Determination Number: AA 303/05
File Number: AEA 1271/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Dave Lindsay (Applicant)
AND	Carter Holt Harvey Limited t/a CHH Futurebuild (Respondent)
REPRESENTATIVES	Anne-Marie McInally, Advocate for Applicant Peter Kiely, Counsel for Respondent
MEMBER OF AUTHORITY	R A Monaghan
INVESTIGATION MEETING	11 and 12 May 2005
SUBMISSIONS RECEIVED	16 May 2005
DATE OF DETERMINATION	12 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Carter Holt Harvey Limited trading as CHH Futurebuild ("Futurebuild") manufactures laminated veneer lumber ("LVL") at its plant at Marsden Point, Whangarei. At the relevant time Neale Fenwick was the plant's production manager, Grant Garrity was the team leader on the dryer project, and Dave Lindsay was the dryer controller on the 'A' shift.

[2] Futurebuild dismissed Mr Lindsay. The dismissal followed warnings primarily about his behaviour towards Mr Garrity, although the dismissal itself arose out of Mr Lindsay's behaviour towards another employee, Logan Suvalko. Mr Suvalko was employed as a boiler controller.

[3] Mr Lindsay says the dismissal was unjustified. He seeks reinstatement and other remedies.

The manufacture of LVL

[4] The Futurebuild plant was opened in early 2002. Since LVL was a new product, the machinery and processes were also new to all concerned. In the early days of the operation it was sometimes necessary to identify by trial and error such matters as which forests produced the most suitable lumber for manufacturing LVL, the most suitable settings for the machinery used to make the product, and whether or how any of the machinery needed to be modified. In addition employees, including Messrs Lindsay and Garrity, received training in the use of some of the machinery directly from the manufacturer.

[5] Broadly speaking the manufacturing process is that Futurebuild peels logs of pinus radiata into veneer sheets, dries the sheets, grades and scarfs them, then glues the sheets together into a product used for residential and commercial construction.

[6] Mr Lindsay was the controller of one of the teams working in shifts on the dryer. The dryer had to be set so that, among other things, the veneer retained its targeted moisture content. Settings could vary according to variables such as whether the veneer came from the high or low sap part of a log, and other factors such as the forest from which the timber originated. The dryer also had to be operated in unison with the plant's boiler, since the release of too much moisture from the dryer could affect the operation of the boiler and create a threat to safety.

The first warning – 16 December 2003

1. The content of the warning

[7] Mr Lindsay's first formal warning was confirmed in a letter dated 17 December 2003. The letter said in part:

> "… I stated that I was very concerned about 4 aspects of your behaviour towards myself and others, and these I have detailed in the attachment to this letter.
>
> Having discussed each point of concern with you, I explained that I now had no alternative but to commence formal disciplinary proceedings against you and duly issued you with a Written Warning for increasingly unacceptable conduct. This will remain in place for 6 months.
>
> Furthermore you need to understand that these aspects of your current behaviour are totally unacceptable and should you fail to change them accordingly we shall have no alternative but to continue with disciplinary action against you."

[8] The four aspects of Mr Lindsay's behaviour were detailed in an attachment to the letter as follows:

> "1. Dave doesn't listen to me or accept a lot of my decision-making
> e.g. The running of the WV [wet veneer] on 30 November
> The use of the chairs on the dryer
> Redry rates
> Dryer cleaning
>
> 2. Uses Neale to undermine my position
> e.g. Smoko breaks/smoking
> Running WV
> Most other operational issues
> Annual leave last week
>
> 3. Language – the way Dave speaks to me and others
> e.g. "bite your arse" this morning
> decision over WV
> abusing other colleagues, in my presence
>
> 4. Not following my directions
> e.g. Smoko breaks
> Dryer cleaning
> Min of 5 people on dryer at any one time"

2. The behaviour leading to the warning

[9] One incident typical of the dysfunction in the relationship between Messrs Lindsay and Garrity, and referred to as an example of points 1 and 2 above, concerned a disagreement on or about 30 November 2003 about the processing of some wet veneer. 'Wet veneer' is veneer that has been dried but retains more than the targeted moisture content. Wet veneer would usually be set aside until it dried out enough to be passed to the scarfers. 'Green veneer' refers to sheets of veneer not yet dried.

[10] There was no green veneer available to dry, and there was a build up of wet veneer. Mr Garrity gave an instruction that the wet veneer be put through the dryer again so staff would be occupied and production could continue. End-of-month financial considerations also weighed with him. Mr Lindsay disagreed with the instruction because he believed that re-drying wet veneer would lead to a higher proportion of rejected sheets, and would probably create more debris and lead to more jams in the machinery. He expressed his disagreement to Mr Garrity, and did not accept the reasons he was given. Mr Garrity knew the disadvantages of re-drying wet veneer and acknowledged his instruction was not ideal, but factors such as those I have listed led him to give it.

[11] Mr Linsday was not satisfied, so spoke to Mr Fenwick at least twice saying he was not happy about the instruction. Mr Fenwick was aware of the instruction and told Mr Linsday he did not have a problem with it. He also explained again the reasons for the decision to re-dry the wet veneer.

[12] The matter was brought up again at a staff meeting on or about 1 December 2003. Mr Lindsay asked Mr Garrity again why the wet veneer had to be run. He said in evidence he did so because team members had questioned the instruction, but I find that disingenuous. By then Mr Lindsay had been given the reasons by Messrs Fenwick and Garrity, and simply did not accept them. In addition it was clear from the evidence overall that Mr Lindsay held some sway over his colleagues and I do not accept it was necessary to raise the matter in the way he did. Moreover, either at that meeting or at a meeting on 16 December, he stated openly that he believed the decision was incorrect. Mr Garrity was entitled to take the view that Mr Lindsay was baiting him. I do not disagree with that view.

[13] Not all of the issues with Mr Lindsay's conduct involved quite such a direct and clear cut challenge to Mr Garrity's authority. One that was a little more complex - and was referred to in points 2 and 4 above - concerned arrangements for smoko breaks.

[14] The collective employment agreement applicable in December 2003 provided that:

> "Rest periods and meal breaks will be incorporated into the rostered hours in a manner to allow continuous production. Rest periods and meal breaks will normally be for 60 minutes per 12 hour period …"

[15] That provision was tightened in the succeeding agreement which came into force on 1 July 2004 – a difference that was not recognised by several of the witnesses including Mr Lindsay. The problem for Mr Garrity at the time was the length and number of smoko breaks being taken, and he sought to address it by trialling two smoko breaks per shift of a half hour each. He could not obtain the employees' consent. Thus - while the suggestion that Mr Garrity's attempts were a breach of agreement seems to be based on a provision that did not apply at the relevant time - the smoko break issue had an industrial relations component as well as being another source of conflict between Messrs Garrity and Lindsay about the running of the workplace.

3. The disciplinary process

[16] Mr Garrity conducted a disciplinary meeting with Mr Lindsay, who was assisted by a union delegate, on 16 December 2003. Mr Garrity's decision to take that action was sparked by his view that, during an ordinary meeting that morning, Mr Lindsay was criticising him in front of others, and trying to argue with him, to a degree Mr Garrity considered unacceptable.

[17] At the disciplinary meeting Mr Garrity read out the four main points of concern set out in paragraph [8] above. When Mr Garrity offered to provide examples of point 1, Mr Lindsay said he did not want to know. When asked whether he wanted to reply to the allegations Mr Lindsay asked what the problem was with his conduct to other team members, and wanted to know who had complained. There was a stand-off when both men wanted their questions answered. Later, when

Mr Garrity asked whether Mr Lindsay wanted him to go through the remaining concerns, Mr Lindsay replied that he did not think there was any point. In the absence of explanations, Mr Garrity decided to issue the warning.

