

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 47/08
File Number: 5118580

BETWEEN JEREMY HILL
 Applicant

AND NEW ZEALAND VAN LINES
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Karl Gill and Jaswin Arneja for Applicant
 Michael Gould for Respondent

Investigation Meeting: Palmerston North, 4 April 2008

Submissions 4 and 11 April 2008. No replies received at the close of
 the deadline on 18 April 2008

Determination: 21 April 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] An application for interim reinstatement was withdrawn by the Applicant when it was agreed the substantive investigation meeting be held on 4 April 2008.
- [2] The Applicant has challenged his dismissal. He claimed his dismissal was unjustified and unfair. He is seeking lost wages and compensation.
- [3] Mr Hill withdrew his claim for reinstatement, without any prior notice, during his interview with me at the Authority's investigation meeting. This surprised everyone.

[4] The Respondent denied Mr Hill's claims. The Respondent contended that Mr Hill's dismissal was justified and that a fair process was followed, albeit the process was not perfect. The Respondent dismissed Mr Hill for serious misconduct.

[5] The parties attended mediation services provided by the Department of Labour but did not settle the employment relationship problem. Thus, it falls on the Authority to make a determination.

Issues

[6] The general issues are:

- Would a fair and reasonable employer have come to an honestly held belief that there was serious misconduct?
- Would a fair and reasonable employer have dismissed Mr Hill in all the circumstances?
- If Mr Hill has a personal grievance what, if any, was his contribution?

[7] In this case the employer made a decision on credibility between the complainant and the Applicant. Given the gravity of the seriousness of the complaint were the employer's reasons sufficient to reach a conclusion to decide against the Applicant?

[8] Other issues to emerge included whether the employer had ulterior motives for dismissing Mr Hill? Were all relevant factors taken into account by the company when the decision was made to dismiss Mr Hill?

The Facts

[9] Jeremy Hill commenced his employment as a packer and permanent employee with NZ Van Lines Limited (Van Lines) on 15 March 2005 at the company's Palmerston North branch. His terms and conditions of employment were governed by a collective employment agreement that expired on 31 March 2006, and nominally remained in force until 31 March 2007, for enforcement.

[10] On 5 March 2008 a new employee, Selen Can started work at Van Lines in Palmerston North at the same depot where Mr Hill worked. She was appointed during the week prior to starting by Mr Kay Westergaard, branch manager, after she was recommended by her partner. Her

partner is a casual worker and sub contractor at Van Lines. She was given an intended employment agreement before she started and returned the signed agreement shortly after starting.

[11] On 5 March 2008 Ms Can was rostered with Mr Hill to drive a little truck to Levin to pack a house as she had a driver's licence, and Mr Hill did not have one. Apparently she did not know Mr Hill although Mr Hill says he had worked with her previously. She says during the trip to Levin they smoked cigarettes. She says Mr Hill asked her, while she was driving, if it was okay if he had a smoke. She says she knew that meant marijuana because prior to him asking they had been smoking cigarettes. She says he got a pipe out of his bag and lit it. She says she kept driving, and did not say anything about his action because she was a woman alone and did not know how Mr Hill would react because she did not know him. She says when they got to the house he worked slowly, mucking around and going to sit in the truck.

[12] She says on the way back to Palmerston North Mr Hill wanted to stop at McDonalds in Levin and they did. She says after that he lit up the pipe again. She says she knew the smell very well because her son has been a user of marijuana, and she hates the smell. Upon returning to Palmerston North she informed Mr Michael Cowles, the operations supervisor, what had happened.

[13] Mr Cowles agreed that she informed him what had happened. He says she told him that Mr Hill had *smoked drugs* on the way to and from the Levin job in the company vehicle. He says she said that Mr Hill was very slow on the job, and she did not want to be rostered with him again. Mr Cowles says he told her that she would have to talk to Mr Westergaard, but that he would tell Mr Westergaard first.

[14] Mr Cowles reported the incident to Mr Westergaard the same day.

[15] On 5 March 2008, after work, Mr Westergaard decided on his way home to visit Ms Can at her home because there was no privacy at work. He told me that previously Ms Can's partner had told him the name of the street they lived in. He says he identified the house by Ms Can's partner's truck parked outside. He says he asked her what the problem was. He says she said that while she was in the company vehicle with Mr Hill he had asked her if she smoked, and she believed he was referring to marijuana. Mr Westergaard says she told him that *she said to Mr Hill she did not smoke and did not like it*. Mr Hill pulled out a pipe which he lit up and smoked. She said he did the same thing on the way back from Levin. Mr Westergaard says she told him she did not know Mr Hill and did not know what to do because she did not know how Mr Hill would react if she said or did

anything more than saying "... *she did not like it*". Further Mr Westergaard says she told him that she knew it was *dope he was smoking* because *her son was badly into drugs* and she knew the smell. She told me that on one occasion she smelt marijuana on her son and she knew the smell because he told her what the smell was.

[16] Mr Westergaard says she agreed to write a complaint.

[17] On 6 March 2008 Ms Can handed in a signed written statement to Mr Westergaard and they discussed the matter briefly:

To Whom It May Concern:

On Wednesday the 5th of March 2008 I was travelling in a company vehicle on two occasions. Firstly from Palmerston North to Levin, and then on the return journey from Levin to Palmerston North.

On both journeys Jeremy Hill smoked a pipe inside the company vehicle we were travelling in.

I believe the contents of the pipe contained illegal drugs.

I object to this conduct and wish to formally advise you of my objection.

Selen Can 6.3.2008

[18] On Friday 7 March 2008 Mr Westergaard handed Mr Hill a letter dated 6 March 2008 that said verbatim:

6 March 2008

I am very concerned to be advised that you were smoking in the Company vehicle on 5th March 2008. It is alleged that the substance being smoked was an illegal drug.

Under the terms of Your Agreement with New Zealand Van Lines, smoking of any description is forbidden in Company vehicles, Company premises or Clients' homes. A breach of this rule is considered serious misconduct and may result in your dismissal. This letter is to formally advise you that I intend to hold a disciplinary meeting with you to discuss this breach of Company policy.

The meeting will be held at 9.00am on Monday 10 March 2008 at our premises in Palmerston North. In the meantime you are suspended [without] from duties.

Please be aware that you are entitled to bring a support person or witness to the above meeting.

[19] There was a meeting held on 7 March, and present were Mr Westergaard, Mr Cowles and Mr Hill. Mr Hill did not refer to this meeting initially in his evidence and then denied it occurred, but later changed his evidence to accept that it had occurred. There is no interview record. Mr Westergaard says Mr Hill was informed of the accusation that “*he had been smoking drugs in the company vehicle on 5 March*”. Mr Westergaard says Mr Hill did not deny the accusation when he said something like Ms Can’s partner “*...has smoked in a company vehicle it was on a trip to Ohakune*”. Mr Westergaard says he informed Mr Hill he was suspended pending an investigation that would involve a meeting on Monday 10 March. I find that the meeting did occur because Mr Westergaard gave Mr Hill his letter, Mr Hill was suspended and Mr Hill acknowledged these events occurred. He has not challenged his suspension, although he says he was shocked by it.

[20] On 7 March 2008 Mr Westergaard received a complaint by email from Mr Hill that Ms Can’s partner, who he named, had smoked an illegal substance in a company vehicle on a journey to Ohakune with Mr Hill four weeks prior to this. For completeness I find that this makes it most probable that Mr Hill did say at the meeting on 7 March 2008 that “*[Ms Can’s partner] has smoked in a company vehicle it was on a trip to Ohakune*”.

[21] On 10 March 2008 there was a meeting and present were Mr Westergaard, Mr Cowles, Mr Hill and his mother Barbara Hill present as a support person. Mrs Hill raised an accusation that other employees used drugs at Van Line’s Christmas barbeque in 2005 that Mr Westergaard had condoned when he threw up his hands and said “*I don’t care what you do*” to a group using drugs, but Mr Westergaard says he cut her off to focus on Mr Hill and the allegation made against Mr Hill. He denied her allegation. There was a brief discussion about drug testing. He says drug testing was raised but Mr Hill would only undertake a test if other employees were tested. Mr Westergaard says that Mrs Hill nodded at Mr Hill who then agreed to be tested. He decided that a drugs test would not be helpful because of the time that had elapsed.

[22] Mr Hill agreed the meeting on 10 March 2008 took place. He says he denied the allegations. He says he was interrupted and says his mother did not nod before he agreed to a blood test but she said “no problem” and he agreed to have a blood test.

[23] Since that meeting, and in the course of the Authority’s investigation, Mr Hill has added the following matters to be considered:

- That he had previously raised a performance review that was overdue and he had a dispute with Mr Westergaard over whether or not the review had taken place
- That he had involved Errol Gardiner, the managing director about his concerns involving Mr Westergaard
- Taken together these involved him being set up by Mr Westergaard
- That he had complained about Ms Can's partner
- That he was interrupted during the meeting on 10 March 2008
- That Mr Westergaard has not been accurate about what happened at the meeting
- That he asked for the written complaint but was not given it until the Authority's investigation. He told me that even if he had been given a copy of Selen Can's written complaint it would not have made any difference given the information he was given by Mr Westergaard.

[24] I find that Mr Hill raised some matters at the meeting on 10 March because I discovered notes made by Messrs Westergaard's and Cowles after the dismissal that referred to these matters, making it more than probable they were raised at that time. The matters Mr Hill raised at the meeting included:

- That no blood test was taken
- That no one inspected the vehicle
- That there was no search of his bag

[25] The meeting was adjourned and Mr Westergaard decided to have a further discussion with Selen Can, because Mr Hill denied the allegation. He visited her at her home again. She was adamant that Mr Hill had smoked the pipe twice in the vehicle and he had smoked an illegal drug. There were no minutes of the meeting held with Ms Can after the meeting held on 10 March was adjourned and before Mr Hill was dismissed.

[26] Mr Westergaard decided to believe Ms Can because:

- She had no connection to Mr Hill
- She had made clear statements
- She reconfirmed her accusation, and
- Mr Hill did not deny the allegation when he responded, but instead made an accusation about Ms Can's partner.

[27] He concluded at the time there was no reason for Ms Can to make up her accusation. He concluded that serious misconduct had occurred.

[28] He reconvened the meeting on 11 March 2008. He says he told Mr Hill that he accepted Ms Can's version, and his reasons for doing so.

[29] He says he afforded Mr Hill an opportunity to make any further explanation and Mr Hill continued to deny the allegation.

[30] Mr Westergaard decided he had no option but to terminate Mr Hill's employment and told him. Mr Hill was the only witness to say that he was given a letter of dismissal on 11 March.

[31] The dismissal was confirmed in a letter dated 11 March 2008 that was posted to Mr Hill. The interview record was enclosed. Mrs Hill confirmed this. Mr Hill was the only witness with a different account.

[32] Next, on or about 12 March, Mr Westergaard wrote up some notes of the matter and Mr Cowles typed them up. These notes were discovered by me during the Authority's investigation meeting when I interviewed Mr Cowles. By the look of the notes they are background notes for the company's head office. They contained more details than what was disclosed in the evidence. In particular

- That earlier another employee had smelt "pot" on Mr Hill in the smoko room and told him he stunk. That matter was not pursued with Mr Hill and there was no complaint made.
- That other staff had mentioned Mr Hill's use but would not back it up. No further details were provided.
- That a very offensive text message attributed to Mr Hill and sent to Ms Can's partner that had been received and the words copied. Mr Hill had never seen this before. He denied any involvement.

[33] Mr Hill now says he has learnt that he was alleged to have smoked a pipe containing illegal drugs twice and previously the allegation was that he smoked a pipe containing illegal drugs once.

[34] He says he has worked with Ms Can before and that he knows her partner and has worked with her partner, which is different to Ms Can's evidence that she did not know Mr Hill.

[35] He also says that the decision was pre-determined by Mr Westergaard.

[36] He says he knows other employees have been caught smoking illegal drugs and not even warned. He provided no evidence to support this allegation.

[37] He says Mr Westergaard and Ms Can's partner are very good friends and could only refer to one example of some job in Linton where Ms Can was present with them. Ms Can denied this claim.

Determination

[38] This matter involved a number of credibility issues and the reliability of some evidence. I prefer the evidence of Messrs Westergaard and Cowles and Selen Can to that of Mr Hill and his mother. My reasons are:

- That Mr Hill was not clear about his evidence. He changed his evidence where he was confused about days and dates. He had to correct his evidence and could not recall matters that he reasonably could have been expected to comment on. He could not corroborate his evidence of meeting Ms Can at Linton. He never raised this in his written statements, statement of problem and affidavit. I find it can not be relied upon.
- That Mrs Hill made allegations based on hearsay without any direct knowledge of the matters she had raised. She complained about the barbeque incident that occurred at Christmas 2005. I have given her claim on this matter little weight to support any condonation because of the time lapse, that there were no complaints made about the alleged incident at the time and as she could not contradict Mr Westergaard's denial.
- Mrs Hill contradicted Mr Hill's evidence that he was given the dismissal letter on 11 March, when it was posted. Mr Hill was the only witness to say he was given it on 11 March.

[39] Mr Hill challenged the meeting days and dates in a written reply denying Messrs Westergaard's and Cowles' recollection of the days and dates of events. Their recollection was at

least supported with some documentation. For completeness I find that the sequence of meetings was as follows:

- 5 March trip to Levin and return to Palmerston North.
- 5 March Selen Can approached Mr Cowles with the problem. Mr Cowles informed Mr Westergaard. Mr Westergaard visits Ms Can at her home for more privacy to discuss the matter.
- 6 March Ms Can meets with Mr Westergaard and handed him a written complaint. He seeks advice from head office about what he should do. A letter was prepared in head office that Mr Westergaard signed and accepted responsibility for.
- Friday 7 March Mr Westergaard and Cowles meet with Mr Hill and put the allegation to him. Mr Westergaard believed that Mr Hill's reaction was tantamount to an admission. Mr Hill is suspended on pay.
- Monday 10 March Mr Westergaard, Cowles and Hill and Mrs Hill meet. The meeting was adjourned when Mr Hill denied the allegation. A record of the interview was filled out by Mr Westergaard. Mr Westergaard visits Ms Can again at her home to put Mr Hill's denial to her. She continues to assert her claims.
- Tuesday 11 March the parties meet and Mr Westergaard puts his conclusion to Mr Hill that he believes Ms Can and the reasons. He gives Mr Hill an opportunity to respond and Mr Hill continues to deny the allegation. Mr Hill says he had no option but to dismiss Mr Hill for serious misconduct. After the meeting he writes a dismissal letter and posts it to Mr Hill.

[40] Mr Hill has not satisfied me that his dismissal was a set up or that there was an ulterior motive. He has not satisfied me that there was some elaborate collusion by Mr Westergaard and Ms Can or Ms Can and her partner to set him up. I found Ms Can a genuine witness in making her complaint. Her evidence was clear and I am satisfied that she believed Mr Hill had smoked what she believed was an illegal drug. She satisfied me that she genuinely knew what marijuana smelt like. Indeed Mr Hill did not challenge that she knew what marijuana smells like. She did not resile from her complaint knowing that Mr Hill denied her allegation. She stuck to her recollection of the event and was sufficiently consistent. She was prepared to put her name to it and has stood by her complaint.

[41] Mr Westergaard was able to respond adequately to the performance review matter involving Mr Hill's complaint to Mr Gardiner that Mr Hill has suggested is an explanation for his dismissal. Mr Westergaard's letters, interview notes, decision to suspend Mr Hill on the grounds of a serious

allegation of misconduct, the involvement of Mr Cowles and contacting the company's head office for advice do not support Mr Hill's suggestion that Mr Westergaard was setting him up. Mr Westergaard's decision to visit Ms Can at her home has left him open to an allegation of bias and a lack of independence in investigating the matter and making a decision. His visits to her home are mitigated by the un-contradicted evidence that they did not know each other personally and that Mr Westergaard had never been to her home before 5 March. I accept that Mr Westergaard remembered the name of her street and looked for her partner's truck to find the house. This was not challenged. There was a lack of formal notes of Mr Westergaard's two meetings with Ms Can at her home considering she was an important witness. However, I find that what Ms Can told him was consistent and was put to Mr Hill therefore the absence of any notes is not fatal. Mr Westergaard acknowledged he had been fishing with Ms Can's partner, but says this only occurred once. Mr Hill could not contradict this evidence.

[42] I discovered Messrs Westergaard's and Cowles' notes that were prepared on 12 March during the Authority's investigation meeting. These notes raised the prospect of submissions being made by Mr Hill's representative that there were matters not previously raised and leave a suspicion that the information was either used by Mr Westergaard without putting it to Mr Hill or that he considered it was not relevant in the conclusion and decision to dismiss Mr Hill.

[43] I am satisfied the notes are consistent with Mr Westergaard's conclusion and the evidence he says he relied upon at the time he reached his conclusion and made his decision to dismiss Mr Hill. The other matters were irrelevant considerations when none of them were put to Mr Hill, I hold. Mr Hill certainly did not know about them because otherwise I am certain he would have raised them during the Authority's investigation.

[44] I am satisfied the matters were not used by Mr Westergaard in reaching his decision to dismiss Mr Hill because he prepared the notes afterwards. There is no reference to the matters elsewhere before he made his decision. His notes are qualified that he did not have the evidence to back up the allegations if they were going to be used. In such a situation an employer is not required to raise such issues if they were not going to be relied upon.

[45] Mr Westergaard told me that he believed Ms Can. I distinguish this from any predetermination because his subsequent action and the events do not support him having made up his mind. He listened to Mr Hill by calling Mr Hill to an investigation and disciplinary meeting and returned to interview Ms Can before putting his conclusion to Mr Hill and inviting him to comment

before dismissing him. Mr Cowles was present at the meetings and Mr Cowles wrote the notes I found existed. Mr Cowles' role has never been challenged and no claim made that he was involved in the alleged set up.

[46] If there is any criticism of Mr Westergaard's process it is that he has mixed up the investigation and disciplinary processes and has inadequately kept a proper record of interviews. His letters were not precise. His process was not perfect, but not fatal in my opinion, because he put Mr Hill on adequate notice of the allegation in sufficient detail for Mr Hill to respond to and knowing that his job could be in jeopardy. Indeed Mr Hill responded by complaining himself about an incident he says occurred four weeks earlier with Ms Can's partner involving "an illegal drug". I find Mr Hill understood clearly what the complaint was about. It is trite to believe Mr Hill did not know what drug was being referred to given his complaint about Ms Can's partner and he did not challenge Ms Can's knowledge about the smell of marijuana. The matter in regard to Mr Hill's complaint about Ms Can's partner is the subject of a current company investigation and entirely separate from the matter involving Mr Hill. The fact that Ms Can has a partner working and sub contracting at Van Lines in Palmerston North is coincidental and it is Mr Hill who has drawn Ms Can's partner into this matter, I hold. All the parties understood the allegation involved an illegal drug, namely marijuana.

[47] Mr Hill's reaction on 7 March providing a response that there was some other similar behaviour involving Ms Can's partner on another occasion, would reasonably lead an employer to conclude that Mr Hill was not denying the allegation. However, a fair and reasonable employer would not have taken that into account at the time of the 7 March meeting because the purpose of that meeting was to put Mr Hill on notice of the allegation and to give Mr Hill the opportunity to get a support person and prepare to respond to the allegation at the next meeting. Furthermore, a fair and reasonable employer would have cautioned Mr Hill that he had an opportunity to reply that was the purpose of the next meeting and if an adverse inference was being taken from the response that should have been clearly put to Mr Hill to enable him to respond. In a preliminary meeting such as the meeting on 7 March the employer did not have to ensure a representative was present as that right was subsequently applied to the next meetings.

[48] Also, I would add that an employer to be genuinely helpful could ensure the employee had an opportunity to put a reply in writing so that there would be no room for any misunderstanding and to get a record of the employee's version of events. That is a matter of good practice, although not doing so will not necessarily be fatal.

[49] A fair and reasonable employer would also point out to an employee the distinction between having a support person and a representative with some professional expertise to assist and ensure a safe and fair process. Mr Hill was covered by a collective employment agreement and he told me he was a member of the union party to that collective so why the company did not include the union in its process has not been explained. The omission, however, was not fatal since Mr Hill never asked, has not raised this as a complaint, and he arranged his own support person for 10 and 11 March and the company put him on notice in writing of his right to have a support person or witness present. The company could do more here to explain the right, in my opinion, but I find its omission is not fatal because Mr Hill had a choice and he decided to take his mother to help him as a support person. Furthermore, given the notice of the seriousness of the allegation and if it was proven that he faced the possibility of dismissal it is reasonable to expect that Mr Hill could have decided to get professional help.

[50] Mr Hill was entirely within his rights to deny the allegation later, which he did, on 10 March. Mr Westergaard then did the proper thing by putting that denial to Ms Can for a further comment. Thus, he took Mr Hill's denial into account genuinely, and recognised it required a further enquiry of Ms Can.

[51] Mr Westergaard put Mr Hill on notice that if serious misconduct was proven he faced the possibility of dismissal. Before dismissing Mr Hill, Mr Westergaard gave Mr Hill the opportunity for further comment on his reasoning, and only when Mr Hill continued to deny the allegation, he decided to dismiss Mr Hill. He had not prepared the dismissal letter at that stage.

[52] I accept Mr Westergaard's evidence that he reached an honestly held belief when he says he believed Ms Can. I find that four out of five of his reasons he relied upon are worthy of weight. These are as follows

- She had no connection to Mr Hill. I accept Ms Can's evidence that she had not met Mr Hill earlier and had not worked with him. Mr Hill could not provide any further details to support his evidence raised for the first time during the Authority's investigation about the Linton work with Ms Can and her partner. I have found Mr Hill's raising this as unreliable because he raised it for the first time at the Authority's investigation meeting and could have been expected to reasonably raise it earlier if it was true or some other context to it.

- She had made clear statements. Although she did not refer to marijuana as such I find that she genuinely believed what she smelt was marijuana. Mr Hill never challenged what was meant by an illegal drug. There was a mutual understanding about what was being referred to. Indeed Mr Hill complained about Ms Can's partner in the same vernacular. She was prepared to put her complaint in writing and with her name and stand by her allegation.
- She reconfirmed her accusation. Mr Westergaard's meeting held with her between the so called disciplinary meeting on 10 March and before Mr Hill's dismissal has never been challenged by Mr Hill.
- Ms Can had no reason to lie that Mr Westergaard could establish since it was her first day at work, and Mr Hill said nothing to contradict her. Indeed Mr Hill's response that she was telling lies lacks sufficient reasoning to be plausible, and that she needed "*testing for hallucinating*" is nonsense.

[53] The fifth reason related to the admission Mr Westergaard says he took from Mr Hill's reaction of complaining that Ms Can's partner had done the same on another occasion. I have been critical of Mr Westergaard's use of this earlier. If this was enough to render the dismissal unjustified, and I am not saying it is, Mr Hill would face some difficulty with an assessment of his contribution and more than likely have zero remedies awarded. However, the four other reasons advanced, I find were enough for the employer to make a decision on.

[54] The question now has to be asked would a fair and reasonable employer have considered other factors to influence the outcome. These factors include carrying out a blood test, searching Mr Hill's bag and inspecting the truck and taking into account Mr Hill's length of service and his personnel file.

[55] I am satisfied that the reasons why Mr Westergaard believed Ms Can were sufficient without him carrying out a blood test and searching Mr Hill's bag. The latter probably would not have assisted the enquiry I hold because of the passage of time and the lack of any company policies on property searches. On the former Mr Westergaard concluded without any professional advice that it was probably too late to get a worthwhile test by 10 March and it would not of its own been proof that Mr Hill smoked the pipe with an illegal drug on 5 March. Also, the lack of any company policy did not assist Mr Westergaard, I hold. Therefore, it was reasonable for him to rely on what information he had and that related to Ms Can's information and he believed her. I am not certain that inspecting the vehicle would have established much considering the passage of the events on 5

and 6 March, and by the time the parties met on 10 March when Mr Hill made the suggestions for the first time.

[56] Also Mr Hill has raised his length of service from 2005 with the company compared to that of the complainant's one day of employment. It seems this was not taken into account and I find no reason why it should have been as it was a matter that was up to the employer. I find that nothing turns on the time of employment to determine credibility. Mr Hill never asked for it to be taken into account at the time.

[57] I requested Van Lines to produce Mr Hill's personal file. I find that there is no evidence that other matters prejudicial to Mr Hill that existed on that file were considered by Mr Westergaard in reaching his decision to dismiss Mr Hill. I had no evidence that he had the file prior to reaching his conclusions and decision. Certainly I am supported in the fact that Mr Hill did not raise such matters at the time. These include a prior warning and another misdemeanour. Mr Hill has not raised an earlier complaint which he wrote in a letter in reply to an earlier disciplinary matter that somebody was out to get him. I have disregarded it as a relevant factor because if Mr Hill had wished he could have reasonably raised it in the Authority's investigation, and did not do so. Also, he did not raise it at the time and if he believed it was relevant he would have reasonably raised it then.

[58] When an employer concludes that there has been serious misconduct it is open to it to dismiss. Mr Hill's employment agreement and the company's code provided for this. Thus, while Mr Westergaard says a warning was another option and he accepted he never raised it with Mr Hill, I find he was not required to raise it with Mr Hill, given the gravity of the offence and that the offence met the requirements of the employment agreement and the company's code to be classified as serious misconduct. Mr Hill never asked for a lesser penalty to be considered in the time he was given an opportunity to reply. I conclude that Mr Hill was not disadvantaged in the process because I am satisfied that if there was any discussion the outcome would have been no different given the finding on credibility and the seriousness of the allegation.

[59] Therefore, I conclude that Mr Hill's claims must be dismissed.

Costs

[60] I now turn to costs. Costs usually follow the event and there is no reason for me to depart from this principle. Van Lines actual costs were \$4,350 plus GST of \$543.75 and disbursements of \$110.80 supported by invoice dated 31 March 2008. Further costs incurred subsequently were \$5,705 plus GST of \$713.13 supported by the Respondent's solicitor's print out of time record. Total legal costs were \$10,055 plus GST \$1,256.87 and disbursements of \$110.80. Deducting mediation costs of \$525 leaves costs of \$9,530 plus GST.

[61] It was submitted that the costs were reasonably incurred by the Respondent to defend the claims. It was submitted that a fair contribution by the Applicant would amount to \$6,346.98 plus GST and disbursements of \$110.80. The Respondent has asked me to consider that the Applicant sought reinstatement and at the 11th hour withdrew his claim and to take into account his conduct.

[62] I am not satisfied that the entire actual costs should be used as the starting point because the employer should have known that there was some likelihood of incurring some costs in the matter and that not all costs are retrievable. There have been costs incurred that should be deducted such as "Mail to client re enquiry about account invoice", "Telephone call from Warwick re PN employee PG", "Miscellaneous mail from mediation/ERA/ email Warwick", and travel. This is because some of the items are not clearly identified being related to the Authority's investigation and the costs incurred for Counsel's travel was a matter of choice for the Respondent and could have been avoided using local Counsel. The parties have to bear their own costs for mediation and that has been recognised by Van Lines. It is my decision to use the average actual costs of \$9,530 and the claimed costs for contribution of \$6,346.98 to assess a reasonable contribution. The sum of reasonable costs amount to \$7,938.49. I have excluded GST because the Respondent can claim it back as it is registered and GST is not awarded by the Authority as a matter of general and consistent practice. However, bearing in mind recent observations of the Employment Court in Wellington that \$3,000 is a starting point for costs in a one day investigation meeting including preparation, attendances and written submissions, and that the Authority sets its own costs, I assess that there is an extra \$969.25 that can be added to meet at least 50% of the reasonable costs, and I award the sum of \$3,969.25 to New Zealand Van Lines Limited towards its costs, plus disbursements of \$110.80.

Conclusion

[63] Jeremy Hill's claims are dismissed.

[64] Jeremy Hill is to pay New Zealand Van Lines Limited \$3,969.25 contribution to costs and \$110.80 disbursements.

P R Stapp
Member of the Employment Relations Authority