

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Craig Jefferys (Applicant)  
**AND** Works Infrastructure Limited (Respondent)  
**REPRESENTATIVES** Michael Hanifin, Advocate for Applicant  
John Watson, Advocate for Respondent  
**MEMBER OF AUTHORITY** James Crichton  
**INVESTIGATION MEETING** 18 January 2005  
**DATE OF DETERMINATION** 5 April 2005

DETERMINATION OF THE AUTHORITY

*Employment relationship problem*

[1] The applicant Mr Jefferys says that he was unjustifiably dismissed from his employment by the respondent (Works) and he further alleges by implication that Works took unjustifiable actions to his disadvantage.

[2] Works deny both allegations and in particular claim that the dismissal was procedurally fair and substantively justified.

[3] The matter went to mediation but was unable to be resolved.

*The facts*

[4] Mr Jefferys was employed by Works as a general hand on 4 August 2002. He was engaged in terms of a collective employment agreement negotiated between the Amalgamated Workers Union NZ (Southern) Inc. and Works.

[5] It was common ground that Mr Jefferys had had a somewhat colourful history with Works and indeed Works branch manager Mr Graeme Henderson told me that he was regularly giving Mr Jefferys the benefit of the doubt during his frequent transgressions.

[6] The evidence for Mr Jefferys various disciplinary problems prior to the events just before the dismissal were not contested and Mr Jefferys never denied that he had had various difficulties with his employer. These difficulties culminated in a final written warning dated 13 February 2003.

[7] This final written warning is significant because the employer seeks to rely upon it in respect to its decision to dismiss.

[8] On 8 September 2003 Mr Jefferys and a work colleague, Mr Cummings, were summoned to the office of Works manager, Mr Henderson. Mr Henderson had come into possession of an allegation that Mr Jefferys and his work colleague Mr Cummings had been smoking marijuana on the work site.

[9] Mr Jefferys and his colleague were told of the allegation and told that they were required to undergo a drug test. They were also told at this time that they would be suspended from work and they were not given any opportunity to comment on that suspension.

[10] Works refused to give Mr Jefferys details of the allegation despite Mr Jefferys' request and Mr Jefferys was given no prior notice of the purpose of the meeting and no opportunity to be represented at it.

[11] No opportunity was offered (or it seems in a practical sense able to be taken) for Mr Jefferys to respond verbally or in writing as to the substance of the allegation.

[12] Mr Jefferys was not asked to consent to the drug test.

[13] Mr Jefferys and his work colleague were immediately thereafter required to submit themselves to the requisite drug test at a local medical practice and the results of that test were subsequently provided to the employer.

[14] On 11 September 2003 (while Mr Jefferys was on suspension as previously noted) he was summoned to a meeting with Works at which Works was represented by Mr Henderson, the branch manager, and Mr George Stewart who is Works' maintenance supervisor.

[15] At this meeting, Mr Jefferys was not given any opportunity to be represented, and he was not provided with details of the drug test at the time but only told that the test was positive.

[16] Mr Jefferys again asked for specific details of the allegation and again this was refused.

[17] Mr Henderson for Works said that the employer ran a "health improvement programme" that Mr Jefferys could be required to participate in or be liable to dismissal, but Mr Henderson indicated that he would need to think about whether the programme could be offered to Mr Jefferys. Mr Henderson said there would be a further meeting at 7.30 am the following day, ie 12 September 2003, and that Mr Jefferys could, this time, bring a representative.

[18] The following day the parties met again and Mr Henderson offered, and Mr Jefferys accepted the health improvement programme. Mr Jefferys' evidence was that he accepted it in order to prevent him from being dismissed so he really thought that he had no choice.

[19] Mr Jefferys also told me that he again sought to be told details of the original allegation and again was told that no such details would be provided. Both parties' evidence confirms that the discussion got pretty heated. Mr Jefferys says that Mr Henderson was rude and abusive, and Mr Henderson accepts that his language was "rich" and "heated".

[20] Mr Jefferys' evidence was that he felt very angry and upset by the way he had been spoken to by Mr Henderson and he was anxious about the prospect of losing his temper so he signed the document that he was asked to sign (which confirmed that he accepted being a part of the health improvement programme) and he was then told to return home to get changed to return to work.

[21] Mr Jefferys' evidence is that at the conclusion of this meeting he told Mr Henderson that he was "... going to take legal advice over my treatment". Mr Henderson's evidence is that no such

statement was ever made to him and Works invite me to reach the conclusion that, even if Mr Henderson is mistaken about that, that no request for time off was ever agreed to. The significance of that last matter will become apparent shortly.

[22] Mr Jefferys left the meeting with Mr Stewart and it is common ground that Mr Jefferys said to Mr Stewart that he would come back to work after he had obtained legal advice as he was unhappy about the way that he had been treated.

[23] I asked Mr Jefferys whether he would have sought legal advice if Mr Henderson had been less intemperate with him, and Mr Jefferys said that he would. So it seems likely that Mr Jefferys' intention was to seek legal advice in any event and Mr Henderson's attitude and demeanour was not determinative.

[24] Mr Jefferys' evidence about Mr Stewart's response to the intelligence that he was off to see his lawyer, was that Mr Stewart seemed to be understanding of that course of action. Mr Stewart's own evidence is clear that Mr Jefferys did in fact convey to him that he was intending to visit a lawyer, but Mr Stewart then says that he asked Mr Jefferys if he had Mr Henderson's permission, and that Mr Jefferys said that he did in fact have Mr Henderson's permission.

[25] What Mr Jefferys did next was to contact Mr Hanifin and there is uncontraverted evidence that Mr Jefferys left Mr Stewart a voicemail message at around 2.30 that afternoon to say that his advocate had advised him that given his agitation and distress it would be inappropriate of him to return to the job that afternoon (which was a Friday) but that he would be available to work the following day, Saturday.

[26] For his part, Mr Stewart went back to Mr Henderson to verify that what Mr Jefferys had told him about Mr Henderson's consent to visiting a lawyer was in fact true. Mr Henderson told Mr Stewart that no such matter had been raised with him and that accordingly he had had no opportunity to consent or otherwise.

[27] Later in the afternoon Mr Stewart discovered the voicemail message that Mr Jefferys had left him telling him about his intentions in respect to obtaining legal advice and conveying the intelligence that he was not in fact going to be back at work that afternoon and so Mr Stewart went back to Mr Henderson to tell him about this message.

[28] I have listened to an audio tape of the message left by Mr Jefferys for Mr Stewart and it certainly is unexceptional either in tone or indeed in content.

[29] In any event, Mr Henderson instructed Mr Stewart to attend at Mr Jefferys' home and require him to attend a further disciplinary meeting at 7.30 am on Monday, 15 September.

[30] It is common ground that Mr Stewart arrived at Mr Jefferys' home at about 5.30 pm and it seems that Mr Stewart spoke to Mr Jefferys without alighting from his Works utility, speaking to Mr Jefferys through the window. Mr Stewart told me this was because Mr Jefferys had a large and attentive dog.

[31] There is dispute between the parties as to the substance of this conversation conducted through the utility window. Mr Stewart says that he said it was a disciplinary meeting, he said that Mr Jefferys had to bring his representative, he said that it was to talk about his unauthorised absence from work that afternoon, and he said that his job was on the line. Mr Stewart says that Mr Jefferys responded by saying that he had left a message for Mr Stewart, and Mr Stewart said that he was still required to attend the meeting.

[32] For his part, Mr Jefferys says that all he was told was that there was to be a meeting, and that Mr Jefferys said that he would have his advocate present. Mr Jefferys was unsure if Mr Stewart had offered him the chance of bringing a representative. He said that there was no mention of it being a disciplinary meeting, and that no details were provided about the matter in contention. Nor was there any mention of his job being *on the line* Mr Jefferys said.

[33] In the result, the applicant's advocate could not attend a meeting at 7.30 am. The meeting was postponed until 2 pm on the same day.

[34] This meeting on Monday, 15 September was clearly intemperate. By this stage, it does not seem unreasonable to say that the parties were talking past each other. Works was frustrated that Mr Jefferys had recruited Mr Hanifin to his cause, as Mr Jefferys had previously used Mr Costello of the Amalgamated Workers' Union.

