

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Samuel Oh (Applicant)  
**AND** Bluebird Foods Limited (Respondent)  
**REPRESENTATIVES** David Fleming, Counsel for Applicant  
Gillian Service, Counsel for Respondent  
**MEMBER OF AUTHORITY** A Dumbleton  
**INVESTIGATION MEETING** 27 January 2005  
**DATE OF DETERMINATION** 9 February 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] On 3 February 2004 the applicant Mr Samuel Oh was summarily dismissed by the respondent Bluebird Foods Ltd (referred to as "Bluebird"). The employment relationship problem brought by Mr Oh to the Authority is a complaint that his dismissal was unjustified.

[2] Using mediation the parties have tried to resolve the problem, but without success. Mr Oh now asks the Authority to investigate and determine his personal grievance. He asks for it to be resolved by reinstating him to his warehousing job at Bluebird and by reimbursing him for lost wages and compensating him for hurt feelings, humiliation and loss of dignity suffered through being dismissed.

**Conduct leading to dismissal**

[3] There is little if any dispute about the essential facts in this case, which I find to be as follows. When he was dismissed Mr Oh was 18 years old and had been working for less than five months in his first permanent job after leaving school. He had previously worked for Bluebird as a casual employee from early 2003 until his appointment in September that year as Storeperson at the company's warehouse.

[4] Bluebird maintains security over the warehouse and surrounding premises. They are fenced in, with a security hut manned by a guard at the entrance. The security policy of Bluebird requires employees at all times to sign in when entering the premises and to sign out when leaving. Prominent signage on the hut requires all visitors entering the premises to stop, report to the security guard and sign in. On departure they are required to sign out. In a "staff signing in and out book" entries are made of the date, employees signature and name, work department, reason for movement, time out and time in.

[5] During a shift he was working on Sunday 1 February 2004, at afternoon smoko Mr Oh left the worksite for a short time. He did not sign out. When Mr Oh returned he was accompanied by his friend Samuel Bailey who was a recent school leaver of about the same age. Neither Mr Oh nor Mr Bailey signed in or reported to the security guard, and Mr Oh had not obtained permission from anyone to take Mr Bailey into the workplace. Once inside Mr Oh showed his friend where he worked driving a forkhoist and then left Mr Bailey in a cafeteria or lunchroom nearby while he returned to continue his work. A short time later a security officer investigating the presence on site of an unknown person found Mr Bailey at work on or near the pallet line, which is an area presenting hazards to health and safety. Mr Bailey was wrapping plastic around pallets containing cartons of Bluebird product. This was work that was normally carried out on pallets to protect the product in the cartons and also to provide stability for the pallet when it is placed in a stack with others. There is no suggestion that Mr Bailey was doing anything other than work that a company storeperson would also have done and in the same way. He wore a high visibility safety vest similar to the ones that the storepersons were required to wear.

[6] Mr Bailey was immediately escorted off the worksite and Mr Oh was questioned about his presence. A formal disciplinary interview was conducted next day by Mr Shaun Batty, Bluebirds Distribution Manager. Mr Oh took with him to the meeting his union delegate as his representative. He said that his friend had been there to keep him company during smoko breaks and that he had not asked Mr Bailey to perform any work and indeed had not known that was happening at the time. During the interview Mr Oh also confirmed that he had known of Bluebird's security – health and safety rules and policies, particularly with regard to signing in and out and taking visitors onsite.

[7] A second interview took place on 3 February, at the end of which Mr Oh was advised by Mr Batty that having considered all the information it had obtained Bluebird regarded him as having committed a serious breach of health, safety and site security requirements, and had also potentially placed product quality at risk. Mr Batty said that the employer had no alternative but to categorise Mr Oh's actions as serious misconduct for which he was immediately dismissed. The dismissal and grounds earlier stated by Mr Batty for taking that action were confirmed in writing to Mr Oh on 5 February.

[8] Although seven months then went by before the application seeking reinstatement was lodged in the Authority by Mr Oh, this delay in itself does not seem to have caused any detriment to the position of either party in any respect. Both seem to accept that during much of this time they were engaged in trying to resolve the grievance.

### Bluebird Code of Conduct

[9] There is no dispute that generally the Code of Conduct was applicable to Mr Oh in his employment both as a casual and later a permanent worker. The provisions of the Code expressly distinguish between "misconduct" and "serious misconduct". In relation to the former, certain acts or omissions are described as constituting conduct which may after warnings lead to dismissal, whereas in relation to the latter certain offences are described as constituting conduct which may lead to summary dismissal.

[10] "Misconduct" under the Code of Conduct expressly includes the following;

1. *Failure to clock in and out when arriving and leaving work.*
2. *Leaving site without informing your manager/supervisor.*
3. *Failure to observe safety rules/instructions .....*

.....