[18] Pursuant to a company disciplinary policy Mr Lindsay exercised a right of appeal against the warning, which Mr Fenwick heard in March 2004. Mr Fenwick upheld the warning. He and Futurebuild's human resources manager, Sally Leftley, also attempted to explain to Mr Lindsay that the company's concern was with his behaviour, and in particular his interaction with Mr Garrity.

The 'counselling letter' of February 2004

[19] There was another incident on 16 December 2003. It involved an allegation that Mr Lindsay was speaking to staff about the management in a manner intended to undermine them. Mr Garrity brought it to Mr Fenwick's attention, and Mr Fenwick interviewed staff members present at the time. They said Mr Lindsay had told them they would need a witness when dealing with Mr Garrity, and passed general comments about the negative atmosphere Mr Lindsay was creating in the team.

[20] The comments were passed to Mr Lindsay, whose response was, broadly, to say the communications in question were communications between employees about union matters and were not the employer's business. Mr Lindsay did not comment on the allegations concerning the negative atmosphere.

[21] Mr Fenwick commenced a disciplinary process in respect of the incident, and believed the matter warranted a warning. However he did not issue a warning as he decided to try a different approach to modifying Mr Lindsay's behaviour. Instead he wrote Mr Lindsay a letter dated 12 February 2004, which was described as a 'counselling' letter.

[22] In the letter Mr Fenwick referred to the 'relationship issues' within the team, and said the goal was to address them. He also expressed the view that the issues could largely be explained by Mr Lindsay's attitude to Mr Garrity and the refusal to treat Mr Garrity as a manager. Finally he said that, rather than giving Mr Lindsay a warning, he would like Mr Lindsay to consider the company's concerns and modify his behaviour and attitude.

The final written warning – 18 June 2004

1. The content of the warning

[23] Following an investigation and a disciplinary meeting on 18 June 2004, Mr Fenwick issued Mr Lindsay with a final written warning in the following terms:

> "… I decided to issue you with a Final Written Warning for unacceptable conduct, namely: -
> 1) Your response and reaction to your team leader
> 2) Leaving your place of work without just cause
> 3) Failure to follow reasonable instruction
>
> This warning will remain in place for 12 months. … any further incidence of misconduct within this period could well result in your dismissal."

2. The behaviour leading to the warning

[24] The warning followed an incident on the morning of 11 June 2004. The previous night the 'D' shift was on duty. Mark O'Leary was that shift's dryer controller. During the night the arm on

one of three dampers on the dryer broke so that the damper stayed fully open. The dampers helped regulate the discharge of moisture from the dryer. Mr O'Leary reported the breakage to Mr Garrity, as well as advising that he had closed the other two dampers to compensate. He indicated that the quality of the veneer was in general excellent, although the low sap veneer was wavy. Even so, it was not outside usual tolerances.

[25] Mr Lindsay's shift was to take over from the 'D' shift early on the morning of 11 June, and at handover time Mr Garrity informed Mr Lindsay of the broken damper. Mr Garrity asked for the remaining dampers to be left closed until the broken damper had been repaired.

[26] Despite this Mr Lindsay opened both dampers almost immediately. When Mr Garrity queried his action, Mr Lindsay told him Mr O'Leary had advised there were problems all night with the quality of the veneer. That was not what Mr O'Leary had said to Mr Garrity. Mr Garrity decided to keep the dampers to a slightly-open position until the repair had been completed. At Mr Lindsay's suggestion he checked the quality of the veneer being produced, and found it was wavy but no worse than normal.

[27] Accordingly Mr Garrity instructed Mr Lindsay to set the two remaining dampers at very slightly open. Mr Lindsay refused, Mr Garrity required him to follow instructions, and Mr Lindsay refused again. Mr Garrity said Mr Lindsay threw his walkie-talkie at him and left, saying he did not want to work for Mr Garrity any more. However I find Mr Lindsay did not 'throw' his walkie-talkie at Mr Garrity, rather he thrust it at Mr Garrity, before leaving the area in a state of agitation.

[28] Both men reported the incident to Mr Fenwick.

3. The disciplinary process

[29] Mr Fenwick held a disciplinary meeting in respect of the matter on 15 June 2004. Mr Lindsay was represented by his union organiser, Heinz Schmitt. Mr Fenwick concluded there was no dispute that Mr Lindsay had changed the damper settings in the face of Mr Garrity's instruction not to do so. Mr Lindsay's explanation was that the settings he wanted to use would produce a better quality product, and Mr Garrity's instruction was wrong. Mr Lindsay also took exception to the way in which Mr Garrity had delivered the instruction.

[30] Mr Fenwick concluded that Mr Lindsay's behaviour in arguing about the settings was unacceptable and amounted to a continuation of the kind of behaviour already discussed with him. Mr Fenwick also found unacceptable Mr Lindsay's action in walking out of the dryer area following the argument with Mr Garrity.

[31] On 18 June there was a further meeting, at which Mr Lindsay was advised a warning would be issued. There were discussions about the possibility of Mr Lindsay transferring to another position, but the parties were unable to reach agreement on a suitable arrangement.

[32] This warning, too, was appealed pursuant to the company's disciplinary policy – although not for some 2½ months. By coincidence Russell Neilson, the Futurebuild site manager, heard the appeal on the day of Mr Lindsay's dismissal. Mr Neilson upheld the warning.

The dismissal

1. Mr Suvalko's complaint

[33] Mr Suvalko complained formally about Mr Lindsay in a document dated 31 August 2004. In general he said Mr Lindsay made his job difficult and unpleasant, and he had decided to complain because if he did not do so Mr Lindsay's behaviour would continue. He told Ms Leftley that he believed he would leave his job if Mr Lindsay's behaviour was not addressed. He said in the complaint: "I don't want to feel like I do any more.", before going on to list three incidents of concern:

(a) an exchange of 11 July 2004 concerning Mr Suvalko's working during a partial strike;
(b) an exchange of 12 August 2004, when Mr Lindsay allegedly passed comment on Mr Suvalko's ability to do his job; and
(c) an incident of 15 August during which Mr Suvalko felt Mr Lindsay was making him out to be a 'grass' and turning other employees against him.

[34] In addition to his employment by Futurebuild, Mr Suvalko had part time work with an enterprise named Forest Loaders. Forest Loaders did contracting work at the Futurebuild plant. An overtime ban was in force at Futurebuild on 11 July 2004, but Mr Suvalko was on the site working for Forest Loaders. Mr Lindsay saw him, and asked him in robust terms what he was doing there. There was a heated disagreement about whether Mr Suvalko was breaching the overtime ban, with both men swearing at each other. Later the same day Mr Suvalko approached Mr Lindsay again to explain his position, and Mr Lindsay's response was abusive. Mr Suvalko complained at the time, but withdrew the complaint after Mr Lindsay apologised to him.

[35] On 12 August 2004 Mr Suvalko was discussing a work-related matter with another employee, Murray Ackers, when in the course of the conversation he commented 'see, I am good at my job.' Mr Lindsay allegedly walked past as he said that, and muttered 'no, you're bloody not.' Mr Suvalko did not take the comment as a joke, said it made him feel bad, and he resolved to avoid Mr Lindsay whenever possible.

[36] On 15 August 2004 Mr Suvalko was present during a dryer shift hand over meeting, which Mr Lindsay was addressing. Mr Lindsay was reading out loud from a memorandum Mr Garrity had issued, then told everyone to be careful because they were being watched. He went on to say that it could not be Mr Garrity doing the watching as he had left the site, but there was obviously someone watching. Mr Suvalko believed Mr Lindsay looked straight at him as he said that, and took the comment as a reference to him. It was the final straw, so he prepared his written complaint.

2. The disciplinary process

[37] On receipt of the written complaint Mr Fenwick decided disciplinary action may be necessary. He conducted a disciplinary meeting on 6 September 2004, at which Mr Lindsay was again represented by Mr Schmitt.

[38] Mr Lindsay's responses to Mr Suvalko's complaints were:

(a) Mr Suvalko initiated the swearing during the earlier encounter on 11 July, and Mr Lindsay had no recollection of the later encounter;
(b) At the time Mr Lindsay denied saying anything on 12 August. I do not accept the evidence he gave at the investigation meeting to the effect that he told Mr Fenwick he acknowledged Murray Ackers; and
(c) Mr Lindsay did not deny making the 15 August statements Mr Suvalko said he did, saying he was concerned about how the subject matter of Mr Garrity's memo had come to Mr Garrity's attention. He said there was nothing in his 'looking' at Mr Suvalko.

[39] Mr Fenwick interviewed an employee named Dave Head as a witness to the 11 July incident, and Mr Ackers as a witness to the 12 August incident. Mr Head was present during the initial encounter on 11 July and effectively confirmed it. However he was not present during the further encounter later that day.

[40] As for the 12 August incident, Mr Ackers said Mr Lindsay had walked past and said something during the conversation in question, but Mr Ackers did not hear what it was.

[41] Mr Fenwick met again with Mr Lindsay and his union representative (not Mr Schmitt this time) on 13 September to discuss areas of difference in the accounts he had obtained. In response Mr Lindsay maintained his earlier position. The representative made the sensible suggestion that he speak to Mr Suvalko, since Mr Suvalko was also a union member, and attempt to sort the matter out between the two. Unfortunately that does not appear to have happened.

[42] There was another meeting on 14 September. Mr Fenwick announced that, as a result of his investigation, he believed Mr Suvalko was genuinely upset by Mr Lindsay's behaviour, and that Mr Lindsay's behaviour on 11 July was inappropriate and unnecessary. The other two incidents were minor on their own, but all three had the cumulative effect of putting Mr Suvalko under duress. In that, Mr Lindsay was guilty of misconduct. The question was one of what to do next, since Mr Lindsay was already on a final warning.

[43] Mr Schmitt argued strongly for the position that the incident arose between union members in the course of an industrial dispute, and was not the company's concern. He also said Mr Suvalko had fabricated his statements. During the course of the discussion on that point Mr Fenwick made the unfortunate statement that while Mr Schmitt was there to represent Mr Lindsay, he (Mr Fenwick) was there to represent Mr Suvalko. Overall Mr Schmitt's position was that Futurebuild should 'throw the whole matter out'.

[44] After an adjournment, Mr Fenwick advised that Mr Lindsay was dismissed for misconduct. He did not agree that the problem between Messrs Lindsay and Suvalko was one between union members and was not the company's business. He believed the company had received a complaint and was obliged to investigate it. He also believed that Mr Lindsay's behaviour on 11 July amounted to an attack on Mr Suvalko, and although the two remaining incidents were minor, cumulatively they amounted to misconduct. Since Mr Lindsay was already on a final written warning, there was no alternative but to dismiss Mr Lindsay.

[45] Mr Lindsay again exercised his right of appeal according to the company's internal procedures. Mr Neilson heard the appeal in October 2004, and decided the dismissal was fair and appropriate. No issue has been taken with that, or any of the other internal appeals.

The justification for the dismissal

[46] The justification for Mr Lindsay's dismissal was challenged, in essence, on the following grounds:

(a) the real problem was one of a breakdown in the working relationship between Messrs Garrity and Lindsay, and Futurebuild did not act appropriately to prevent the breakdown or advise Mr Lindsay as to how he could modify his behaviour;
(b) Neither of the warnings was justified, hence they could not be relied on;
(c) Messrs Fenwick and Garrity were biased or prejudiced against Mr Lindsay; and

(d) The nature of the conduct complained of by Mr Suvalko did not warrant dismissal

1. Breakdown in the relationship between Messrs Garrity and Lindsay

[47] The difficulties between Messrs Garrity and Lindsay were probably far more extensive than any difficulties between Messrs Suvalko and Lindsay. However that does not necessarily mean there was no real problem involving Mr Suvalko. Rather the difficulties involving Mr Garrity formed the basis for the disciplinary warnings. The existence of the warnings meant Mr Lindsay's employment was already in jeopardy when the problem involving Mr Suvalko arose.

2. Reliance on the warnings

[48] No personal grievances were raised in respect of the warnings. Nevertheless the Employment Court has said this about the relevance of such warnings when addressing the justification for a dismissal:

> "When an employer is seeking to justify a dismissal on the basis of a series of warnings, the onus is on the employer to establish that each of those warnings was justifiable, regardless of the union's previous inaction." **Northern Distribution Union v Armourguard Security Limited** [1989] 3 NZILR 262, 267.

[49] Regarding the warning of 16 December 2003, I agree with the submission on behalf of Mr Lindsay that Mr Garrity should not have acted, in effect, both as complainant and judge. With reference to Futurebuild's submissions, Mr Garrity may have had the general authority to conduct disciplinary proceedings at the level of a first warning but that does not address the problem caused by such an incompatibility of roles here. Nor is the problem addressed by pointing out the concerns did not relate solely to Mr Lindsay's behaviour towards Mr Garrity, since they did relate very substantially to that matter. Mr Garrity could counsel Mr Lindsay and seek informally to resolve problems the two were having - as he had attempted to do - but it was not appropriate for him to conduct the disciplinary process. Another manager should have done so instead.

[50] Were it not for that, I would consider the warning justified. I have taken into account that, both then and later, some of the disagreements in the workplace involved industrial relations matters. However that was not always so, and Mr Lindsay's behaviour often transcended any genuine debate about those matters.

[51] Regarding the June 2004 warning, there is a question of whether it can stand independently of the December 2003 warning, as well as one of whether it was otherwise justified.

[52] Futurebuild's disciplinary process involved a stepped series of warnings and ultimately dismissal, but it was not obligatory to follow through those steps before a final written warning or dismissal could be issued. A final written warning, for example, could be issued when there was further misconduct by someone already on a written warning, or where the seriousness of the matter in question warranted going straight to a final written warning.

[53] Mr Fenwick took Mr Lindsay's conduct on 11 June very seriously. Mr Lindsay's explanations of that conduct were: Mr Garrity's instructions were wrong and were producing low quality veneer; when issuing the instruction Mr Garrity spoke to him in a demeaning way; and there was a lack of clarity about the extent to which, as dryer controller, he was entitled to determine dryer settings for himself.

[54] Viewing the evidence overall, I find Mr Lindsay believed he knew better than Mr Garrity how the dryer should be operated, and refused to accept Mr Garrity's authority to issue instructions

on the matter. Eventually he had no respect for Mr Garrity as a manager at all, and made that quite clear in actions that went well beyond disagreements about dryer settings.

[55] It was acknowledged that Mr Lindsay was a good worker and I accept that he was genuinely motivated to ensure the company produced the best quality product possible. He genuinely did not believe that Mr Garrity's instructions would achieve that end. Nevertheless he was told time and again that the other factors explained to him had to be considered, and it was part of Mr Garrity's role to take those factors into account. In turn Mr Garrity and other managers were responsible for the outcomes, hence the final responsibility for the settings was theirs. Mr Lindsay consistently refused to take the explanations into account. Accordingly I found unconvincing his protestations that the boundaries between his areas of responsibility and authority, and those of Mr Garrity, were unclear.

[56] I also found unconvincing Mr Lindsay's complaints about the way Mr Garrity spoke to him. While it is possible Mr Garrity did not manage the difficulties with Mr Lindsay as well as he could have, and likely he found it increasingly difficult to communicate civilly with Mr Lindsay, I consider it unlikely that his manner of speaking to Mr Lindsay was much more than a reflection of the defiance Mr Lindsay exhibited. Accordingly I consider it likely Mr Lindsay's perception that Mr Garrity spoke to him as if he were 'a dog', or 'a naughty schoolboy' flows from the way Mr Garrity reacted to Mr Lindsay's defiance.

[57] Mr Lindsay's attitude to Mr Garrity's authority was overt and led him on occasion to grandstand in front of his colleagues. For example I have already found that he baited Mr Garrity in front of them in December 2003. Several minor incidents, discussed in the evidence but not recorded here, were further illustrative of a tendency to bait Mr Garrity. Mr Lindsay's attitude, and his role as a ringleader, was apparent even during the investigation meeting.

[58] Here, Mr Lindsay's history of outright refusal to accept Mr Garrity's instructions, and the efforts of Mr Fenwick and Ms Leftley to counsel him about his behaviour, mean I do not accept that the flaw in the earlier written warning inevitably renders unjustified the final written warning. Futurebuild was entitled to take the warning into account in its subsequent decision to dismiss.

3. Bias or prejudice on the part of Messrs Fenwick and Garrity

[59] There are several aspects to the allegations of bias or prejudice.

[60] The first concerns Mr Garrity's role as complainant and judge in the disciplinary process leading to the December 2003 warning. I have accepted that was not appropriate.

[61] The second amounts to a proposition that Mr Garrity was not well-disposed to Mr Lindsay, and either picked on him or singled him out unfairly. My view of the respective credibility of both men means I do not accept that.

[62] There were also suggestions that Mr Fenwick was prejudiced against Mr Lindsay. I do not accept that either. In the course of an apparently lengthy period during which Mr Garrity and Mr Lindsay were approaching him frequently about each other's actions, he tried to steer a middle course. Aside from the conclusions he reached in the course of the disciplinary action, there was nothing to indicate that he preferred Mr Garrity's accounts to Mr Lindsay's or 'took sides'. If any criticism can be made of him it is that, with hindsight, he should have taken a more proactive approach to the developing problem. Moreover, despite considering in February 2004 that a further warning was warranted, he did not wish to place Mr Lindsay's ongoing employment in further jeopardy so took an alternative approach.

[63] Finally, there is Mr Fenwick's unfortunate comment on 14 September 2004. Placed in its proper context, I do not believe it means Mr Fenwick had taken the role of advocate for Mr Suvalko during the investigation and had failed to conduct it in an impartial way. Moreover the evidence about the investigation does not suggest that was the case.

[64] The comment was the immediate response to Mr Schmitt's attempt to persuade him that the incident between Messrs Lindsay and Suvalko was none of the company's business, and that in any event Mr Suvalko was making his story up. In evidence Mr Fenwick said he made the comment because he did not think it was appropriate for Mr Schmitt, as a union official, to be accusing one of his members of lying to set another up when there was no evidence in support of the accusation. Since I found Mr Fenwick to be a credible witness, and there was otherwise nothing to suggest his investigation was less than impartial, I accept that explanation.

4. Whether the conduct complained of warranted dismissal

[65] I did not understand Futurebuild to be relying on Mr Suvalko's complaints as standing alone in justification for the dismissal. I would accept they are not sufficiently serious for that. Futurebuild's position was that the complaints referred to behaviour sufficient to amount to misconduct, and that was all that was necessary given the existence and content of the final written warning.

[66] Taking into account Mr Fenwick's explanation of his comment about representing Mr Suvalko, I believe he conducted a full and fair investigation into Mr Suvalko's complaints. He was entitled to reach the conclusions he did. While he acknowledged, appropriately, that some of the complaints were minor, he was entitled to form the view that they amounted cumulatively to something more significant.

[67] The terms of the June 2004 warning were that any further incidence of misconduct could result in dismissal. There was a further incidence of misconduct within the period during which the warning applied.

[68] For these reasons I find the dismissal was justified. Mr Lindsay is not entitled to the remedies he seeks.

Costs

[69] Costs are reserved. The parties are invited to agree on the matter. If they seek a determination from the Authority they may file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority