

Determination Number: WA 153/05

File Number: WEA 230/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Ross Moody (applicant)
AND	Foodstuffs (Wellington) Co-operative Society Limited (respondent)
REPRESENTATIVES	Gregory Lloyd for the applicant Russell Buchanan for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 6 September 2005
SUBMISSIONS	12 September, 2005
DATE OF DETERMINATION	14 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Ross Moody says he was unjustifiably dismissed by the Company – statement of problem (SOP) received on 13 May 2005. He sought reinstatement, amended on the day of the investigation to reinstatement to another position, as well as compensation for lost earnings and humiliation, etc and costs.

2. The Company says Mr Moody was justifiably dismissed for failing to meet, on numerous occasions and after a number of warnings, the respondent's legitimate performance standards – statement in reply (SIR) received on 22 July.
3. The parties were unable to settle this employment relationship problem at mediation. Agreement was reached on a 1-day investigation in Wellington on Tuesday 6 September. The parties usefully provided witness statements in advance of the investigation. Efforts during the investigation to settle the matter were not successful. Agreement was reached on a timetable for closing submissions. However, following receipt of his closing submissions, I was satisfied Mr Moody could not succeed with his grievance. By agreement with counsel for the respondent, Mr Russell Buchanan, I was satisfied it was unnecessary – and cost efficient – not to require the respondent's submissions.

Dismissal

4. The relevant facts are largely agreed.
5. The Company operates, amongst other things, a supermarket distribution centre in Silverstream, Upper Hutt.
6. Mr Moody is currently 59 years of age. He was employed by the Company as a storeman or selector in the selection team at the centre on 11 March 1996. He was responsible for making up orders. His terms and conditions of employment were set out in an individual employment contract (document 2 in the SIR).
7. At paragraph 26 of Mr Moody's contract it states:

I (full name) Ross Moody declare that I have read and understood the conditions of employment detailed above and accept them fully. I further declare that I have read the Company Rules (or had them explained to me) to my satisfaction, and accept them also.

8. Since 2000, and by way of its Company Rules, the respondent has used a performance measurement system known as Engineered Labour Standards (the Standards) to monitor the performance of many of its staff, including the applicant.
9. The Company's SIR describes the Standards in some detail, including that they are *"designed for application in the fair measurement of individual work performance and for assistance to management in the effective utilisation of labour and incentive administration"* (par 2.3).
10. The Standards measure the speed at which workers, including Mr Moody, complete their duties. A time is attached to each product in the warehouse from which the time required to complete an order can be derived. Each worker's performance is thereby measured. If a score of less than 90% is achieved disciplinary action may be taken. If a score of more than 100% is achieved a bonus may be paid. Failing to achieve weekly totals over 90% three times over a six month period may result in the termination of that worker.
11. The time to complete an order includes the time taken to make up an order, from start to finish, including measuring the actual distance involved, rearranging a load, scheduled breaks, travel time, personal needs (e.g. getting a drink of water, going to the toilet) and a fatigue allowance. Time back can be claimed for activities not factored into the formula, including first aid duties and union activities. A standard time is then determined for performing tasks required of employees. An in-built clock measures the time taken by individual employees to complete their tasks so that their actual performance can be contrasted with the standard time calculation.
12. The Company also says that each element of the Standard is *"based upon universally accepted time study procedures that ensure accuracy, fairness and adaptability"* (par. 2.4).
13. The applicant accepts that, prior to the implementation of the Standards, he was not warned about his performance whereas after their introduction he began receiving warnings for failing to meet standards.
14. It is accepted by Mr Moody that he failed to achieve the Standards on a number of occasions and that there were six specific instances relied upon by the Company to

justify his termination. It is further accepted that Mr Moody's speed was regularly slower than other workers subjected to the Standards.

15. During February and November 2000 Mr Moody was counselled by the Company in respect of inadequate work performance (document 23 in the SIR).
16. On 18 December 2003 he was counselled for failure to perform to Company standards (document 25 in the SIR). On 14 January 2004 he was again counselled for failing to meet Company performance standards (documents 26 in the SIR).
17. On 20 April 2004 Mr Moody received a written warning for incorrectly filing a tobacco order (document 27 in the SIR).
18. On 27 May 2004 he received a first warning for failing to meet the Standards (document 28 in the SIR). A meeting on 1 June followed in an attempt to identify what it was that was preventing Mr Moody from achieving the required performance standards.
19. By way of a letter dated 19 August Mr Moody was advised that he had failed to meet performance levels required of him on 31 July and 7 & 14 August: a meeting was sought with the applicant regarding a serious disciplinary issue arising out of his performance issues (document 37 in the SIR). A meeting resulted on 10 September which in turn led to mediation by the parties on 20 September.
20. A result of the mediation was that Mr Moody underwent retraining between 14 and 27 September. During his retraining he met or exceeded the performance targets required of him.
21. In a letter to Mr Moody's union dated 6 October the Company:
 - Confirmed that the applicant had completed his retraining and that he had achieved minimum performance levels,
 - Reiterated the opportunity available to Mr Moody to apply for positions at the centre not covered by the Standards positions; and

- Advised that Mr Moody had two written warnings on file and a third could lead to his dismissal.

(document C in the SOP)

22. In a letter dated 18 October the Company advised Mr Moody of his failure to meet performance levels on 9 & 16 October: a meeting was sought in respect of a serious disciplinary issue (document D in the SOP).
23. By way of a letter dated 22 October Mr Moody was issued with a second written warning for repeated failure to meet prescribed standards (document 29 in the SIR).
24. By way of a letter dated 1 November Mr Moody was advised of his failure to meet performance levels on 30 October (document F in the SOP). A meeting was proposed for 2 November regarding a serious disciplinary issue: it resulted in a letter of the same date setting out a third written warning for repeated failure to meet prescribed performance standards (document 30 in the SIR).
25. By way of a letter dated 9 November Mr Moody was advised of his failure to meet performance levels on 6 November.
26. The parties agree that, while the Company did not set out in writing its grounds for terminating the applicant, Mr Moody was dismissed on 14 or 18 November for not meeting the Company's Standards (see letter of 6 December from the applicant's union).
27. Shortly beforehand, and by way of a letter dated 11 November, the Department of Labour's Occupational Safety and Health Service advised it had "*no issues*" regarding workplace stress and the applicant (document H in the SOP).
28. OSH responded to a further inquiry by Mr Moody's union, by way of a letter dated 22 February 2005 (document X in the SOP). It sets out the results of its investigation into the Standards and how they impacted on individual employees. The conclusion reached was that,

While there is some dissatisfaction amongst the employees with the standards, in my opinion there is no evidence that the standards in place constitute a failure under the Health and Safety in Employment Act ... to take all practicable steps to ensure the safety of employees while at work. As such, we do not intend to take any further action in respect of the matter.

29. Mr Moody's staff appraisal forms and selector training reviews consistently record the applicant's difficulty with large orders, i.e. those taking more than 35 minutes to assemble.
30. According to the Company's Upper Hutt Manager, Mr Raymond Check, somewhere between 300 to 350 of its staff (located from New Plymouth to Wairoa, south) work to the Standards. Men and women occupy these positions and their ages range from 17 to 60+ years. Between 50 and 60 employees work to the Standards at its Silverstream centre. Something like 15 of its employees have been warned as a consequence of failing to meet the Standards. The only dismissal resulting from the same was that of the applicant.

Applicant's Position

31. *Trotter v Telecom Corporation of New Zealand Limited* [1993] 2 ERNZ 659 is the leading authority on the issue of dismissal for poor performance. Dismissal for poor performance is fundamentally no different than dismissal for misconduct: the question is the same, i.e. was it open to a fair and reasonable employer? A three-step test results: was the employee's behaviour a breach of the agreement, was it so serious that the employer was entitled to accept the repudiation of the contract and was the termination procedurally fair?
32. Counsel for Mr Moody, Mr Gregory Lloyd, accepts on his client's behalf that an employer is entitled to implement a reasonable performance measurement system. He also says there was insufficient evidence to question the validity or fairness of the Standards. However, it is submitted that the Standards only measure one aspect of performance, namely the speed at which a worker completes his or her duties. Accordingly they cannot be considered a complete performance measurement system as overall performance consists of more than speed.

33. The respondent acknowledged that Mr Moody's performance was only defective in respect of the speed he took to complete his tasks: it had no other real concerns about his performance. This is a significant procedural failing.
34. It is accepted that in certain circumstances the law would allow the termination of employment on the basis of a failure to meet the Standards, however this could be justified only if the alleged poor performance was so serious that the Company was entitled to regard the performance as a repudiation of the employment agreement. An objective analysis is therefore required of Mr Moody's performance. The evidence before the Authority does not amount to performance so poor that the Company could justifiably regard the employment agreement as repudiated. On the evidence Mr Moody's failings amounted to a technical and/or minor breach of the employment agreement in that he only failed to achieve the Standards on a number of occasions. The breach was not so serious that the Company was entitled to accept the repudiation of the agreement.
35. The Company cannot show any loss resulting from Mr Moody's (non)performance. The Company admitted it had not done so. It is submitted it would be virtually impossible to do so as the difference between Mr Moody's performance and that of other pickers who achieve the Standards is negligible. If the Company can show no actual loss then it follows the respondent would not suffer any measurable loss by retaining the applicant.
36. The quality of the retraining provided Mr Moody was not adequate and this amounts to a serious procedural shortcoming in the termination of the applicant's employment.
37. In breach of *Trotter* (above), the Company failed to consider alternatives to dismissal including redeployment. In all the circumstances it would not have been unduly onerous for the Company to retain Mr Moody in his then-position pending a suitable redeployment opportunity, in particular a position not covered by the Standards.

Respondent's Position

38. Because of my finding for the respondent in this matter I am satisfied there is no need for me to summarise their position.

Discussion and Findings

39. The relevant law in respect of dismissal for poor performance was correctly identified by the applicant: *Trotter* (above).
40. I am satisfied Mr Moody was justifiably dismissed for the following reasons.
41. The applicant does not dispute the validity or fairness of respondent's Standards performance system. The OSH investigation did not see it as raising any health or safety issues, in general or in respect of Mr Moody. The Authority's investigation turned up no reason to challenge the applicant's or OSH's views. I am satisfied a fair and reasonable line has been drawn in the sand by the Company.
42. The applicant properly accepts that he failed on a number of occasions to meet the requirements of the Standards and that his speed was regularly slower than other workers subjected to the Standards (see par. 14 above).
43. The evidence before the Authority was unambiguous: Mr Moody had consistent difficulty in meeting the Standards, particularly in respect of large orders. Because of his difficulty, he was provided with retraining opportunities, during which he met the Standards, but later his performance reverted to its previous form. Mr Moody did not contest the adequacy of his retraining at the time, nor did he challenge the warnings he received for non-performance. The investigation disclosed no reason to regard Mr Moody's retraining as inadequate or defective.
44. I do not accept Mr Lloyd's argument on behalf of the applicant that the latter's performance was not so poor as to justify the Company terminating the employment agreement (or, as Mr Lloyd puts it, regarding the agreement as repudiated). For the same reasons, I do not accept his claim that the evidence of Mr Moody's failings made clear it amounted to only a technical and/or minor breach of the employment agreement. What the evidence made clear was that Mr Moody's failings were frequent and, unfortunately for the applicant, not capable of being brought up to the mark despite a fair and reasonable retraining opportunity: it was highly probable that Mr Moody's poor performance would continue. Because of its repetition, and the

applicant's poor prognosis, I am satisfied that the breaches were so serious that the Company was entitled to accept the repudiation of the agreement.

45. I am also satisfied that the Company can show a loss resulting from Mr Moody's poor performance: the loss lies not only in the cost, modest as it is (by, I accept, measures of seconds) but primarily in the investment the Company has made in the Standards system itself. If the Standards cannot justify Mr Moody's termination then, by way of inevitable disparity claims, it cannot be applied in any poor performance situation. An investment measurable in thousands of dollars would be lost.
46. Mr Lloyd is effectively arguing that the Company should set aside its standards for the applicant. And, failing that, that the Authority should substitute its opinion for that of the employer's. The Company, of course, does not have to set aside its fair and reasonable standards and it is not open to the Authority to substitute its opinion: in *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 the Court of Appeal said it had to be satisfied that "*the decision to dismiss was one which a reasonable and fair employer could have taken*" (emphasis added).
47. The Authority's investigation disclosed no evidence to support a suggestion that the Company might be prejudiced against the applicant and/or that it dismissed him because of his union membership and activity and/or his age and/or because its application of the Standards to Mr Moody failed to fairly take account of his legitimate union and first aid activities in the workplace.
48. I do not accept the suggestion that, because the Company had not dismissed Mr Moody sooner for his under performing, that the respondent condoned his inadequate performance and was estopped from terminating his employment for the same. The Company met its redeployment obligations to Mr Moody by its willingness to consider him in the event vacancies occurred in non-Standards work areas, during the period of the warnings being put to the applicant: no vacancies occurred and/or Mr Moody did not apply for any positions not coming under the Standards.
49. The Company has clearly established that reasonable performance standards were required of Mr Moody. He was clearly advised as to those standards. He knew what was expected of him. He was also warned as to the consequences of not meeting

those standards. He enjoyed real opportunities for explanation and unbiased consideration of the same. The Company thereby met the minimum requirements for procedural fairness: *NZ (with exceptions) Food Processing etc IOUW v Unilever New Zealand Ltd* [1990] 1 NZILR. The applicant often met the required standards, before during and after his retraining. However, Mr Moody did not consistently maintain those standards and, after many warnings, was dismissed for poor performance. While clearly distressing to the applicant, I am satisfied that – given its comprehensive approach to the problem of Mr Moody’s regular underperforming – the Company was fairly able to cry halt.

Determination

50. For the reasons set out above I find in against Mr Ross Moody’s claim that he was unjustifiably dismissed by Foodstuffs (Wellington) Co-operative Society Limited.
51. Subject to comment from counsel for Mr Moody, Mr Gregory Lloyd, I can indicate that the respondent’s indicative costs claim of \$2,000 appears appropriate. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority