

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2019] NZERA 343
3032038

BETWEEN WILLIAM RUDLING
Applicant

AND BRIDGESTONE NEW
ZEALAND LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: Anthony Drake, counsel for the Applicant
Jane Latimer, counsel for the Respondent

Investigation Meeting: 7 and 8 March 2019

Submissions received: From both parties at the investigation meeting

Date of determination: 10 June 2019

DETERMINATION OF THE AUTHORITY

- A. William Rudling was not unjustifiably dismissed by Bridgestone New Zealand Limited.**
- B. A timetable is set for submissions on costs, in the event that the parties are not able to resolve the issue themselves.**

Employment relationship problem

[1] William Rudling is originally from South Africa. He came to New Zealand and was employed by Bridgestone New Zealand Limited (Bridgestone or the company) from 15 February 2016. Initially he worked as an assistant manager and was later promoted to commercial tyres manager. Bridgestone is a motor vehicle tyre fitting and retail business.

[2] Mr Rudling was dissatisfied with aspects of his employment and reported these to his manager Steven Volschenk. The two met on 11 January 2018. The meeting included a discussion about Mr Rudling having an employment offer from another company. The content of the discussion is disputed. Mr Rudling was called to further meetings with Bridgestone managers on 23 and 31 January 2018 as the managers understood that Mr Rudling had accepted a job with a competitor. He denied that he had told company representatives that.

[3] A disciplinary meeting was held on 20 February 2018 and Mr Rudling was summarily dismissed for misleading Bridgestone about having accepted other employment, which was seen as serious misconduct.

[4] Mr Rudling claims that his dismissal was unjustified both substantively and procedurally. Bridgestone claims that it was justified in its decision and process.

[5] An investigation meeting was held in 7 and 8 March 2019. I heard evidence in person from Mr Rudling and his friend who supported him at a meeting with Bridgestone. For Bridgestone I heard from Mr Volschenk, Jeremy Mackintosh (Commercial Business Manager), Gregory Neville (Wholesale Manager New Zealand), and David Piper (National Human Resources Manager).

[6] This determination has not recorded all material received from the parties but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result, as permitted by s 174B of the Employment Relations Act 2000 (the Act).

Issues

[7] The issues for determination are whether Mr Rudling was unjustifiably dismissed by Bridgestone on 20 February 2018 and if so, what remedies (if any) should he be awarded.

[8] Although Mr Rudling says that he was told at meetings in January 2018 that he was going to be put on garden leave and that his employment was going to be terminated, these matters were not pursued as separate personal grievances.

Mr Rudling's role and concerns

[9] Mr Rudling's experience and specialisation was in earth moving tyres, rather than the truck tyres he was involved in selling for Bridgestone.

[10] Mr Rudling's role was as the senior Bridgestone representative within a defined territory for the company's commercial sales and service. This included maintaining existing business and developing additional business within the territory. Mr Rudling was described by Mr Mackintosh as having access to pricing structures, key growth opportunities, customer lists, innovation projects, service level agreements, operational strategies and insights into Bridgestone's plans for the specialty products department.

[11] Mr Rudling's work visa included Bridgestone as his employer. He was in the process of applying for permanent residency in New Zealand.

[12] I do not need to detail Mr Rudling's concerns but suffice to say that he did not appreciate the company's business approach or the culture at the company. He describes the tipping point as relating his perception of the use of electronic company vehicle monitoring to monitor staff. He was also frustrated by having to gather, create and input data for an electronic system, when it was difficult to get the data holders to provide it to him.

11 January 2018 email and meeting Mr Volschenk

[13] On 11 January 2018 Mr Rudling emailed his immediate manager Mr Volschenk, stating amongst other things:

I now find myself in a place where there is no support ... in regards to completing an additional work instruction and as a result any doubts that I have had in regards to my future with Bridgestone had now been laid to rest.

[14] Mr Volschenk asked Mr Rudling to have coffee with him. At this meeting Mr Rudling outlined his concerns.

[15] Comments were made by Mr Rudling regarding an offer of employment with another company. His recollection was that he said he had received an offer for employment and that he was seriously considering it. During the later disciplinary process he did not accept that he had mentioned the competitor's name.

[16] Mr Volschenk's evidence was that Mr Rudling said he had spoken to Michelin (a tyre producer), the previous day and was now going to sign his contract with them. Mr Volschenk says that he clearly remembers the reference to Michelin.

[17] Mr Rudling's witness statement refers to him now recalling having mentioned "call Michelin", in order to get references from his previous employer, Michelin in South Africa. He says that Mr Volschenk may have misunderstood him and believed he was moving to Michelin in New Zealand. Mr Volschenk does not accept that evidence, denying that Mr Rudling referred to "call", or that there was any reference during their conversation to South Africa or residency issues. He also notes that this is the first time Mr Rudling has offered this explanation despite the case continuing for a year. Mr Mackintosh and Mr Neville say there was no reference by Mr Rudling in their discussions with him, to this scenario or explanation. I have not been able to identify any reference to it in the various emails, letters or the disciplinary meeting transcript.

[18] Mr Volschenk's evidence is more consistent and in keeping with what he told Mr Mackintosh later that day and with notes he made some weeks after the discussion. Also, Mr Rudling accepted at the investigation meeting that he could possibly have said that he was going to sign a contract. I find that he did say that to Mr Volschenk.

[19] Mr Volschenk says that he then asked Mr Rudling if he was going to leave, and if so, when. Mr Rudling replied, in about a month and a half. Mr Volschenk says he wanted Mr Rudling to stay but sensed this was not a good time to continue the discussion, so he left it there.

Offer of employment

[20] Mr Rudling says that he never had a job offer from Michelin in New Zealand and in January 2018 Michelin were not formally operating in New Zealand.

[21] Technically this appears accurate but I accept the evidence of several witnesses that selling Michelin tyres for a distributor called Tyreline and working for Michelin were often used interchangeably in the sector. Similarly with references to other tyre brands being used for the distributor company. Michelin bought a share of Tyreline in 2017 and are the sole distributor of Michelin tyres in New Zealand. Mr Rudling accepted that some people would refer to Tyreline as Michelin.

[22] Although not known to Bridgestone at the time of the dismissal, Mr Rudling had received a written offer of employment from Tyreline dated 1 November 2017.

He says that this was the result of him being approached by Tyrelina. He says that he did not accept the offer.

[23] Mr Rudling says in his witness statement in reply that (as of January 2018) there was no offer to be accepted as the November 2017 offer had expired. Whilst technically that is true, I find the comment somewhat disingenuous, when Mr Rudling said during the investigation meeting that he understood this to be an open offer. There was a shortage of specialised employees and Tyrelina were prepared to wait to see if Mr Rudling became available. The other company had to give updated offers because of the backlog at the immigration service.

[24] Mr Rudling was reluctant to put pen to paper with the other company because of his immigration situation. His immigration adviser advised him that it was not the right time to accept an offer, as a change in conditions would need to be applied for. There was an issue about the location condition on Mr Rudling's visa and how that would fit with Tyrelina and also with Mr Rudling's life circumstances. I note that after his dismissal Mr Rudling took up employment with Tyrelina.

Referral to Mr Mackintosh

[25] Going back to the sequence of events at Bridgestone, Mr Volschenk raised Mr Rudling with senior manager Mr Mackintosh, telling him that Mr Rudling was going to Michelin, was going to sign a contract with Michelin and would be leaving in a month and a half.

[26] Both Mr Volschenk and Mr Mackintosh were concerned as Michelin was a direct competitor. Mr Mackintosh asked Mr Volschenk to set up a meeting for them both with Mr Rudling. Mr Piper from human resources was also invited. The message invite was entitled "Discussion wrt unhappiness"¹. Mr Volschenk saw the meeting as being to discuss Mr Rudling's exit from Bridgestone and to see if there was anything they could do to turn that around. I accept that Mr Volschenk and Mr Mackintosh regarded Mr Rudling as a valuable employee and wanted him to stay with Bridgestone.

¹ Discussion with regards to unhappiness

[27] Mr Rudling socialised with Mr Mackintosh and his family through a wider group of South African friends. As often seems to be the case when such matters come before the Authority, the two did not agree as to the degree of their friendship.

23 January meeting with Mr Mackintosh

[28] Mr Rudling had limited information before the meeting and thought it was to discuss his concerns with Bridgestone. In the end the meeting was solely with Mr Mackintosh.

[29] Mr Mackintosh opened the meeting with a comment about work is work, to distinguish what was happening in the meeting from their social relationship. He also used an Afrikaans swear word to indicate that sometimes as a manager he had to be the bad guy.

[30] Mr Mackintosh says that during the meeting Mr Rudling told him that he had a job offer from Michelin since November 2017 but that it had expired in December 2017. In addition, Mr Rudling had verbally accepted the offer subject to him not wanting to relocate from Auckland to Hamilton. Mr Mackintosh reports Mr Rudling saying that he was meant to hear back from Michelin in regards to these terms and conditions in the next day or two but certainly during the same week and that he would inform Mr Mackintosh of the outcome before the end of the week.

[31] Mr Mackintosh was aware of Mr Rudling's dissatisfaction with Bridgestone from previous discussions with him and was not going to try and talk him out of the move. Instead he wished him well and supported him in his new venture. He asked how Mr Rudling's New Zealand residency application was going. The latter indicated that the process was more lengthy and expensive than expected but that his immigration advisor had said the application should be ready for submission in three weeks.

[32] According to Mr Mackintosh, Mr Rudling mentioned the possibility of having to apply for a change in his current visa, to a new employer, but preferred to remain at Bridgestone while the residency application was completed.

[33] Mr Rudling disputes Mr Mackintosh's account of this meeting. He says that Mr Mackintosh gave him two scenarios or options. One was that he would be terminated. The other was that he would go on garden leave. Mr Rudling says being told these things put him into shock and that there was a lot of the meeting which he did not remember due to that. He says that he recalls asking Mr Mackintosh whether he was being fired because someone gave him an offer and Mr Mackintosh confirming that.

[34] Mr Rudling's notes made after the meeting refer to being put on garden leave. There is no mention of termination. He notes that Bridgestone indicated that because he was on a visa, he would be allowed to take annual leave and sick leave, and his notice period, totalling three months. Mr Rudling records:

I did explain that it was an offer and no contract was signed.

[35] This would seem to leave open the prospect of the offer being verbally accepted but no written agreement having been signed.

[36] Previously Mr Mackintosh had dealt with another employee in a similar immigration situation but who was going through a disciplinary process. That person asked to take annual leave and unpaid leave until the residency application was completed. Mr Mackintosh had worked up a proposal based on Mr Rudling's dissatisfaction with his current role, his expressed intention to work for a direct competitor and his immigration needs. He had an electronic calendar page filled in with different types of leave, which he gave to Mr Rudling.

[37] The proposal allowed Mr Rudling to stay at Bridgestone to complete his residency application but not to be in the workplace. Mr Rudling would take annual leave for February, followed by his paid notice period for the whole of March with a few additional days' leave to follow. Mr Mackintosh denies mentioning garden leave, saying that is not a term he was familiar with, partly because it was not used in South Africa.

[38] Mr Mackintosh acknowledged that the plan was based on his presumption before the meeting that the residency application had just been submitted. He

acknowledged that the proposal may not allow enough time, once he knew the application had yet to go in.

[39] Having discovered that Mr Rudling had verbally conditionally accepted an offer from Michelin, Mr Mackintosh advised that he would have to check with the business whether the proposal was still available.

[40] Mr Drake submits that Mr Rudling should have been informed prior to the 23 January meeting that a proposal to end his employment was going to be put to him. While that may have been preferable, Mr Rudling was not forced to make a decision about the proposal at the meeting. He said he would respond later and he did not accept the proposal. In any event from Bridgestone's perspective Mr Rudling had announced that he intended to finish his employment relationship with Bridgestone.

Conclusions regarding 23 January meeting

[41] Both men agree that it was an open and casual conversation, although Mr Rudling says he was thrown by Mr Mackintosh's opening to the meeting. Given Mr Rudling and Mr Mackintosh's friendship and the calm nature of the meeting if Mr Rudling thought that he have disagreed or continued to talk to set the record straight when it became apparent Mr Mackintosh thought Mr Rudling was leaving.

[42] I found Mr Mackintosh's evidence about the 23 January meeting, and more generally to be clear and consistent, and I accept his evidence.

[43] The meeting was designed to resolve what appeared to Mr Mackintosh to be a situation where Mr Rudling was about to go and work for a competitor but had immigration issues which seemed more readily resolved by him continuing at Bridgestone for a period first.

[44] The question of whether garden leave was referred to in so many words is not critical. There was no reference to garden leave in Mr Rudling's employment agreement. I do not see this as preventing the parties from agreeing on arrangement in the nature of garden leave. Clearly Mr Mackintosh's proposal involved a somewhat similar arrangement to garden leave, with Mr Rudling completing his employment away from the workplace.

Next steps

[45] The next day Mr Mackintosh met with Mr Piper from human resources to let him know what was happening. This included Mr Mackintosh saying that Mr Rudling had said he had accepted an offer from Michelin. Mr Piper said that in those circumstances the company would usually stand the employee down, although that did not happen here.

[46] Having not heard from Mr Rudling by 30 January, Mr Mackintosh phoned him. Mr Rudling said he was acting “on advisement” and would only accept anything Mr Mackintosh said either in writing or with a witness present. Mr Mackintosh ended the call and decided to invite Mr Rudling and a support person to a meeting.

31 January meeting with Mr Mackintosh and Mr Piper

[47] Mr Rudling brought a friend to the meeting as a support person. He asked about recording the meeting. Mr Piper said that as both parties were taking notes and it was an informal meeting, he did not feel it was necessary.

[48] The parties’ recall of aspects of this meeting is different. Mr Rudling recalls Mr Mackintosh saying that Rudling’s employment presented too great a risk and he would need to be placed on garden leave.

[49] Mr Mackintosh said that given Mr Rudling’s stated intent to join Michelin, and Bridgestone was considering terminating his employment given the risk to the company, as a result of him confirming he had accepted employment with a direct competitor.

[50] Mr Rudling said that he had merely received an offer. He says he did not specify that it was Michelin but felt like Mr Mackintosh was pushing him to identify the new employer. Mr Mackintosh replied that at the 23 January meeting Mr Rudling had said that he had verbally accepted the offer.

[51] Mr Piper asked if there was any response on the earlier proposal or any other suggestions about how to proceed. Mr Rudling said he was acting “under advisement” and did not wish to say or agree to anything but suggested Bridgestone put anything they were proposing in writing. He would seek legal advice.

[52] Although there was a dispute about whether the phrase “garden leave” was mentioned, there was some mention of Mr Mackintosh’s proposal.

[53] Mr Rudling says that Mr Mackintosh mentioned Mr Rudling bringing his stuff, suggesting that he return company property. His friend’s notes refer more ambiguously to the company needing to collect items. Mr Mackintosh denied there was mention of Mr Rudling returning his company property.

[54] Even if Mr Mackintosh did say that Mr Rudling would be put on garden leave or had to return his property neither of those things eventuated in the immediate aftermath of this meeting. Contrary to the view expressed by Mr Rudling, I do not accept that he was terminated or given notice of dismissal at the 21 January meeting. Mr Rudling continued to work and so was not forced to take garden leave or the like.

Subsequent discussion and emails

[55] On 1 February Mr Rudling emailed Bridgestone advising that he had taken legal advice and that the company’s grounds for terminating were unlawful. Further he had been told to reserve all his rights in relation to Bridgestone’s actions. Mr Rudling acknowledged he had been approached by a competitor but said that at “no stage have I informed Bridgestone that I have accepted employment or given notice of resignation”.

[56] Mr Mackintosh replied that Mr Rudling had told him at the 23 January meeting that he had verbally accepted the offer. He also reiterated the commercial risk given Mr Rudling’s dissatisfaction with Bridgestone and intent to work for a significant competitor. The following day Mr Rudling again emailed indicating that he had not referred to accepting the offer.

Lawyers’ correspondence

[57] Bridgestone’s lawyers then wrote to Mr Rudling noting that Mr Rudling’s employment had not been terminated. Concern was expressed that Mr Rudling had notified Mr Mackintosh that he had accepted Michelin’s verbal offer of employment but was now backtracking by suggesting he had only received an offer.

