	JORN DOUGLAS Applicant
AND	A & G PRICE LTD First Respondent

Member of Authority: Vicki Campbell Representatives: Anthony Russell for Applicant

Paul Weaver for Respondent

Investigation Meeting 23 August 2007 at Hamilton Submissions Received: 4 September from Applicant

4 September from Respondent

Determination: 12 November 2007

### DETERMINATION OF THE AUTHORITY

#### Employment Relationship Problem

[1] Mr Jorn Douglas was employed by A & G Price Limited (“AGP”) initially as an apprentice and subsequently as a moulder at its plant in Thames from 2001 until July 2006. At the time of his dismissal Mr Douglas was working the night shift from 10.45pm to 6.30am. It was common ground at the investigation meeting that Mr Douglas was working autonomously with no supervision on the night shift.

[2] Mr Douglas was subject to a disciplinary process in July 2006 after AGP had concluded that he had made a number of moulds during his usual working hours for personal use. AGP determined that the time attributed to the making of the moulds had been charged against client codes even though the work had not been carried out for that client and that this equated to falsification of company records by Mr Douglas.

[3] AGP quotes product for its clients based on historic records. The company use employee’s timesheets to record the amount of time used to complete a particular product and then uses that information on which to base its quotes for

future orders. If hours are misrepresented on the timesheets, from which the information is extracted, then prices will be inflated.

[4] Mr Douglas was dismissed for serious misconduct. Following notification of his dismissal Mr Douglas, together with his union delegate, made representations to the company and requested that the dismissal be allowed to stand as a resignation. This was agreed to by AGP.

[5] Mr Douglas is challenging his dismissal/resignation and says AGP did not undertake a fair and reasonable process and therefore the dismissal is unjustified.

[6] AGP denies the dismissal is unjustified.

[7] I am required to examine AGP's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[8] The section requires me to scrutinise AGP's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

### **Terms and conditions of employment**

[9] Mr Douglas was a member of the Manufacturing and Construction Workers Union and was subject to a collective employment agreement ("CEA"). The relevant terms of the CEA at clause 2 sets out some general principles under which the parties to the Collective Agreement agree to operate which include:

2.1.1. To develop and maintain the prosperity of the Company and its Employees.

2.1.2 To promote and maintain the mutual trust and co-operation between the company and its Employees.

[10] Also applicable to Mr Douglas' employment are AGP's House and Safety Rules. The rules set out two distinct categories of misconduct. Included in the list of Category 1, Serious Misconduct is:

(a) Unauthorised possession and/or movement of company, client or other workers property. This includes scrap, waste or damaged items.

(b) Falsification or being party to falsification of any Company or client document or record. This includes time / wage / accident / expense / leave / production / scrap records etc.

The penalty for failing to observe category 1 rules may include dismissal. The rules state:

All allegations will be put to the employee concerned in the presence of a witness of his/her choice and the employee will be given adequate opportunity to provide an explanation. [my emphasis]

### **Homers**

[11] Mr Douglas told me that throughout his employment it was common for employees to make use of AGP materials and resources, for example, casting moulds, for personal use. This work was commonly known as a "homer".

[12] Witnesses for AGP accept that homers were carried out by staff, but say the rules relating to homers are that homers must be done in an employees own time and with the prior permission of their manager. Further, when employees did undertake to complete homers during working hours, employees were to use a "general" code on their timesheets to distinguish that time, with time worked on jobs for clients of AGP.

[13] Mr Douglas told me he had the permission of his previous Foundry Manager to make homers at will and that he did not require the permission of the new Foundry Manager.

[14] I am satisfied Mr Douglas was aware of and knew the rules applying to homers. At the time of the disciplinary meeting Mr Douglas acknowledged to the company representatives at that meeting, that he did not have authorisation to work on the homers and he had completed some of the work during his normal working hours.

### **Disciplinary process**

[15] On Friday 28 July 2006 during a routine clean-up of the Hand Mould area where Mr Douglas worked during his night shift, 5 moulds were found behind a conveyor which was behind Mr Douglas's work bench. Two moulds were also found at other venues in the factory.

[16] At the end of the working day on 28 July 2006, Mr Robert Affleck, supervisor and union delegate, was approached by Mr Darren Sparg, the Foundry

Manager, and asked if he could be available for a meeting with Mr Douglas the following Monday morning, at the completion of Mr Douglas' shift. Mr Affleck was advised the matter was serious and related to homers completed by Mr Douglas.

[17] Neither AGP nor Mr Affleck contacted Mr Douglas and advised him there was to be a meeting to discuss a serious matter relating to the homers. It was not until the end of his shift on Monday morning that Mr Douglas was told about the need to attend a meeting.

[18] On completion of his shift on Monday morning 31 July 2006, Mr Douglas was approached by Mr Etienne Coetzee the moulding department supervisor/foreman who told him to stay behind because Mr Sparg wished to see him. No further information was forthcoming at this stage.

[19] Mr Sparg then approached Mr Douglas and requested him to attend a meeting. Mr Douglas was invited into Mr Sparg's office where Mr Affleck was already waiting. Mr Douglas says he was interrogated about the homers that had been found the previous week. Mr Sparg says at the commencement of the meeting he advised Mr Douglas that they wished to discuss a serious matter and explained that he had requested Mr Affleck to be present at the meeting to represent Mr Douglas.

[20] Mr Sparg says he then asked Mr Douglas specifically about the moulds he had found. He says Mr Douglas admitted he had made them along with other work he had completed during his shift. Mr Douglas was asked if he had received prior approval to make the moulds and admitted that he had not done so. Mr Douglas also admitted not recording the time used to make the moulds on his time sheets.

[21] As a result of his admissions, AGP checked Mr Douglas' timesheets but could find no reference to the "general" code instead, all his time had been attributed to specific client codes.

[22] Mr Douglas told me he would attend work about ½ an hour earlier than his start time and begin working and preparing for his shift and that he made up this

½ hour by working on his homers during usual work hours. However, Mr Affleck, who attended the investigation meeting to provide evidence in support of Mr Douglas, told me, and I accept, that Mr Douglas was coming in about 10.30pm for a shift that started at 10.45pm and that Mr Douglas would just walk around talking.

[23] I am satisfied AGP were able to conclude, as it did, that Mr Douglas had worked on the moulds during his normal work time and that he deliberately did not assign that time to the "general" code in his timesheet. Mr Affleck told me that the anchor had been given to him initially but he figured there was no way he could make it during his meal break and did not want to stay at work after his normal hours of work to complete it.

[24] I do not accept Mr Douglas' evidence that he had used leftover sand from other jobs to build the anchor moulds, and only spent ½ an hour each shift working on the moulds. The evidence at the investigation meeting supports my conclusion that the anchor moulds alone, would have taken Mr Douglas a minimum of 8 days to get to the stage they were, when they were broken open. Mr Etienne, AGP's foundry manager, says the anchor moulds, in particular, had only been in the foundry for a couple of days. He had noticed them but thought they were for a client.

[25] In relation to the amount of sand used for the moulds, Mr Affleck was of the opinion that the anchor moulds would have used an estimated 400kgs of sand. The respondent estimated 700kgs. Further, it was common ground that the sand is bonded. If Mr Douglas had used the run off sand as he completed other jobs, the layer poured into the mould first would have gone hard before the next layer was poured and therefore would not bond to the previous layer. As explained to me at the investigation meeting, it is important for the sand to be poured before it goes hard, in order to make sure that it bonds. Not only would bonding not occur with several lots of sand being poured at different times on different dates, it could not have been done in 30 minute cycles.

[26] In his written statement Mr Affleck told me that generally homers did not use a large quantity of materials and were not a huge expense to the company. At the investigation meeting, Mr Affleck conceded that the anchor moulds were substantially bigger than other items made as homers.

## **Determination**

### *Serious misconduct*

[27] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

... an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered

(with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[28] The Authority must have regard to the nature and degree of the alleged misbehaviour and its significance in relation to the position held by the employee and the business of the employer. What is required, if the response of dismissal is warranted, is that the misbehaviour must go to the heart or root of the contract between them or be such that it constitutes a serious breach of the employment agreement (*North Island Wholesale Groceries Ltd v Hewin* [1992] 2 NZLR 176).

[29] I am satisfied that the two anchor moulds, together with the five other moulds being completed by Mr Douglas as homers, were not the usual type or number of homers contemplated by the unwritten policy of AGP. My conclusions are supported by Mr Affleck's evidence where he told me he was concerned about the number of homers Mr Douglas was doing and warned him that he would ruin things for everyone and that he should stop making it so obvious that he was doing homers.

[30] I find the failure to accurately account for his time under the "general" code, has serious flow on implications for the company in that it uses the time attributed to specific client codes to calculate fixed prices for its tendering and quoting processes in seeking to secure ongoing work, which in the current economic environment, is very competitive. In using a specific account code instead of the general code, Mr Douglas may inadvertently cause AGP to over price its products when tendering or quoting.

[31] It was common ground at the investigation meeting that the night shift, on which Mr Douglas worked, was established due to an increased demand for product to be made and pressures to meet customer orders. Given that situation, I am surprised Mr Douglas had the time to spend on all his homers, especially the anchors which I have already established, took him about 4 hours to complete to the stage they were, when discovered by the company. Mr Douglas was largely unsupervised on the nightshift and was therefore trusted to be working on product for AGP, not himself.

### *Procedural fairness*

[1] It is well known and standard practice that an employer must tell an employee who is summoned to a disciplinary meeting that he is in peril of dismissal, if that is the case (*Morris v Christchurch Airport Limited* (unreported) Goddard CJ, 24 June 2004 CC13/04).

[2] The Court in *NZ Food Processing IUOW v Unilever NZ Ltd* [1990] 1 NZLR set out what the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

- notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
- a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
- an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

[32] Mr Sparg asked Mr Affleck on the Friday afternoon to be available for a meeting with Mr Douglas on the following Monday morning. Mr Affleck told me, and I accept, that when he was told it was serious he did not believe at that stage that dismissal was a possibility. It was common ground that Mr Sparg never mentioned to Mr Affleck that dismissal was a possible outcome of the meeting.

[33] Mr Sparg told me at the investigation meeting that Mr Affleck was the union delegate and that he had arranged for him to be at the meeting to represent Mr Douglas. It seems, from Mr Sparg's evidence, that he believed Mr Affleck would contact Mr Douglas over the weekend and advise him of the meeting. However, Mr Affleck was not aware of this expectation and did not make any contact with Mr Douglas.

[34] I find that AGP have failed to follow the rules of procedural fairness in setting up its meeting with Mr Douglas. It was not Mr Affleck's responsibility to set the meeting up, that lay with AGP. At no stage prior to the meeting, was Mr Douglas either advised of the issues to be discussed, nor warned that dismissal may be an outcome.

[35] Further, Mr Douglas, according to AGP's own rules, was entitled to have a witness of his choice at the meeting. By arranging for Mr Affleck to be involved AGP has acted outside its own policy. Although at the investigation meeting it was common ground that Mr Douglas was happy to have Mr Affleck at the meeting.

[36] Had Mr Douglas been dismissed at this point, the failures in procedural fairness would have led to the conclusion that the dismissal was unjustified. But the matter did not end there.

[37] After initially putting the allegations to Mr Douglas and advising of the serious nature of the allegations, the meeting was adjourned to allow Mr Douglas

the opportunity to discuss the situation with Mr Affleck. It was common ground that during the adjournment Mr Affleck made contact with his Union Organiser, Mr Ray Mavor, and the EPMU delegate, Mr Nigel Cooper. While Mr Cooper was not Mr Douglas's official representative, when the meeting reconvened Mr Cooper, at Mr Douglas' invitation, made submissions to AGP on Mr Douglas' behalf for leniency. After taking into account Mr Cooper's submissions, the decision to dismiss Mr Douglas for falsifying company documents, in that he had not properly accounted for the time worked on homers and had falsely attributed the time to clients, was made.

[38] During a second brief adjournment, Mr Cooper advised Mr Douglas that it would be best for him to try and negotiate a resignation so that he could obtain the employer contribution to his superannuation. Mr Douglas was also concerned about the impact his dismissal would have on his volunteer work with the Pauanui Voluntary Fire Brigade, Land Search and Rescue, and the Coastguard.

[39] When the meeting reconvened, a suggestion by Mr Cooper, that Mr Douglas' dismissal could be officially recorded as a resignation was agreed to. This agreement resulted in Mr Douglas becoming entitled to and being paid the full employer subsidy on his superannuation scheme. This would not have occurred, had the record shown that Mr Douglas been dismissed from his employment.

[40] While I accept the initial stages of the process followed by AGP was flawed, its failures were rectified when AGP adjourned the disciplinary meeting and Mr Douglas sought advice from his union organiser and the EPMU site delegate. At the time Mr Douglas sought this advice he was well aware of the allegations against him and the possible consequences to his employment. Mr Cooper had also become involved and made representations to AGP at Mr Douglas' invitation (see *Rankin v Attorney-General in respect of The State Services Commissioner* (No 2) [2001] 1 ERNZ).

[41] Mr Douglas then had a full opportunity to discuss the consequences of the decision to dismiss him, with AGP, and as a result of those discussions and submissions made, on his behalf; the termination of his employment was treated as a resignation. This had tangible benefits for Mr Douglas, in that his volunteer work was secured, and he received the employer's contribution from his superannuation fund.

[42] I find the actions of AGP and how AGP acted throughout the disciplinary process including allowing Mr Douglas the opportunity to seek advice, choose a

representative (Mr Cooper) and the decision to record the termination of Mr Douglas' employment as a resignation were the actions of a fair and reasonable employer in all the circumstances of this case.

**I find the dismissal to be justified and can be of no further assistance to Mr Douglas.**

#### **Costs**

[1] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell

Member of Employment Relations Authority

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