[35] A consequence of Mr Hanifin being involved (from the employer's perspective) was that Mr Hanifin wanted to use the meeting as an opportunity to discuss the alleged inadequacies of the employer's process in relation to the drug allegation. From Works' point of view, the drug allegation was dead and buried in the sense that there had been a process culminating in a finding of drug use which in turn had led to an agreement between the parties that Mr Jefferys would join the health improvement programme. The consequence of that from Works' point of view was that the matter was closed.

[36] Mr Hanifin, acting for the applicant, was firmly of the view that the process used to obtain the applicant's consent to the drug improvement programme result was unfair, and that therefore the applicant had in effect been entrapped into reaching a conclusion to this matter that the employer could live with. Mr Hanifin wanted to debate the issues and Mr Henderson and Mr Stewart who were present at the 15 September meeting were not much interested in that. The meeting became more and more intemperate it seems, and the applicant's evidence was that Mr Henderson kept interrupting Mr Hanifin when he was endeavouring to give Mr Jefferys' explanation for his alleged absence without leave.

[37] I accept that Mr Hanifin irritated the employer at this meeting, but I cannot find fault with him for that. He was doing his job. The difficulty for him was that the approach that he was taking was not an approach that the employer expected, and indeed the employer had expected to see Mr Costello present rather than Mr Hanifin. For his part, Mr Jefferys told me that the reason that he had removed himself from the care of the Union and asked Mr Hanifin to represent him was that he was dissatisfied with the Union's work in that regard. He implied, without stating it in so many words, that had the Union done a proper job of looking after him, he would not have had so many strikes against his name on the company record.

[38] This meeting concluded with Mr Henderson undertaking to reflect on what he had heard and the parties reconvened at 10 am the following day (Tuesday, 16 September 2003) and it seems common ground that Mr Henderson gave Mr Jefferys an opportunity of further attempting to defend himself. Mr Jefferys, through his advocate Mr Hanifin, indicated to the employer at this stage that all the points that they wished to make had in fact been made, albeit with difficulty, at the meeting the previous day and there was nothing further they had to add.

[39] It appears that the employer then took a short recess during which the evidence suggests the decision was made to dismiss, and that decision was conveyed back to Mr Jefferys on the spot. Mr Jefferys was then immediately handed a letter of dismissal which suggests that the decision to dismiss may actually have been made earlier.

### *Findings of fact*

[40] It is unchallenged evidence that Mr Jefferys had had a troubled career with Works and was on a final written warning dated 13 February 2003 at the time of his dismissal.

[41] I accept the applicant's evidence (which was corroborated by Mr Cummings) that at the first meeting with the employer on 8 September 2003:

- (a) The applicant was not given details of the specifics of the allegation;
- (b) The applicant was told he would have a drug test;
- (c) No consent to such drug test was proffered or sought;
- (d) The applicant was suspended without any opportunity to comment on that process;
- (e) The decision to suspend must have been made in advance of the employer seeing the applicant, or contemporaneously as the applicant had no involvement in that decision whatever;
- (f) The applicant was not provided with any notice of the purpose of the meeting and there was no opportunity for the applicant to obtain representation before the meeting, or indeed be advised as to its necessity.

[42] I further find that at the second meeting with the employer on 11 September 2003 the applicant was again refused details of the specifics of the allegation made against him, and I also find that the applicant would have had a reasonable apprehension that his job was in jeopardy if he did not participate in the health improvement programme which the respondent was considering offering him.

[43] At the meeting on 12 September 2003 between the employer and the employee I find that the applicant again asked the respondent for details of the allegation, and was again refused. It was uncontraverted evidence that this meeting was intemperate and unpleasant and accordingly, it is not unlikely that the applicant may have felt upset and angry as he says in his evidence about the attitude of the respondent's Mr Henderson.

[44] Whether Mr Jefferys told Mr Henderson of his intention to seek legal advice is difficult to say with any certainty. Mr Jefferys said in his evidence that he did tell Mr Henderson he was going to take legal advice, and Mr Henderson says that no such statement was ever made. Mr Jefferys' own comparatively contemporaneous written record refers to this meeting and the relevant part of the notes says this –

*The meeting then ended with Graeme [Mr Henderson] saying he would be in touch with Instep Counselling Services and told me to go home and get changed and be back at 8 o'clock Friday morn. Then told him I would have to contact my lawyer.*

[45] Clearly Mr Jefferys has the day wrong – it should be 8 o'clock Saturday morning, and not Friday morning, but the rest of the message is clear enough. In his evidence orally before me, Mr Jefferys was absolutely adamant that he had made that statement to Mr Henderson, and Mr Henderson was equally adamant that no such statement was made.

[46] There is no complete corroboration of Mr Henderson's version of events from Mr Stewart because it is common ground that Mr Stewart was not present for the totality of this meeting, he

having been asked by Mr Henderson to leave the meeting briefly to attend to some paperwork that was required for Mr Jefferys to attend to.

[47] I have reached the conclusion that Mr Jefferys certainly thought that he had conveyed that message, but equally I am not persuaded that Mr Henderson is completely mistaken in his view that he did not receive such a message. By all accounts the meeting was intemperate and unpleasant and both parties would have been excited. In the heat of the moment, it is understandable that a message which one party thinks they have transmitted is not received clearly by the other.

[48] What inclines me to the view on points (if I may use that loose form of the vernacular) to prefer Mr Jefferys' recollection is his handwritten notes and his subsequent behaviour in respect to Mr Stewart.

[49] It is common ground that on leaving this meeting, Mr Jefferys told Mr Stewart that he was going to see his lawyer. What happens next is also the subject of dispute in that Mr Jefferys records Mr Stewart as having tacitly approved such a course of action, whereas Mr Stewart's evidence is that he asked Mr Jefferys if Mr Jefferys had talked to Mr Henderson, and Mr Jefferys said that he had.

[50] Whatever the truth of the last mentioned point, it is not in my view material. The next important factual issue is the telephone voicemail message left by Mr Jefferys on Mr Stewart's telephone to advise the latter that Mr Jefferys had been advised to stay away from work that afternoon, Friday 12 September 2003 because of his agitation and distress. In fact I note in passing that in Mr Jeffrey's own notes of his conversation with Mr Hanifin his advocate, which I referred to above, the suggestion that Mr Jefferys stay away from work that afternoon came from Mr Jefferys and was supported by Mr Hanifin, but nothing, I think, turns on that.

[51] The significance of the statement allegedly made by Mr Jefferys to Mr Henderson about seeking legal advice is that if, as I found on the balance of probabilities, it is more likely than not that that statement was made then the safety of a decision to summarily dismiss for *taking leave without permission or authorisation* must be in question. Clearly nobody advances the proposition that a request for time off was made and granted but I have preferred the applicants evidence that a statement by him was made to his manager that he would seek legal advice and I consider the applicants subsequent behaviour is consistent with an understanding that he had at least the tacit consent of his employer.

[52] The dismissal was summary and relies on the existence of the final written warning dated 13 February 2003. The employer alleges in the dismissal letter that Mr Jefferys' actions constituted serious misconduct therefore he could be summarily dismissed because of the earlier warning.

[53] I do not accept the logic of this at all. In my opinion, what Mr Jefferys did, whether there was a final written warning in place or not, could not possibly constitute serious misconduct. At worst it is ordinary misconduct and such a definition seems to me to be absolutely consistent with Works own collective employment agreement. Mr Henderson himself accepted under questioning during my investigation meeting that in fact this offence (if proved) would constitute misconduct rather than serious misconduct. On that basis then, the summary dismissal of Mr Jefferys must be unjustified.

[54] A further difficulty for Works is that their own evidence (both from Mr Stewart and from Mr Henderson) suggest that matters which are not referred to in the dismissal letter at all as a basis for the dismissal in fact influence the decision to dismiss. Mr Henderson's handwritten notes of his final interview with Mr Jefferys suggests that:

- a) The very fact of Mr Jefferys being on a final warning was itself an influencing factor in the decision to dismiss.
- b) The fact Mr Jefferys had been a bit of a handful in a disciplinary sense also seemed to weigh with Mr Henderson.

[55] For his part Mr Stewart's evidence was concerned about Mr Jefferys apparently lying to him about Mr Henderson giving him permission to be away for the afternoon.

[56] Mr Henderson in evidence at my investigation meeting talked about Mr Jefferys *disobeying my instructions* but both Mr Henderson and Mr Stewart agreed that the only allegation that had been put to Mr Jefferys was the allegation that he had had an unauthorised absence from work which is what the letter of dismissal refers to albeit in a slightly different wording.

### ***Determination***

[57] I have spent some time outlining the facts in this matter partly because they are a little unusual but more importantly because they effectively advance two quite distinct issues which need to be resolved between the parties.

[58] The first of these issues is whether Works health and safety policy as it relates to drug use has been fairly applied in respect to Mr Jefferys. For the purposes of this determination, I do not need to make any broader findings than are required simply to deal with the particulars of Mr Jefferys' employment relationship although I do observe that Works drugs policy, while laudable in its intent, seems to me to potentially breach employees normal employment rights insofar as it seeks to abrogate the normal rules about matters such as having a representative present at meetings with the employer, being able to have a full description of the nature of the allegations against one, giving informed consent to procedures or agreements without a sense of being bullied and so on.

[59] Works say that they obtained an agreement with the various unions who cover their workforce in order to abrogate these usual rules. However, it is difficult to see how there can be an agreement between parties to an employment relationship which in principle varies the normal rules of law and practice.

[60] In respect to the employment relationship problem that I am required to determine here, I find that Mr Jefferys was subject to unjustifiable actions to his disadvantage in the process by which the employer Works processed the allegation of drug use against Mr Jefferys and in particular in the way in which the employer obtained Mr Jefferys' consent to participate in the health improvement programme. I have found as a fact that Mr Jefferys was effectively given that option or the likelihood of imminent dismissal. In my opinion, the process used by the employer to reach that point was unfair and unreasonable and the culmination of that process whereby Mr Jefferys *consented* to joining the health improvement programme amounts to a kind of constructive consent.

[61] I also find that Mr Jefferys' summary dismissal is unsafe and that in consequence, in addition to proving unjustifiable actions to his disadvantage, Mr Jefferys is also successful in his claim of unjustifiable dismissal.

[62] I reach this conclusion in relation to the dismissal because:

- (a) I have found on the balance of probabilities that it is more rather than less likely that Mr Jefferys did tell his employer of his intention to seek legal advice;
- (b) It is by no means clear that Works adequately conveyed to Mr Jefferys the significance of the disciplinary meeting to be held on 15 September to consider his alleged absence

without authority, particularly in terms of whether Mr Jefferys was told that his job might be in jeopardy or even what the specific purpose of the meeting was;

- (c) Works summarily dismissed Mr Jefferys yet its own collective employment agreement which covered Mr Jefferys' work would define Mr Jefferys' breach at worst as misconduct rather than serious misconduct which would therefore not attract a summary dismissal;
- (d) On the evidence presented, there seemed to have been matters taken into account by Works in respect to the dismissal which were not specifically put to Mr Jefferys;
- (e) The existence of a final written warning is not a grab-bag to cure defects in the decision making process and the existence of a final written warning does not of itself entitle the employer to act arbitrarily and without the fundamental elements of good faith required by section 4 of the Employment Relations Act 2000.

### ***Remedies***

[63] In the absence of contribution, I would award Mr Jefferys the sum of \$5,000.00 in total as compensation for the unjustifiable dismissal and the unjustifiable actions to his disadvantage. There was ample and graphic evidence at my investigation meeting of the stress and distress experienced by Mr Jefferys as a consequence of his dismissal. In particular, the effect on his partner and immediate family was graphically demonstrated.

[64] Given the fact that Mr Jefferys has been successful in his claim, he is entitled to payment of lost wages and in that regard, I award him the sum of \$5,086.26 being a reasonable calculation of three months earnings were he still employed by Works after the deduction of the sums earned by him since dismissal.

[65] However, this is a case where it is impossible to avoid the conclusion that Mr Jefferys has amply contributed to his own misfortunes. While I have found as a fact that the process used by Works to deal with Mr Jefferys was unfair and did not conform with the law, it is reasonable to say that Mr Jefferys put himself in a position where, by his behaviour, he gave his employer those opportunities. I evaluate Mr Jefferys' contribution at 40%. Accordingly I rebate the compensatory payment by that percentage figure.

[66] Accordingly, Works will pay to Mr Jefferys the sum of \$3,000.00 in compensation for hurt, humiliation and injury to his feelings pursuant to section 123 (c)(i) of the Employment Relations Act 2000 together with the sum of \$5,086.26 being a contribution to wages lost in consequence of the dismissal.

### ***Costs***

[67] Costs are reserved.