[58] The company made a decision to investigate its concerns and the letter proposed to invoke the suspension clause in its Code of Conduct while the investigation took place.

[59] Mr Rudling's lawyer responded on 5 February, opposing suspension and requiring further information before he could comment on suspension. Mr Rudling's earlier concerns about termination and garden leave were repeated. Bridgestone's lawyer replied.

[60] No suspension action was taken. Mr Rudling remained working.

Mr Neville's involvement

[61] Mr Rudling was invited to a disciplinary meeting. Given his friendship with Mr Rudling, Mr Mackintosh was not involved in the meeting. Bridgestone decided to seek a senior manager from another part of the business to undertake the disciplinary process. Mr Neville, whose role was in the Consumer Division, rather than commercial, was nominated.

[62] The invitation letter identified concern about Mr Rudling misleading management regarding accepting the offer of employment either by initially telling the company he had done so or by subsequently saying he had not. A second allegation referred to Mr Rudling telling his immediate manager that he was dissatisfied with the company and had decided to leave.

[63] The letter provided the employment agreement, the Code of Conduct, witness statements from Mr Volschenk, Mr Mackintosh and Mr Piper and an email chain.

Disciplinary meeting

[64] Mr Neville and Mr Piper were present for Bridgestone, along with a lawyer. Mr Rudling was present with his lawyer. Unbeknownst to others involved, Mr Rudling recorded the meeting, so a transcript was available at the Authority. The meeting was lengthy, with the transcript running to 19 pages. I note that I accept Mr Piper's evidence that he was not the decision-maker.

[65] The parties disagree regarding the flavour of the meeting and whether Mr Rudling was communicative and responsive. In any event, Mr Neville asked if Mr

Rudling could help him understand what the process of the contact with Michelin and how it had actually happened. Mr Rudling replied. Mr Neville asked Mr Rudling whether he was 100% certain whether he had informed Bridgestone that he accepted alternative employment. Mr Rudling replied “Not to my recollection no. I said that I am minded to”. Mr Rudling denied having mentioned Michelin at all.

[66] Mr Neville asked Mr Rudling whether there was any reason why Mr Mackintosh might make up the statement. Mr Rudling did not offer any explanation.

[67] Mr Rudling said that he was under stress at the time of the 23 January meeting. His apparent inability to give a definite answer was significant to Mr Neville. He also saw Mr Rudling as agitated and not looking at him when responding to questions. He did not regard this body language as instilling the perception that Mr Rudling was honest, confident and sure about what he was saying. Mr Rudling says that he was on edge.

[68] Mr Neville says he was genuinely trying to understand Mr Rudling’s views and responses. While there was some failure to respond to questions, Mr Neville felt Mr Rudling had a good opportunity to respond.

[69] The meeting was adjourned and Mr Neville asked Mr Mackintosh to speak to him. Mr Neville wanted the chance to test his evidence. Mr Neville asked about the state of Mr Mackintosh’s relationship with Mr Rudling. Mr Mackintosh replied that they had a good relationship. Mr Neville also asked about what Mr Rudling had said about his intentions at Bridgestone. Mr Mackintosh said that Mr Rudling had told him that he had verbally accepted Michelin’s offer. Mr Neville’s impression was that Mr Mackintosh was very adamant and clear about what Mr Rudling had said to him.

[70] On resuming the meeting, Mr Rudling confirmed that he had no issues with Mr Mackintosh. Mr Neville said that Mr Mackintosh was adamant in his evidence that Mr Rudling said he had verbally accepted the offer.

[71] Bridgestone called another adjournment so that Mr Rudling’s responses could be considered. Mr Neville says he was seriously concerned about the veracity of Mr Rudling’s responses. He considered that Mr Mackintosh’s version of events aligned with the evidence and he had a good relationship with Mr Rudling. Further, it was

likely that Mr Rudling had opened up to Mr Mackintosh because of their relationship.

[72] The meeting was resumed and Mr Neville said that the proposal was to terminate Mr Rudling's employment. Mr Neville did not believe that Mr Rudling had been honest with the company. He said that Mr Rudling had misled the company which undermined its trust and confidence in him. Mr Neville invited Mr Rudling to provide a response to the proposal to summarily dismiss with immediate effect.