9. *Acting in a negligent, careless, indolent manner in the discharge of duties; .....*

[11] As grounds for the summary dismissal of Mr Oh however, Bluebird relied on the following “offence” which is expressed to be “serious misconduct”;

9. *Acting in a manner that threatens personal safety & health, and /or that of another employee; actions affecting hygiene in the workplace and/or product quality; or acting in a manner that prevents the safe and proper performance of the duties of other employees.*

[12] Although with regard to safety it can be seen there is an overlapping of ground 3. under “misconduct” and ground 9. under “serious misconduct”, the rationalisation which is implicit in the Code is that whether any misbehaviour will constitute misconduct or serious misconduct will depend on the degree or extent of failing on part of the employee.

#### Whether the misconduct was serious

[13] On his behalf Mr Oh’s representative, the National Distribution Union, has realistically acknowledged that his actions on 1 February amounted at least to misconduct. Mr Fleming for the union acknowledged that Mr Oh could have been disciplined for this up to the warning stage, and that his actions constituted “contributing behaviour” under s.124 of the Employment Relations Act 2000 for the purposes of assessing the nature and extent of any remedies he may be held entitled to if his grievance claim is upheld. However the degree of that contribution Mr Fleming submitted was no more than 25% and not so great as to disentitle Mr Oh to reinstatement.

[14] While Mr Oh and his mate Mr Bailey acted unthinkingly without any intention of harming Bluebird in any way, their behaviour had severe consequences for Mr Oh. However the importance of health and safety in employment must not be disregarded in favour of any aspects of Mr Oh’s case which attract sympathy. Given that there was misconduct, the question is whether it was serious enough to justify summary dismissal. As the question is one of degree there is a line or level beyond which misconduct becomes serious misconduct. Whether that line has been crossed or that level has been reached, is a matter for the employer to decide provided in doing so it acts fairly and reasonably. The fairness and reasonableness of the employers inquiry is therefore the primary matter for investigation by the Authority.

[15] The information the Authority has been left with at the end of its investigation is plentiful and in this case almost entirely uncontroverted. There is a careful record of the disciplinary interviews conducted with Mr Oh, and insight into the employers thinking at the time it decided to dismiss is given by the reasonably detailed dismissal letter. It is often the case that by the time a statement in reply is drafted and is followed by the witness’s statements in writing and again orally, terminology and expression used may indicate some uncertainty on the part of the employer as to the way it carried out its inquiry or the conclusions it reached.

[16] An example of this arose from the use by Mr Batty in his statement of evidence of the expression “zero tolerance”. He said twice that Bluebird has a “zero tolerance” policy on breaches of health and safety. Mr Fleming fastened onto this statement as indicating a closed mind by Bluebird, contrary to the requirement for a fair and reasonable employer to consider and make due allowance for any explanation or matter of mitigation put forward in relation to an employees conduct. The use of the expression “zero tolerance” has been viewed in a similar way by the

Court in *Hoyts Cinema v Jacob* [2002] 2 ERNZ 638, at 662. As had the employer in that case, Bluebird made no reference in its Code of Conduct to the existence of a “zero tolerance” policy or to what in fact such a policy meant, as it should have done if it wished to rely on it.

[17] Mr Batty however in his written and oral evidence mentioned “mitigation” in conjunction with the “zero tolerance” policy. It may seem contradictory to have a strict or absolute policy yet at the same time make allowance for matters of excuse or explanation. To see best the employers thinking and what it really did take into account in this case, it is necessary to return to the transcript of the disciplinary interview and the letter of dismissal. I am satisfied from those records that indeed, as it has said it did, the employer had its mind open to any matters of excuse, qualification or mitigation put forward by Mr Oh when it was inquiring into his conduct before deciding to dismiss him. In announcing the decision to dismiss Mr Batty said that no mitigating factors had been found to explain Mr Oh’s actions. In my view that statement accurately reflected the way he had approached the disciplinary inquiry with regard to both the subject of it and his receptiveness to any explanations offered.

[18] The Authority has considered the claim made in defence of Mr Oh’s conduct that Bluebird did not enforce its sign in/sign out requirements. However the evidence that these rules were observed more “in the breach” was weak and little more than mere assertion. The difficulty with this claim is that Mr Oh did not try to make excuses for his conduct by saying he thought the rules had been relaxed or were no longer even operable. He accepted that the rules did apply to him and he admitted failing to observe them. I am satisfied that Bluebird did take its own security rules seriously and did require employees to obey them. Also, Bluebird did nothing to encourage its employees to think that it was optional to observe the requirements. Mr Bailey was apprehended through the effective operation of the security system itself. Although he was not at first challenged when he was seen entering the premises with Mr Oh, this was because the work clothes including a safety vest he was wearing left the security guard uncertain whether or not he was an employee. There was however no delay before the security officer went to check this out and found Mr Bailey working in an area where there were risks to health and safety.

[19] At the investigation meeting Bluebird showed some uncertainty about whether Mr Oh had asked his mate Mr Bailey to work on the line or at least had known he was doing that. In the dismissal letter Mr Batty detailed several serious breaches of the Code of Conduct by Mr Oh including that he had, “allowed [Mr Bailey] to perform work duties on your behalf....” Support for that conclusion was available from the written report of Mr Shandip Sharma, a Team Leader who had spoken to Mr Bailey straight after he had been found working. Mr Sharma wrote on 1 February that Mr Bailey had told him he was there because he had been asked by Mr Oh to come and help him. The security guard reported that he too had heard Mr Bailey say this to Mr Sharma. It was important information Mr Batty had at the time he interviewed Mr Oh on 2 February. Mr Oh had read to him the security guards report about what Mr Bailey had said to Mr Sharma. He denied asking Mr Bailey to help and said he had not known Mr Bailey was working. The apparent conclusion that Mr Oh had some knowledge that Mr Bailey was going to do some work would seem therefore to have been reasonable in the light of what Mr Bailey had said to Mr Sharma.

[20] Some of the evidence of Mr Ross Pilkington, Bluebird HR Manager and Mr Batty was equivocal about the question of Mr Oh’s knowledge and also the importance of the fact that Mr Bailey had been found working. The question of justification for the dismissal is to be considered at the time the decision to dismiss was made. From the letter of dismissal dated 5 February 2004 I am satisfied that the grounds for dismissal included the fact, as the employer believed it to be, that Mr Oh had allowed Mr Bailey to perform some of his work. It was open to the employer to reject Mr Oh’s denial and accept what Mr Bailey had told Mr Sharma. It is not open to an employer to later on retreat from the conclusion it reached at the time it dismissed. In any event I accept that the

decision to dismiss was not founded on this question alone. As he said in the dismissal letter, Mr Batty concluded that Mr Oh had failed to supervise or control the movements of a person he had allowed into a hazardous area without permission. I accept that at the heart of the decision to dismiss were failures by Mr Oh in the way Mr Bailey was brought by him onto the site to begin with and a subsequent failure to supervise his activities once there. I find that it was reasonable for the employer to regard those failures as constituting serious misconduct quite apart from the question of Mr Oh's state of knowledge about Mr Bailey working onsite as well as being present.

[21] I do not accept that as contended this was a case of dismissal by "remote decision-maker". I find that the impetus for the decision to dismiss was the recommendation made by Mr Batty who personally had inquired fully into the circumstances. The fact that Mr Pilkington and Mr Ian Mayes another Bluebird manager, both of whom were consulted by Mr Batty, approved of or agreed with that recommendation before it was adopted and implemented by the employer, does not detract from its integrity as a considered conclusion reached after a full and fair inquiry. If the recommendation had only been a stab in the dark by Mr Batty this criticism would have carried more weight. I find that the recommendation was an informed one made carefully by Mr Batty.

[22] I am bound to apply the law as it was at the time the contended grievance arose. That law has since been changed by recent amendments to the Employment Relations Act, but in February 2004 the law was as restated by the Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448. As submitted by Ms Service, the law did not permit the Authority to second guess the decision of the employer if dismissal was within the range of disciplinary responses open to a fair and reasonable employer in the circumstances. There is I find no significant dispute about the facts of Mr Oh's conduct or that it amounted to misconduct. Mr Batty's considered decision was that as a matter of degree the misconduct was serious. I find that this was a decision that Bluebird as a fair and reasonable employer could have made. As such it is not a decision the Authority may overrule by substituting a different one of its own.

### Determination

[23] For the above reasons I determine that the employment relationship problem that has been investigated by the Authority is not one that Mr Oh's former employer has legal responsibility for. Accordingly, no orders need be made against Bluebird. I find that the employer in dismissing Mr Oh did so with justification – it had grounds to dismiss and it acted fairly and reasonably in reaching the decision to dismiss and in carrying out that action. Therefore, Mr Oh's personal grievance claim against Bluebird does not succeed.

### Costs

[24] Costs are reserved. As is usual once an investigation by the Authority has been finished, the parties representatives Ms Service and Mr Fleming are now asked to confer with a view to disposing of this question by agreement. If that proves unattainable written application may then be made to the Authority for appropriate orders.

A Dumbleton  
Member of Employment Relations Authority