

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brent Nimmo (Applicant)
AND Kaipara Limited (Respondent)
REPRESENTATIVES Helen Thorpe, Advocate for Applicant
Maria Dew, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 4 October 2005
DATE OF DETERMINATION 25 November 2005

DETERMINATION OF THE AUTHORITY

The problem

[1] Mr Brent Nimmo (“Mr Nimmo”) makes application for an investigation into his dismissal from his employment with Kaipara Limited (“Kaipara”). Mr Nimmo says he was unjustifiably dismissed but Kaipara says the dismissal was justified.

[2] Mr Nimmo asks the Authority to resolve the problem by making orders for reimbursement and compensation.

[3] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[4] Mr Nimmo commenced employment with Kaipara in 1996 as a Fitter Welder. The terms of Mr Nimmo’s employment were recorded in a written individual employment agreement signed by Mr Nimmo on 6 September 2004.

[5] In or about December 2004, Kaipara’s Engineering Manager Mr Gerry Kelly (“Mr Kelly”) became aware of irregularities in Kaipara’s use of gas cylinders. Kaipara was being charged rental for gas cylinders it did not appear to possess. This situation as well as excessive gas bills and comments from engineering staff led Mr Kelly to investigate.

[6] On 28 April 2005, Mr Kelly marked gas cylinders in the yard and on each Fitter Welder’s truck with an indelible marker. He also marked each new cylinder that was delivered from BOC Gases. He made handwritten notes of the location and movements of each marked gas cylinder. He repeated this exercise on 3 May, 14 May, 16 May, 18 May and 20 May. He produces his handwritten notes and a tabular transcript of them to the Authority.

[7] On 16 May 2005, Mr Kelly photographed a selection of the marked cylinders. He produces copies of these photographs to the Authority.

[8] Mr Kelly tells the Authority that on Saturday 14 May 2005 he observed Mr Nimmo removing gas cylinders marked "O" and "X" from his truck and replacing them with cylinders marked "G" and "E". He says he saw Mr Nimmo leave the yard at noon that day with those same cylinders. Mr Kelly says that as he was leaving Pine Harbour at 12.35 pm he saw Mr Nimmo driving from Maraetai but with no gas cylinders on his truck.

[9] On Monday 16 May 2005 Mr Nimmo arrived at work with two gas cylinders on his truck. Mr Kelly checked these cylinders and found that they did not have the "G" and "E" markings he had made and were both dirty and muddy. It was apparent to Mr Kelly that the cylinders were not those he had observed Mr Nimmo place on his truck on Saturday 14 May 2005. Mr Kelly checked the cylinders and ascertained they were both empty.

[10] The empty cylinders remained on Mr Nimmo's truck until 11.15 am on Friday 20 May 2005. As Mr Nimmo went to exchange them, Mr Kelly confronted him. I prefer Mr Kelly's evidence and find that there was then this exchange:-

<i>Mr Kelly</i>	<i>Where are the gas cylinders you put on the truck last Saturday?"</i>
<i>Mr Nimmo</i>	<i>I didn't change the cylinders last Saturday</i>
<i>Mr Kelly</i>	<i>Yes you did because I saw you change them on Saturday</i>
<i>Mr Nimmo</i>	<i>Oh yes, you're right. I did.</i>
<i>Mr Kelly</i>	<i>So where are the cylinders you put on the truck last Saturday?</i>
<i>Mr Nimmo</i>	<i>I have just changed them and they are in the rack</i>
<i>Mr Kelly</i>	<i>Those are not the cylinders you took last Saturday</i>

[11] Mr Nimmo continued to maintain that he was exchanging the same gas cylinders he had placed on his truck the previous Saturday. The exchange then became unpleasant.

[12] Mr Kelly and his manager one Mr Martyn Knight ("Mr Knight") give sworn evidence that Mr Knight was present as a witness during the exchange between Mr Kelly and Mr Nimmo. Mr Nimmo is adamant that Mr Knight was not present. Mr Knight apparently did not participate in the exchange. I accept the weight of evidence that Mr Knight was present and find accordingly. I also make a credibility finding having seen and heard these witnesses, that I prefer Mr Kelly's evidence where it conflicts with that of Mr Nimmo.

[13] Mr Kelly says he explained to Mr Nimmo the markings on the gas cylinders and that the cylinders Mr Nimmo had returned should have been marked with "G" and "E" respectively. He says he pointed out to Mr Nimmo that the cylinders were unmarked. He says he explained to Mr Nimmo that he had recorded the cylinders' movements as part of his continuing investigation of irregularities.

[14] Mr Kelly also says he told Mr Nimmo he had discovered the cylinders on Mr Nimmo's truck on 16 May were empty. He told Mr Nimmo too that he had seen Mr Nimmo driving out of Maraetai on 14 May with no cylinders on his truck after he had left the yard with full cylinders.

[15] At that point according to Mr Kelly, Mr Nimmo then admitted he had taken the full gas cylinders home. Mr Kelly says Mr Nimmo then confessed and said he had gas cylinders lying on his driveway at home and volunteered to retrieve them. Mr Kelly interrupted him by asking where the dirty cylinders he had exchanged for full cylinders had come from. Mr Nimmo did not respond except to mutter verbal abuse.

[16] During the course of my investigation meeting, I observed Mr Nimmo mutter inaudible comments but he declined when I invited him, to communicate his comments clearly.

[17] Mr Kelly says that he asked Mr Nimmo what excuse he had for taking full gas cylinders and replacing them with empty ones. Mr Nimmo's only response was to shrug his shoulders and mutter inaudible comments. Mr Kelly says he then said to Mr Nimmo "*As you have been warned on numerous occasions in the past about taking company property, I have no other option than to dismiss you from your duties as an employee of Kaipara Limited on the grounds of unauthorised removal of company property.*"

[18] Mr Kelly then told Mr Nimmo to collect his belongings and said he would organise a lift home for Mr Nimmo and at the same time collect the gas cylinders in Mr Nimmo's driveway. Mr Kelly said Mr Nimmo then asked "*what f... cylinders*" to which Mr Kelly reminded him he had admitted having. Mr Nimmo is said to have then verbally abused Mr Kelly.

[19] A maintenance fitter Mr Andrew David Weston ("Mr Weston") drove Mr Nimmo home. I have interviewed Mr Weston. Mr Weston was unable to locate any gas cylinders at Mr Nimmo's home.

[20] Mr Nimmo was sent an undated letter in the post which confirmed his dismissal. That letter stated:-

This letter is to confirm our conversation today which resulted in you being dismissed from the company.

As I stated to you, the reason for your dismissal was the theft of three "G" size gas cylinders, namely one acetylene cylinder, one oxygen cylinder and one argon cylinder, all of whom are rented from the company's gas suppliers plus the gas contents.

Theft of property under the control of the company by an employee is grounds for summary dismissal and as such regrettably today will end your employment with Kaipara Limited. Should you wish to discuss the matter further with me, either with or without a representative being present, please let me know so that we can organise a convenient time and location.

I have arranged for your severance pay to be credited to your bank account today. The final pay however has been adjusted to take account of the three missing gas cylinders and their gas contents collectively charged out to our company at \$1,120.00 by the suppliers BOC New Zealand Limited. As soon as you return the three full cylinders to me, I will immediately arrange to have the above amount credited to your bank account.

I am personally sorry that your employment must end in such a manner. Thank you for the service you have given to the company over the years and for the assistance you have given to me during the time we have worked together.

*Yours faithfully
Gerry Kelly
Engineering Services Manager*

The determination

[21] Mr Nimmo's prepared written statement was incomplete as to material particulars. I regard that factor as going to credibility.

[22] The dismissal letter refers to the theft of three "G" size gas cylinders. One of those cylinders was an argon cylinder which Kaipara says Mr Nimmo admitted removing in October 2004. Mr Nimmo denies removing that cylinder and disputes the circumstances surrounding the incident. In any event, I find that Kaipara is not entitled to pursue the matter against Mr Nimmo now. I find that at the particular time it did not formally discipline Mr Nimmo in the required manner. I conclude then that Mr Nimmo's dismissal was a summary termination and not one on notice given after warning.

[23] Mr Nimmo is adamant that he did not admit to having gas cylinders at his home. Both Mr Kelly and Mr Knight confirm Mr Nimmo's admission. Having made a credibility finding against Mr Nimmo, I find that he did make such an admission.

[24] I accept Ms Dew's submission that once Mr Nimmo made the admission, there was no requirement for a further formal inquiry with the attendant minimum requirements of procedural fairness. I agree too with counsel's submission that the interview with Mr Nimmo certainly could have been conducted in a better way. But it is substantial fairness that is required and not pedantic scrutiny.

[25] I am satisfied that the allegation was clearly communicated to Mr Nimmo such that he understood what was being alleged against him. The discussion on 20 May 2004 was an opportunity for Mr Nimmo to refute and respond to the allegation. His response was to admit to the allegation. I discern no unfairness in any aspect of the circumstances of that situation.

[26] It follows then that faced with Mr Nimmo's admission, Kaipara was entitled to conclude that Mr Nimmo had removed its property without authority to do so. His admitted conduct amounted to serious misconduct and it was open to Kaipara as fair and reasonable employer to take that view of his conduct.

[27] On an objective view and weighing both Kaipara's and Mr Nimmo's respective interests, I find that Kaipara's decision to terminate Mr Nimmo's employment was justifiable. **Mr Nimmo does not have a personal grievance and the Authority is unable to assist him further.**

[28] Mr Nimmo signed an employment agreement on 6 September 2004 which I have sighted. That agreement provides at clause 11.5

11.5 All issued company property is to be returned and any money owed to the company repaid before final payment of wages are made. If this provision is not complied with, the value of any unreturned company property and any debts to the company will be deducted from the final payment.

[29] I find by virtue of the signed agreement and the operation of the said clause, that Mr Nimmo consented to the deduction from his final wages for the value of unreturned gas cylinders he admitted having in his possession.

Costs

[30] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Dew is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Thorpe is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson

Member of Employment Relations Authority