

- [3] Mediation did not resolve this employment relationship problem.

Background

- [4] Mr Horton was employed by the Company as a mechanical technician from September 1994 until his dismissal on 29 May 2009.
- [5] Mr Horton says that, prior to his dismissal he had not been subject to any disciplinary action and had an exemplary work history.
- [6] In mid February this year Mr Horton made enquiries with the Company's roofing contractor about obtaining some reject roofing iron belonging to the respondent, to build a fence on his property.
- [7] Mr Horton obtained authority from the contractor "... to remove approx 200 metres of roofing iron ... these items have no scrap value and no intended purpose ... " (see doc C in the agreed bundle). Delivery of roofing iron took place on 27 February to the applicant's property.
- [8] On or around 7 April, while Mr Horton was on leave, his manager arrived at his property and informed the applicant that he believed he was in possession of roofing iron belonging to the Company. It was subsequently returned to the respondent.
- [9] Mr Horton returned to work on 4 May, following which an investigation process involving several meetings was initiated by the Company. Mr Horton faced an allegation he "*removed and was in possession of property belonging to Fonterra without the correct authorisation*" (doc D, above).
- [10] At a meeting on 29 May Mr Horton was advised of the Company's decision to summarily dismiss him. The decision was reached after the respondent acknowledged:

... that you had received authorisation to remove scrap iron from site, but the iron you removed was new and still of considerable value and use to the Company. The explanation you gave was that you have received permission ... to remove the new iron. You acknowledged that statements provided by witnesses ... do not support this explanation and version of events, and further stated that the witnesses could be

providing false statements because they felt guilty about the role they played in the removal.

After a full and thorough investigation process and due consideration given to the facts and various accounts of the incidents outlined above, the Company considers that, on a balance of probabilities, your version of events was unlikely to accurately reflect the actual events, and that your actions constitute serious misconduct justifying termination of your employment.

(doc M, above)

- [11] In advice dated 10 June 2009 (doc O, above) responding to notice of Mr Horton's personal grievance the Company undertook not to replace his position for at least three months.

Applicant's Position Summarised

- [12] Mr Horton approached, and received authorisation from a person he had been told was in charge of the reject roofing iron, i.e. the roofing contractor. He offered to pay but was told the iron had no value and he could have it provided he paid for the removal. A signed removal authorisation was provided.
- [13] Based on subsequent statements, it appears the applicant was told there were some bundles he could have and some he could not. The evidence of the various people involved is inconsistent with respect to exactly what Mr Horton was told he could and could not have.
- [14] The Company did not have a clear, recognised and consistently enforced policy with respect to the removal of material from site. That failure and others by the persons involved, including the contractors and Company staff, contributed to the respondent's finding of unauthorised removal of property from the site.
- [15] The Company's investigation and disciplinary process was flawed: relevant factors were not considered while irrelevant factors were. While it now claims to have considered Mr Horton's character and intention there is no evidence of the same during the investigation process itself.

- [16] The evidence before the Authority does not support a conclusion that, in all the circumstances a fair and reasonable employer would have dismissed Mr Horton. Having regard to all the circumstances the only conclusion one can reasonably reach is that it was inevitable, given the obvious confusion and uncertainty about the process for removal of material from the site, that a mistake of this nature would be made.

The Company's Position

- [17] Because of my findings it is unnecessary to summarise the Company's position.

Discussion

- [18] There are two types of roofing iron: the scrap or reject 400 series iron, and the new 600 series iron. They can be distinguished by their distinctive profiles.
- [19] In his interview with the Company on 29 May Mr Horton confirmed he *"definitely knew the 600 profile"* (above).
- [20] Amongst other conclusions, the Company decided Mr Horton knew he was not authorised to remove any 600 series iron.
- [21] Mr Horton's evidence to the Company and to the Authority was that he took what was authorised, i.e. that he *"had permission to remove reject roofing iron which is exactly what I believed I was taking"* (par 23 of his witness statement).
- [22] Of the three bundles found on his property, Mr Horton says two were damaged 600 series and authorised for removal; he cannot account for the third, unauthorised bundle transported to his house. He says the third bundle was wrapped in scrap and he did not realise what it consisted of hence, despite the passage of time from delivery to recovery, he took no steps to return it to the Company (see doc A1 & A2)
- [23] Mr Horton also claims there has been a fundamental failing on the Company's part to implement and properly enforce a policy on the removal of property from site.

Findings

- [24] I do not accept Mr Horton's evidence and submission for the following reasons.
- [25] Mr Horton's authorisation, "*to remove approx 200 metres of reject roofing iron*" (doc C) is not at issue in this matter, anymore than the Company's processes (adequate or otherwise, clearly spelt out or not, understood by Mr Horton or not) for gifting property to its staff.
- [26] What is at issue is the decision to dismiss Mr Horton for "*removing from site and being in possession of property belonging to Fonterra, specifically 3 bundles of 600 series diamond deck roofing iron, **without correct authorisation** to do so*" (emphasis added, doc M).
- [27] The test of justification of the decision to dismiss is set out at s. 103A of the Employment Relations Act 2000: the question of whether a dismissal was justifiable is determined on an objective basis by considering whether the employer's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.
- [28] The decision to dismiss Mr Horton was made by the Company's Whareroa maintenance manager, Mr Brian Purser. Mr Purser conducted the interviews of all witnesses, including the respondent's roofing contractors, the truck driver who removed the iron and Mr Horton. Mr Purser also visited the applicant's house on 26 and 30 March and identified the missing 600 series iron present on his property.
- [29] Mr Purser preferred the version of events of all other relevant witnesses over Mr Horton's claims. He did so by way of 3 key findings:
- a. Mr Purser preferred the contractors' version, that Mr Horton had clearly been told what he could and could not remove, i.e. that he could have 400 series but not 600 series roofing iron;
 - b. He also preferred the contractors' evidence that, notwithstanding their written authorisation to remove reject roofing iron (doc C), Mr Horton was told – but failed – to get further authorisation from a Company consultant

before removing any iron. Mr Purser did not find credible the applicant's claim that, while admitting to knowing he had to seek approval from the Company's contractor to remove 400 series iron, he was not under a similar obligation to seek approval for the 600 series iron, a newer and more expensive material; and

- c. Finally, Mr Purser preferred the evidence of the truck driver who loaded and transported the iron to Mr Horton's property. In particular he accepted his claim that despite raising doubts with Mr Horton about the appropriateness of the material to be taken, he was directed by the applicant – who was present at the time – to remove the iron that was taken to the applicant's property, and which resulted in his dismissal.

[30] In arriving at his decision Mr Purser took into account Mr Horton's confirmation that he had shown the driver the iron to be removed (while denying he was present at the time of its actual removal).

[31] In this instance the Authority's role is to enquire into and judge objectively what a fair and reasonable employer would have done (see *Air New Zealand Ltd v Hudson* [2006] 1 ERNZ 415; *Air New Zealand Ltd v V* [2009] 9 NZELC 93,209, etc).

[32] Having done so I am unable to fault the respondent's process or decision. This was not a matter of establishing, beyond all reasonable doubt, whether Mr Horton stole Company property: the respondent instead properly inquired into how the applicant came to have Company property at his residence. After conducting a comprehensive inquiry during which all relevant parties were questioned (some more than once), and after giving Mr Horton access to the evidence of others, the Company found as not credible his claim he was authorised to have 600 series roofing iron and – effectively – that he was not responsible for non-authorised roofing iron being placed on the truck that delivered it to his property, where it remained from 27 February to after 26 March 2009.

[33] While it is not a numbers game, the Company fairly and reasonably found a consistency in the evidence it obtained from other witnesses and concluded it should prevail over Mr Horton's.

- [34] The Company's investigation disclosed no suggestion of a conspiracy, active or passive, by the witnesses against the applicant. The Authority's investigation resulted in a similar conclusion, i.e. what a fair and reasonable employer, objectively considered, would have concluded.
- [35] I note here that, while it was not put to Mr Horton as part of the Company's inquiry, during the Authority's investigation the applicant did not dispute Mr Purser's assessment that the material at his property measured significantly more than the "*approx 200 metres*" described in the authorisation document (doc C): in Mr Purser's opinion, it was over 800 metres.

Determination

- [36] I find against Mr Horton's claim of unjustified dismissal.
- [37] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority