

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Allister Keast  
**AND** Stainless Design Ltd  
**REPRESENTATIVES** John Pebbles for Applicant  
Glenys Steele for Respondent  
**MEMBER OF AUTHORITY** Janet Scott  
**INVESTIGATION MEETING** 13 June 2006  
**DATE OF DETERMINATION** 23 August 2006

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] The applicant submitted he was unjustifiably suspended and then dismissed from his employment with the respondent company. To remedy his alleged grievance he claims lost remuneration, compensation pursuant to s.123 (1) (c) (i) and costs.

[2] The respondent denies the applicant's claims and submits that Mr Keast was justifiably dismissed for serious misconduct.

*Background*

[3] The applicant was General Manager for Stainless Design Ltd. He was appointed to that position in December 2003.

[4] By mid-2005, the managing director, John Cook, had become concerned at the poor induction practices being followed in introducing new employees to the company. He had given direction that a new and thorough induction process be developed and followed in inducting new employees.

[5] The opportunity to follow the new induction policy arose on 1 August 2005 when two new employees joined the company. They were from Holland and Mr Cook was concerned that the company had an even greater responsibility for these people because they were from a different country and their first and main language was Dutch.

[6] It was Mr Cook's evidence that he emphasised to Mr Keast that he required a full and proper induction to be conducted before work commenced and that this would, in all likelihood, take all day. He did not expect these employees to commence productive work until Tuesday, 2 August.

[7] Certainly it is not in dispute that the company was introducing a new induction policy for new employees and instructions had been given to Mr Keast that the new induction policy was to be followed. Mr Keast accepted that this instruction was a fair and reasonable one.

[8] Joanne Laurie, the Health and Safety Coordinator for the company, came in on Saturday 30 July to complete the induction booklet to be used in inducting these employees.

[9] The workers (Joost and Daisy) arrived at the plant just before 8am on the morning of 1 August.

[10] At 9am, Mr Cook inquired with Joanne Laurie about the progress of the induction process. Ms Laurie replied that she had not heard from Mr Keast and had assumed that the workers had not yet turned up. In the meantime, she had got on with some other work. Mr Cook requested Ms Laurie to make contact with Mr Keast. Ms Laurie phoned Mr Keast. He told her that the workers had started working and were working on the presses and he had done the induction himself and taken them through the health and safety notice board. Ms Laurie was shocked to hear that these workers were working – given the specific instructions from Mr Cook that Joost and Daisy were not to start work until they had been fully inducted. She was also shocked that they were working without safety boots. Ms Laurie reported her conversation to Mr Cook.

[11] Mr Cook phoned Mr Keast. He told him the new employees should not be working at all as they had no safety footwear and had not been inducted.

[12] Subsequent to this conversation Mr Keast sent Mr Cook an email stating “*I am taking full responsibility for their safety while we have not provided them with the correct footwear*”.

[13] Mr Cook contacted Mr Keast immediately on receiving this email and told him to “*stop the employees from working now and to do the inductions now*”.

[14] After some consideration, Mr Cook arrived at the view that Mr Keast had some serious issues to answer with regard to his behaviour on this day. As a result, the company wrote to Mr Keast asking him to attend a disciplinary meeting to address these concerns. The letter inviting Mr Keast to a disciplinary meeting to be held on Monday, 8 August, clearly sets out the nature of the company’s concerns:

*“The purpose of the meeting is to give you an opportunity to offer any explanation of the following allegation:*

*Late last week you had been directly instructed by me to do full inductions for the two latest employees arriving/starting on Monday, 1 August 2005. It was made clear to you that these employees were from Holland and had no knowledge of New Zealand industrial practices/OSH requirements and our own work practices. I further advised that induction and training may take all day Monday and I was not anticipating they would start work until Tuesday.*

*On Monday at approximately 9.45am you advised that you had the new employees working on the presses. This was without safety boots and without being properly inducted as requested.*

*At that point I advised you that they should not be working as they did not have appropriate safety boots. Rather than recognising the grave danger of staff working without safety boots, you chose to delay that instruction and instead returned to your office and sent me an email stating ‘I am taking responsibility for their safety while we have not provided them with the correct footwear’.*

*This lack of recognition of the high priority our company places on health and safety issues is a matter of serious misconduct.*

*The underlying concern is that you failed to follow a lawful and reasonable instruction from me (effectively twice), which resulted in placing not only the employees at physical risk but also exposed the company to liability under the Health and Safety Act. Furthermore given your knowledge and understanding of our statutory obligations regarding workplace safety your actions demonstrated a serious lack of judgement at best or a flagrant disregard of my instructions at worst.*

*To avoid any doubt you are advised that we consider this matter as most serious. Depending on the outcome of the investigation your job could be in jeopardy.*

*You are welcome to bring a support person or representative to the meeting should you wish. We have requested that an EMA representative be present to assist”.*

[15] When Mr Cook handed the above letter to Mr Keast, he gave Mr Keast the opportunity to take time off over Thursday and Friday to consider the issues, arrange representation and prepare himself for the meeting. Mr Keast asked if he had been suspended. Mr Cook replied no, but he thought it would probably be in Mr Keast’s best interests if he took the time being offered to prepare. In the event, Mr Keast remained at work on Thursday and took the Friday off.

[16] However, when Mr Cook went to check with Mr Keast at the end of the day on Thursday, 4 August, he was somewhat taken aback to see Mr Keast taking photos, pictures and personal documentation from his office. Mr Cook asked him what he was doing, as Mr Keast seemed to be pre-judging the situation and potential outcome. Mr Cook’s evidence was that he was dumbfounded that Mr Keast had packed his bag to leave. Mr Keast simply replied that he felt uncomfortable with his wife’s photo on the desk and he left the premises.

[17] The disciplinary meeting took place on Monday, 11 August<sup>1</sup>. Mr Keast was represented by senior counsel. That meeting took a significant period of time, from 9.30am to 1.50pm. Following the disciplinary meeting, Mr Cook undertook further investigation and interviewed Ms Laurie. The notes of that interview were forwarded to the applicant’s counsel.

[18] The parties had another meeting on 12 August to address the issue of remedies prior to the disciplinary decision being taken. Following that meeting Mr Cook took an adjournment to meet with his advisers to consider the issues that had been raised. Having considered all the issues, Mr Cook made the decision that serious misconduct had taken place. Mr Cook made the decision to dismiss Mr Keast. The decision was communicated to Mr Keast orally at the meeting on 12 August and was confirmed in writing to him on 16 August.

[19] The reasons given for the dismissal were:

- Failure to follow a lawful instruction in that on the 1<sup>st</sup> of August 2005 you failed to ensure that full inductions were carried out on two new employees as directed by the managing director.
- Failure to ensure that approved safety shoes were worn by staff working in the workshop, by allowing two new staff to operate the presses in running shoes.

---

<sup>1</sup> It was delayed to meet the availability of Mr Keast’s counsel.

**Applicant**

[20] Mr Keast accepted that he knew there was a new induction policy being introduced and that it was to be followed. He accepted that this was a lawful and reasonable instruction.

[21] However, it is his position that at the time Joost and Daisy commenced their employment he was unaware that the induction policy had been completed and he had not been issued with a copy of that policy. It was his submission therefore that he could not adhere to a policy that he did not know had been completed or implemented.

[22] It was also Mr Keast's position that when he had the new employees working on the presses on the morning of 1 August was (a) familiarising the new employees with the work processes and (b) was undertaking competency assessments with them as "*part of the induction process*".

[23] Mr Keast submitted that he had directed Ms Laurie to obtain safety footwear for the new employees two weeks prior to their starting employment. Despite this request, they had not been issued with the appropriate footwear<sup>2</sup>. In the event it was Mr Keast's position that on 1 August he evaluated the situation as General Manager and made the decision that the new employees could safely work on projects that were already set up as they were already wearing sturdy footwear. He also considered that the parts the new employees were working with were light and easy to handle and the working area was clean and tidy. As a result, it was his assessment that any risk to the employees was at most minimal.

[24] After the lack of safety footwear was brought to the Managing Director's attention, Mr Cook made a '*comment*' to him that the new employees should not be working without safety footwear. Mr Keast's submission was that this was not a directive or an instruction, it was just a comment. Nevertheless, because the Managing Director had made this comment he returned to the shop floor and assessed the situation in regard to the safety of the new employees. Having done that, he re-sent an email relating to the safety shoes and copied that email to the Managing Director personally, assuming (as General Manager) any responsibility in regard to the safety of the new employees while they had no safety shoes. He now appreciates that this would not have exempted the company from liability under Occupational, Safety and Health legislation, but he made the gesture in good faith as General Manager to show that he considered there was no problem.

[25] It was also Mr Keast's that he was unjustifiably suspended from his employment on 4 August 2005.

[26] In summary it was submitted for Mr Keast:

- He did not know the induction policy had been completed and implemented. Nor had he been provided with a copy.
- In the absence of an induction policy and having forgotten he had requested safety shoes to be ordered the applicant initiated inducting the employees on the presses as part of the induction process, knowing that the administrative aspects of the induction process would be carried out later by Joanne Laurie. In carrying out the skills assessment the applicant had assessed the level of any risk posed to the employees was minimal and they were closely

---

<sup>2</sup> In his oral evidence Mr Keast said it had slipped his mind to ask Ms Laurie on 1 August if she had obtained the safety footwear.

supervised at all times. In this regard Mr Keast was complying with the respondent's instructions to fully induct the new employees.

- Managing Director did not initially direct Mr Keast to remove the workers from the presses because they had not been issued with safety footwear. It was simply a comment that they should not be working without safety footwear. When Mr Cook did issue a direction that the workers be removed from the presses Mr Keast complied immediately.
- Mr Cook was erroneously informed by Ms Laurie that Mr Keast had said to her that he had completed the inductions and that the workers were working on the presses. Mr Cook did not ask Mr Keast if he had said that the inductions were complete and the workers working. When Mr Keast explained (at the disciplinary meeting) that the inductions were not finished and he was carrying out a skills assessment as part of the induction process Mr Cook ignored his explanation because he had predetermined that the applicant had deliberately disobeyed his instruction to carry out the inductions in reliance on the hearsay information provided to him by Ms Laurie.
- Given that Mr Keast was doing his best to induct the new employees in the absence of the completed induction policy and given the fact his request for safety footwear for the employees had not been complied with and the fact he immediately removed the workers from the presses when he was directed to, the penalty of dismissal was disproportionate to the offence committed. It was submitted that there was no conduct that could come close to deeply impairing or being destructive of that trust and confidence that is essential to the employment relationship.
- Further, the respondent has not shown the wearing of safety footwear was mandatory under Health and Safety regulations and if that could be shown the transgression of allowing the employees to work without safety footwear would warrant a warning at most.

## **Respondent**

[27] It was Mr Cook's evidence that the instruction to carry out full inductions with the new employees was the culmination of many discussions he had had with Mr Keast over a long period of time going as far back as August 2004. He wanted inductions to be carried out properly as it had not happened in the past. He was fed up that Mr Keast, as General Manager, had not pursued a new induction policy earlier and he made it very clear that induction was a big issue in commencing these new employees.

[28] Ms Laurie was responsible for preparing the induction booklet to be used in inducting the new employees and she had come to work on Saturday 30 July to complete the booklet for use on Monday 1 August.

[29] On the matter of the required safety footwear it was the respondent's practice to take new employees to the supplier to choose their own style and fit. This was to happen after the induction was completed and before the workers started work.

[30] It was the evidence of Mr Cook that the events of the morning of 1 August left him upset and shocked that even though he had made a big deal about the need to induct the new employees fully and professionally, Mr Keast had failed to do this despite having been specifically advised that there was no pressure on getting these employees engaged on productive work. On the contrary, the emphasis was on getting the induction process fully complied with.

[31] It was the respondent's position that it followed a fair process in investigating the matter and that the decision to dismiss Mr Keast was open to a fair and in reasonable employer considering all the circumstances at the time.

[32] Mr Keast was formally advised of the allegations against him and the seriousness with which they were viewed and that his employment could be in jeopardy. He was advised of his right to representation and was supported throughout the process by competent senior counsel. Mr Keast's explanations were carefully considered and further investigations carried out. Mr Keast was provided with all relevant documentation including the record of the respondent's interview with Ms Laurie. The respondent allowed counsel additional time to address it on remedies when that opportunity was sought.

[33] In the event the respondent did not accept Mr Keast's explanations and the factors considered in arriving at the decision to terminate Mr Keast's employment included:

- The position held by Mr Keast that of General Manager. It was the second most senior position in the company. Mr Keast was expected to carry out the Managing Director's instructions and in this particular case the importance of the induction process had been emphasised to Mr Keast and a clear instruction given that full and complete inductions were to occur. Mr Keast was well aware of, not only the instructions, but also the company's need to improve its processes in this area. However, Mr Keast did not comply with that direction.
- When the issue was raised with Mr Keast, he denied any responsibility. Instead he attempted to shed blame onto a fellow employee (Joanne Laurie), initially by saying to his knowledge the material was not prepared and secondly by raising the naïve argument that no one gave it to him. As General Manager, any material Mr Keast wanted was at his disposal and he only had to pick up the phone or walk to Joanne Laurie's office. Mr Keast agreed at the disciplinary meeting that he was aware of the instruction to induct the new employees fully and this did not happen.
- It was well within Mr Keast's capability to ensure the inductions happened and by failing to contact Ms Laurie to ensure that the inductions occurred, he was dismissive of the seriousness of the discussions leading up to the instruction as well as the instruction itself.
- As General Manager Mr Keast had a high level of accountability for and input into company procedures in many areas.
- The failure to fully induct the employees in question rested with Mr Keast himself as it was within his control to have carried out the inductions fully. He was aware of its importance, given the legislative requirements imposed on the business in the Occupational Safety and Health field. The consequences of failure to follow that instruction was further compounded by his total disregard for safety when he put the employees to work on the press without safety boots.
- Added to that was Mr Keast's actions when the lack of safety equipment was brought to his attention. He continued to have the two new employees working without safety equipment on the press and flippantly assumed responsibility for any misfortune that they may encounter.
- Mr Cook felt entitled expect a high level of comprehension of the issues at hand from his General Manager. He had lost trust and confidence in Mr Keast's ability to appreciate the

necessities of the role and to follow lawful and reasonable instructions from his employer. It concerned Mr Cook how Mr Keast might be conducting the business in his absence and what other risks the company may or may not be exposed to. Mr Cook had to have complete faith in Mr Keast that he would obey instructions and obey the law as it related to the business.

## Legal Considerations

[34] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

[35] ***103A Test of justification***

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

[37] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of ***a fair and reasonable employer ...in all the circumstances ...at the time....***

[38] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[39] At paragraph 144 the Court said in respect of the case before it:

*“The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which it characterised as serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process but there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policies. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her”.*

[40] The Court noted that the objects of the Act including the obligation of good faith must inform any objective assessment of what a fair and reasonable employer would do in the circumstances.

## Discussions and Findings

[41] In arriving at a determination in this matter I have had regard to the evidence, submissions of the parties and to relevant case law.

[42] While there was little dispute over the facts in this case I must find that Mr Keast did not present as a credible witness. His evidence was contradictory and it was characterised by blame shifting and irrelevant ad hominem arguments.

[43] The evidence of the respondent's witnesses was, on the other hand, focussed on relevant considerations and it was balanced and consistent.

[44] As a result where there are disputes in the evidence it is the evidence of the witnesses for the respondent that I prefer.

## Findings

[45] I find the applicant, as General Manager of Stainless Design Ltd, was aware of and indeed carried a very significant responsibility for the observance and implementation of company policies. He was therefore required to demonstrate to a high standard compliance with company policies both in terms of his operational responsibilities and in modelling such compliance to other employees. Where his responsibilities meshed with ensuring compliance with regulatory frameworks, for instance, Health and Safety legislation the obligations on him were of the highest order with the exception only of the obligations reposed in the company's managing director, Mr Cook.

[46] I find that the respondent through its Managing Director gave a clear instruction to Mr Keast that the employees commencing their employment on 1 August 2005 were to be given a comprehensive induction, prior to commencing employment. Part of that process I find was kitting the new employees out in safety footwear *before* they commenced work.

[47] I find that Ms Laurie worked over the weekend of 30 – 31 July 2005 to complete a new induction booklet to be followed in inducting the new employees. Ms Laurie could not complete the booklet as it related to the actual work processes to be followed by the employees in question. I find that this was because the applicant had adopted a slaphappy attitude to providing the necessary information to complete this aspect of the induction policy. This was, I find, indicative of a poor attitude demonstrated by the applicant over time with respect to the induction of new employees.

[48] The respondent had been concerned for some time with this attitude demonstrated by Mr Keast and went to particular lengths to emphasise with him the importance of following a revised and thorough induction process with the employees commencing employment on 1 August 2005. The process assumed even greater importance on this occasion because the new employees were foreign nationals and English was not their first language. I find this too was emphasised to Mr Keast.

[49] I find that on 1 August when Mr Laurie inquired of Mr Keast as to the progress on inducting the new employees, Mr Keast told her that he had completed the inductions and had the employees working on the presses. At no stage on 1 August did Mr Keast advise Ms Laurie or Mr Cook (when he spoke to him that day) that he was carrying out a skills assessment as part of the induction process.

[50] During the disciplinary meeting held with Mr Keast this explanation was alluded to only – Mr Keast's written response to the allegations<sup>3</sup> against him refers to an *intention* to include a skills assessment as part of the induction process. It was not his explanation that he had been carrying out a skills assessment at the time.

[51] I find the employer's investigation into this matter was meticulous and Mr Keast was treated fairly in the process.

---

<sup>3</sup> Which Mr Keast says he read verbatim at the disciplinary meeting.

[52] I find also that the respondent carefully reflected on Mr Keast's explanations and there was no predetermination of the matter. In particular, to the extent that Mr Keast's explanation did allude to the fact he planned for inductions to include a skills assessment the respondent concluded reasonably, I find, that the induction programme did not include conducting skills assessments in the manner contemplated by Mr Keast and any skills assessment would *follow* the completion of the induction process and would take place after the employees were provided with appropriate safety footwear.

[53] Speaking generally, the evidence discloses that the explanations offered by Mr Keast for his conduct on 1 August were naïve, facile and completely at odds with the standard of conduct an employer would expect of a General Manager of a company employing dozens of employees.

[54] The submissions for Mr Keast perpetuated this approach. The argument that safety footwear is not mandated in regulations misses the point. Current safety legislation focuses on the *prevention of harm* and requires employers and the senior managers charged with implementing the legislation with the responsibility to take all reasonable and practicable steps to prevent harm. Obviously the provision and wearing of safety footwear goes the prevention of harm in industrial occupations. Mr Keast is well aware of the philosophy behind the legislation as he was aware of the company policy that safety footwear was to be worn by workers engaged in the work in question.

[55] In conclusion, it was, I find, open to the employer to reflect on Mr Keast's explanations and to assess those explanations (as it did) against the conduct and performance expected of Mr Keast as General Manager of the company. It was also open to the respondent as a fair and reasonable employer to reject the explanations offered as being inconsistent with the performance expected at that level.

[56] The respondent's actions considered objectively were consistent with the actions that would have been taken by a fair and reasonable employer in all the circumstances at the time.

[57] Lastly on the matter of the claimed unjustified suspension the evidence before me does not disclose this matter was raised as a grievance when a grievance relating to the dismissal was raised with the employer. In the event however, I find on the evidence that Mr Keast was consulted about taking two days out of the workplace to prepare for the disciplinary meeting which was planned for early the following week. Mr Cook denied Mr Keast was being suspended and agreed with Mr Keast's request to work out the first day. By consent Mr Cook did not attend work thereafter.

## **Determination**

[58] Mr Keast was not suspended from his employment on 4 August 2005.

[59] Mr Keast dismissal was justified and he is not entitled to the remedies he seeks.

## **Costs**

[60] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined

Janet Scott  
Member of Employment Relations Authority