

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Colin Head (Applicant)
AND Goodman Fielder New Zealand Limited (Respondent)
REPRESENTATIVES Jenny Beck, Counsel for Applicant
Lewis Turner, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 27 July 2006
SUBMISSIONS – APPLICANT 13 September 2006
– RESPONDENT 29 September 2006
DATE OF DETERMINATION 10 October 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Colin Head, commenced his employment with the respondent company in 1999 as a baker on the night shift. He worked as a baker until April 2004 when he was offered and accepted the position as the Health and Safety Co-ordinator for the respondent's Dunedin operation.

[2] As a baker Mr Head's work was covered by the Quality Bakers South Island Bakery and Specialty Products Employees collective agreement 1 August 2002 to 31 July 2004. When Mr Head commenced the health and safety role his work was not covered by the collective agreement. Mr Head continued though to be employed on the same terms and conditions in the collective agreement except where there was specific agreement otherwise.

[3] The respondent, Goodman Fielder New Zealand Limited, has a number of work sites where employees are involved in the manufacture of bread, small goods, pies, pastry and other food related products. I shall refer to the respondent in this determination as Quality Bakers.

[4] Mr Head was dismissed from his employment on 15 March 2005 for falsification of time records by leaving work on occasions before his shift ended and returning later in the day to clock out. Mr Head says that his dismissal was unjustified.

[5] Grant Kumeroa was employed at the material time as Quality Bakers Dunedin Manufacturing Manager. He had responsibility for the overall management of the Dunedin bakery operation. Mr Head says that he was advised by Mr Kumeroa when he commenced the health and safety role that

he would be paid for a 50 hour week even when he worked fewer than 50 hours per week. He says that whilst he would clock in when he arrived at work he was not required to clock out. The Kronos payroll system at Quality Bakers is operated on the basis that waged employees are paid on the hours they are actually at work. The hours are established by employees clocking in and clocking out.

[6] On 12 October 2004 the assistant accountant at Quality Bakers, Nicci Wilson, circulated a memorandum reminding all time clock employees that it is part of their employment responsibility to clock in and out each day they are on site to work. The memorandum provided that this was so that the company could see who was on site in the event of an emergency and that it enables the supervisors to pay employees correctly for the hours worked. The memorandum also provided that as from 18 October 2004 any missed clocks in or out will not be corrected until the following week which would mean delayed payment. Mr Head received a copy of the memorandum but said that he reasoned that it could not apply to him because he had been told not to clock out by Mr Kumeroa.

[7] After Mr Head's pay was held up on about two occasions after the memorandum when he had not clocked out, he said that he went to see Mr Kumeroa to discuss the matter. Mr Head said that he was told by Mr Kumeroa that *If you need to, finish working, shoot home and then come back later and clock out. I haven't said this though.*

[8] Mr Head said that in light of this agreement with Mr Kumeroa his dismissal for returning to work to clock out was unjustified. He says that there were also serious procedural deficiencies in the process adopted by Quality Bakers to investigate the allegations and then dismiss him.

[9] Quality Bakers say Mr Head accepted at a disciplinary meeting on 15 March 2005 the allegations that he had on occasions over two months falsified his time records. Quality Bakers say that it was only after Mr Head was dismissed that Mr Head alleged Mr Kumeroa advised him that he should leave work early and return later to clock out. Quality Bakers does not accept the allegation that Mr Kumeroa agreed with Mr Head about clocking out in this manner. It says that Mr Head's dismissal was justified for serious misconduct because it no longer had the required trust and confidence in him.

The Issues

[10] The justification of this dismissal is to be determined in accordance with the new test of justification set out in section 103A of the Employment Relations Act 2000. This requires an objective determination of what a fair and reasonable employer would have done in the circumstances. The questions that require determination in terms of the test for justification are the following:

- (i) Was Mr Head falsifying his time records?
- (ii) Was he authorised to clock out in this manner by Mr Kumeroa?
- (iii) Was there a full and fair investigation undertaken by Quality Bakers which disclosed conduct a fair and reasonable employer would regard as serious misconduct.
- (iv) Would a fair and reasonable employer have summarily dismissed Mr Head in all the circumstances?
- (v) If the dismissal was unjustified was there contributory conduct on the part of Mr Head which should reduce any remedies awarded to him?

Was Mr Head falsifying his time records?

[11] Mr Kumeroa and the site accountant at Quality Bakers, Karen Begg, attended the two disciplinary meetings held with Mr Head on 15 March 2005. Mr Kumeroa took notes and ran the meeting. Ms Begg's role was to attend as a witness and ask questions if she felt something needed to be clarified or hadn't been covered by Mr Kumeroa.

[12] The first disciplinary meeting took place at 10.00am. Mr Head was shown Quality Bakers documentation about leaving from his shift and then returning later to the site on the three days in question to clock out. The information was gathered from cameras throughout the site and the clocking machine. Mr Head admitted that he left work on the three occasions in March 2005 and then returned later to clock out. The notes taken at the meeting provide that Mr Head expressed regret for his actions and offered to work without pay as a means of compensation. When asked how long it had been happening, the notes taken at the first disciplinary meeting reflect, Mr Head said *a couple of months*.

[13] Mr Head denied in his evidence to the Authority that he had in fact told Ms Begg that it had been happening for a couple of months.

[14] Mr Head accepted that he was, at the second meeting on 15 March 2005 at 12.00pm, given an opportunity to look at the notes taken from the first meeting and that *he may have agreed with the notes at the second meeting* on 15 March 2005. He said that he only glanced at them quickly.

[15] There is a dispute about that matter which requires resolution because Mr Kumeroa said that as part of the decision making he took into account there had been more than just the occasions in March 2005 when Mr Head had left early and clocked out later.

[16] I have considered a number of matters in reaching a conclusion that it was more probable than not that there was a question at the disciplinary meeting about how long [the falsification of time records] had been going on and that Mr Head did respond to the question by answering two months.

[17] Ms Begg said that Mr Head had come to her attention as someone who regularly forgot to clock out and people could never find him particularly in the afternoon. It was as a result of her being suspicious of Mr Head's behaviour that his whereabouts was monitored. It seemed to me likely in these circumstances that Ms Begg would have asked a question about how long it had been going on.

[18] The three occasions that were put to Mr Head related to one week in early March 2005. I think it unlikely therefore that there could have been some mistake about months rather than times when Mr Head answered the question about how long it had been going on.

[19] Ms Begg and Mr Kumeroa were very clear that Mr Head said *a couple of months*. Ms Begg said about Mr Head at the first disciplinary meeting that *he clearly gave the impression that he had been caught out and that they did not push him because he had admitted that he had done wrong*. Ms Begg said that she understood at the meeting that Mr Head knew what it was about – *the tip of the iceberg*.

[20] Mr Head also had an opportunity to read the notes from that first meeting and advised that he agreed with them. I have also placed weight on Mr Kumeroa's evidence that as part of the decision making process to dismiss Mr Head he considered that Mr Head had been clocking out in this way for a couple of months rather than just on the three known occasions.

[21] In circumstances where Mr Kumeroa and Mr Head had a good relationship I find it less likely that Mr Kumeroa would simply assume that Mr Head had clocked out after he had finished his shift on more than just the three occasions. I think it more likely that Mr Kumeroa relied on what Mr Head said in reaching the conclusion that it was not limited to the three occasions.

[22] I find that Mr Kumeroa formed an honest belief after the disciplinary meeting that Mr Head had been falsifying his time records on more than just the occasions that Mr Head had been viewed by camera clocking out in March 2005. It was open to Mr Kumeroa to conclude this from what Mr Head had said during the meeting. As a result Mr Head was being paid for hours that he had not worked.

Was he authorised to clock out in this manner by Mr Kumeroa?

[23] When Mr Head was appointed to his new role he was concerned that he would be paid less than he was receiving as a baker in receipt of the night shift allowance. Mr Head said that he was advised by Mr Kumeroa that he would be paid for a 50 hour week even though he was working fewer hours.

[24] Mr Kumeroa did not accept that was what he told Mr Head. Mr Kumeroa said that he advised Mr Head that there would be 50 hours available for him to work each week in his new role.

[25] I am of the view that the oral evidence of Stephen Barnes, who was called to give evidence in support of Mr Head, is consistent with this. Mr Barnes said that he had a discussion with Mr Kumeroa at the time that Mr Head took up the new role because Mr Head was concerned that he would be taking a pay cut. Mr Barnes said that Mr Kumeroa told him *I'll sort something out to make up to 50 hours per week*. I find that it was likely that Mr Kumeroa was talking about sorting out 50 hours work rather than stating that he would pay Mr Head 50 hours per week regardless of whether he worked or not.

[26] Mr Head said in paragraph 8 of his written evidence that he considered that the October 2004 memorandum with the direction to employees to clock out could not apply to him because Mr Kumeroa specifically instructed him not to clock out. At the investigation meeting Mr Head said that he could not physically recall Mr Kumeroa actually advising him not to clock out. For this reason and having regard to the wage and time records which I shall refer to shortly in this determination I do not find this instruction was actually given.

[27] Shortly after the memorandum was issued in October 2004 Mr Head said that he received a letter advising him that he had missed clocking out and therefore his pay would be held up. It was at this point that Mr Head said he spoke to Mr Kumeroa who advised him that *if he needed to, finish working, shoot home and then come back later and clock out. I haven't said this though*. Mr Head said that he understood from his conversation with Mr Kumeroa that he was required to clock in and clock out but if he needed to he could come back later to clock out.

[28] Mr Kumeroa denies that at any stage he advised Mr Head to leave early and then return later in the day at the end of the scheduled shift to clock out.

[29] Mr Head said that he told Ms Begg and Mr Kumeroa at the disciplinary meeting at 10am on 15 March 2005 that he had an understanding with Mr Kumeroa. Mr Kumeroa and Ms Begg do not accept that there was any mention of an understanding or arrangement during the disciplinary meeting and there is nothing in the notes about that explanation. The detailed letter which raised Mr Head's personal grievance from Ms Beck to Quality Bakers dated 13 June 2005 does not state that this was an explanation that Mr Head raised at the disciplinary meeting. The letter provides

that Mr Head when asked what excuse he had for his behaviour replied that *he had been promised 50 hours pay per week, ie 10 hours per day.*

[30] I do not accept Mr Head's evidence that he gave an explanation at the disciplinary meeting that he had an understanding with Mr Kumeroa. Mr Kumeroa said at the investigation meeting that had he done so it would have been inappropriate for him to continue being involved with the disciplinary process as a decision maker. The only explanation that I find Mr Head gave was that he needed to work ten hours per day for financial reasons. The notes reflect that Mr Kumeroa told Mr Head that they had discussed this and that he had made it clear that Mr Head could work ten hours per day.

[31] During the investigation meeting I requested Mr Head's time and wage records. These were provided. Contrary to Mr Head's evidence they did not show that he was regularly paid for 50 hours work per week. During the time that Mr Head was employed in the health and safety role the records reflect that he was paid for 50 hours or more per week for five weeks out of a total 51 weeks. For the remaining weeks Mr Head was paid for less than 50 hours per week.

[32] Mr Head gave evidence about the records. He said that he didn't pay too much attention to his pay if he was paid close to 50 hours per week.

[33] The time records support the evidence from Mr Kumeroa that Quality Bakers would pay Mr Head for 50 hours per week if he worked the hours. They also support that Mr Head was paid for the hours that he worked as verified by him clocking in and clocking out and frequently these were less than 50 hours per week. If Mr Head did not clock out for a particular day he was asked by his supervisor what time he had left so that there could be a manual adjustment of the record. The records do not support, as submitted by Ms Beck, that there was a manual adjustment each week by Mr Kumeroa or another person to 50 hours per week for Mr Head.

[34] In conclusion therefore Mr Head did not regularly receive payment per week based on 50 hours work. The evidence does not support an agreement to pay Mr Head for 50 hours of work a week regardless of whether he worked those hours or not. He was usually paid for less than 50 hours of work per week. Mr Head did not raise any complaint about this whilst employed in the role and accepted that he didn't specifically tell Mr Kumeroa that there was not enough work for him in his role to fill 50 hours per week.

[35] Given that conclusion it is less probable in my view that Mr Kumeroa would have a reason to tell Mr Head with respect to clocking out to *shoot home, come back later and clock out.* If there had been such an agreement, then I would have expected Mr Head to have readily given that explanation at the disciplinary meeting for his deliberate conduct rather than expressing regret for clocking out in this manner and offering to work for free. This would be so in my view even if, as Mr Head said in his evidence, his personality is such that he readily agrees with what is put to him. Mr Head was not being asked to agree to a proposition at the disciplinary meetings instead he was being asked for his explanation. He did not give an explanation that there was an agreement or understanding with Mr Kumeroa to deliberate conduct that amounted to falsification of time records.

[36] I prefer the evidence of Mr Kumeroa to that of Mr Head that Mr Kumeroa did not authorise Mr Head to leave early from work and then return later to clock out.

Was there a full and fair investigation undertaken by Quality Bakers which disclosed conduct a fair and reasonable employer would regard as serious misconduct.

[37] There were several complaints by Mr Head about the process.

[38] Mr Head said that Mr Kumeroa advised him about the allegations and the need for an investigation at 8.15am on 15 March 2005. Mr Head said that Mr Kumeroa told him that they would have to work out some way to keep his job and that Mr Kumeroa would come up with some way of smoothing it over. Mr Head said that it was not until about 9.45am on 15 March 2005 when Mr Kumeroa telephoned him that he was aware of the time of the meeting and advised to bring a support person. He said that he was unsuccessful in getting a support person given the short period of notice of the meeting time.

[39] Mr Kumeroa did not accept that he made the comments to Mr Head prior to the first meeting about keeping his job or smoothing things over. Mr Kumeroa said that he told Mr Head that it was serious and that he would have to do some fast talking if he wanted to keep his job. He said that he advised Mr Head at that point, which was about 8.15am, of both the time of the meeting and to bring a support person.

[40] In light of my previous findings I prefer the evidence of Mr Kumeroa that he did not advise Mr Head that he would come up with a way of smoothing things over or suggest that the two of them would work together to keep Mr Head's job. Mr Kumeroa did emphasize the seriousness of the matter to Mr Head and show him the documentation as it concerned the allegations. If Mr Head had denied the allegations then I may well have had some concern about the possibility of pre-determination in terms of Mr Kumeroa's comment about keeping his job but that did not occur.

[41] There is no dispute though that Mr Head was aware of the purpose of the meeting. I find he was aware the allegations were serious enough that he may be dismissed.

[42] Mr Head was advised either at 8.15am or shortly before the meeting of his right to have a support person at the 10.00am meeting on 15 March 2005. Even if he was advised at the later time, I find that this right was reiterated to him at the commencement of the 10.00am meeting and Mr Head did not request an adjournment or advise Mr Kumeroa and Ms Begg that he had had difficulty obtaining a support person. If Mr Head had said that he wanted a support person the meeting would have had to be adjourned. Mr Kumeroa gave evidence that he would have been open to this if he had been advised accordingly. I do not find any procedural unfairness in this respect.

[43] Mr Head was asked for an explanation and given an opportunity to give an explanation. He did not, I have found, give an explanation about an agreement or understanding with Mr Kumeroa. He admitted the allegations that he had been returning to clock out after leaving site. He said that it had been happening for a couple of months. In mitigation he said that he needed to work 10 hours per day for financial reasons.

[44] Mr Head was advised at that point of the seriousness of the situation and that the outcome may possibly be dismissal. He was asked if there was anything he wished to add after expressing regret for the situation. Mr Head had nothing further to add.

[45] It was then decided to end the interview and meet again at 12.00pm so that a decision could be delivered to Mr Head.

[46] Mr Kumeroa and Ms Begg discussed the situation during the almost two hour adjournment. They telephoned Mr Andrew as part of their deliberations. I can understand why Mr Head, when

advised that there was a discussion with Mr Andrew when the meeting resumed at 12.00pm, considered that Mr Andrew made the decision to dismiss. If that had been the position then it would have been unfair because Mr Andrew had not heard from Mr Head. The evidence however from Mr Andrew, Ms Begg and Mr Kumeroa is very clear that it was Mr Kumeroa who made the decision. There was a discussion with Mr Andrew but ultimately I am quite satisfied that Mr Kumeroa made the decision to dismiss Mr Head which was advised to Mr Head at the 12.00pm meeting.

[47] Ms Beck submitted that there should have been further investigation about how long the clocking out had been carrying on. She said Mr Head did not accept that it was systemic falsification and as that conclusion formed part of the decision making process it should have been put to Mr Head. I have found that it was likely, as recorded in the notes, that Mr Head said it had been going on for a couple of months. These notes were put to Mr Head at 12.00pm to say whether he agreed or disagreed with the contents. Mr Head agreed with the notes. In those circumstances and where there was no denial by Mr Head of the allegations I do not consider further investigation was required. Mr Kumeroa was able to conclude that there was falsification of Mr Head's time records on more than three occasions.

[48] Ms Beck submitted that the disciplinary process was conducted with untimely haste from the first meeting to dismissal all within a few hours. I accept that the process was concluded quickly. In the circumstances of this case it is difficult to see that it was unjust or unfair when Mr Head admitted the conduct and said that he had nothing further to add when asked. He was also reminded at both meetings on 15 March 2005 of his right to have a support person.

[49] I do not find that the evidence supports an ulterior motive to dismiss Mr Head because of the nature of his role and I will not therefore set out the evidence I heard in that regard.

[50] I also heard evidence that Mr Kumeroa accepted that he would, when he was shift manager of the night shift that Mr Head worked on as a baker, sometimes tell employees at the end of the week that they could leave without finishing their shift and clocking out if the work was complete. Mr Kumeroa would make sure that the shift was then paid for their full shift. This was in circumstances where Mr Kumeroa authorised the early departure and there was no suggestion that the employees falsified the time records but were rather acting on instruction and were given permission to leave early. This was also prior to the October 2004 memorandum. In the circumstances I do not consider it relevant. Mr Head did not mention that by way of explanation during the disciplinary meeting.

[51] In conclusion I find that there was a full and fair investigation process into Mr Head's conduct. Mr Head admitted the conduct and I am satisfied that deliberate falsification of the time records in this manner was conduct that a fair and reasonable employer would conclude was serious misconduct.

Would a fair and reasonable employer have summarily dismissed Mr Head in all the circumstances?

[52] I have found that there was a fair enquiry carried out and Mr Head did have a reasonable opportunity to answer the allegations of falsification of time records.

[53] Mr Head admitted falsifying his time records on three occasions in March 2005 that were viewed by camera and said that this conduct had been going on for a couple of months. His explanation was that for financial reasons he had to work ten hours a day but otherwise he offered no other explanation. I have not found that he explained during the disciplinary process that he falsified his time records because of an understanding with Mr Kumeroa.

[54] Mr Kumeroa considered Mr Head suitable for the health and safety role and endeavoured to ensure that Mr Head would have an opportunity to earn what he did as a baker. He advised Mr Head that there was 50 hours of work available if he wanted it in the new role. The hours though had to be actually worked. The time records indicate that there were occasions when Mr Head was paid for working 50 hours without any complaint from Quality Bakers.

[55] Mr Head knew that it was his responsibility to clock in and clock out after October 2004. If he failed to do so Quality Bakers relied on him to give the correct finishing time to his supervisor but in the meantime he would not be paid for the hours worked on days he did not clock out. There was a further written reminder sent to Mr Head from Ms Wilson on 2 March 2005 to clock out each day after he had failed to do so for two days in February.

[56] Mr Head worked reasonably independently at Quality Bakers in an important role. Quality Bakers needed to have trust and confidence in Mr Head and be able to rely on him in undertaking his duties and in time recording.

[57] As a result of Mr Head's conduct in clocking out in this manner he was paid for hours that he did not work by Quality Bakers and the notes of the disciplinary meeting reflect an acceptance by him that he was, in effect, *stealing* from Quality Bakers.

[58] A fair and reasonable employer would have given Mr Head credit for his admission, apology and his length of service. I am satisfied that Mr Kumeroa did consider these matters.

[59] I find that after carrying out a full and fair investigation into Mr Head's misconduct summary dismissal was an option available to Quality Bakers for falsification of time records and that a fair and reasonable employer would have dismissed Mr Head in all the circumstances of this case.

Determination

[60] Mr Head was justifiably dismissed from his employment with Quality Bakers and does not have a personal grievance. He is not therefore entitled to the remedies he seeks.

Costs

[61] I reserve the issue of costs.