[73] Mr Drake got up with Mr Rudling following. Mr Drake said "we will challenge that thank you very much". Bridgestone's lawyer explained that it was only a proposed outcome and they had the opportunity to give feedback. Mr Drake responded "no, no I'm saying that we'll challenge that, thank you."

[74] After they departed, Mr Neville proceeded to confirm his decision and a letter was drafted to Mr Rudling advising of the dismissal.

Substantive justification

[75] I now look at aspects of the justification for the dismissal. The dismissal was based on the first allegation of Mr Rudling having misled the company. He was found to have misled Bridgestone either by initially telling Mr Mackintosh that he had accepted employment with a competitor or by later denying that he had accepted an offer. The second allegation was not pursued.

[76] Bridgestone's concern was that Mr Rudling's behaviour was dishonest and misleading. It considered that this dishonesty went to the heart of the employment relationship and the company thus lost trust and confidence it needed in Mr Rudling as a senior employee.

[77] Mr Rudling claims that he was subjected to a disciplinary process because he had raised concerns about Bridgestone. While his dissatisfaction with the company was a factor in its concern about his remaining with it, I have not found evidence to establish that his concerns of themselves were the basis for the disciplinary action.

[78] Mr Drake submitted that the question is whether Mr Rudling's actions would be seen by a person of ordinary honesty as being dishonest conduct or a dereliction

of duty towards his employer. He refers to *Robb v Green*², as approved in *Schilling v Kidd Garrett Ltd*³. It was submitted that Mr Rudling was just being open and honest by telling his employer that he had been approached by a competitor. Further, that when it became apparent that Bridgestone misunderstood, Mr Rudling attempted on a number of occasions to clarify the position.

[79] However, what is described as his clarification is that he denied saying what Mr Mackintosh reported him saying. The issue of the prospect of a misunderstanding was not the approach taken.

[80] Mr Neville preferred Mr Mackintosh's evidence which he saw as clear and concise, in contrast with Mr Rudling's evidence. Mr Mackintosh's evidence was in keeping with that of Mr Volschenk that Mr Rudling had earlier said he was going to sign a contract. Both Mr Mackintosh and Mr Volschenk said that Mr Rudling had referred to Michelin, whereas Mr Rudling denied that at the disciplinary meeting. The background was Mr Rudling's dissatisfaction with Bridgestone. The state of the relationship between Mr Rudling and Mr Mackintosh was explored, with a view to identifying any prospect of Mr Mackintosh having a reason to make up his story. Mr Neville's assessment was one open to a fair and reasonable employer in these circumstances.

Procedural fairness

[81] A number of aspects of the process were identified for Mr Rudling as being unfair.

Predetermination

[82] For Mr Rudling it is submitted that the decision to dismiss was predetermined. Mr Neville denies that, saying that he took his role as an impartial decision maker seriously. Having seen and heard Mr Neville's evidence, I conclude that he came to the process with an open mind and was committed to undertaking a fair process.

[83] I do not accept that it was Mr Rudling's rejection of the exit proposal which motivated the disciplinary process. Those were informal discussions which Mr

² *Robb v Green* [1895] 2 QB 315 at p316

³ *Schilling v Kidd Garrett Ltd* [1977] 1 NZLR 243 at p248

Mackintosh hoped would find a way to resolve Mr Rudling's situation to everyone's satisfaction. When that was not possible, the company was left with an employee who had indicated that he had accepted employment with a competitor only to then deny that he had said that.

[84] Investigations must be conducted fully and fairly with an open mind. For Mr Rudling it was suggested that as there was inconsistency between accounts, more was required of the company. It was not clear what more could have been done here. Mr Neville appears to have had all the relevant documents in existence prior to the disciplinary meeting, statements from witnesses and also spoke to Mr Mackintosh during the adjournment test his evidence.

Decision-maker

[85] It is submitted that there were conflicting statements by Bridgestone regarding who the decision maker was and who was conducting the investigation. Mr Neville saw himself as the decision-maker rather than the investigator.

[86] It appeared from Mr Mackintosh's evidence during the investigation meeting that only the managing director of Bridgestone New Zealand and the Australian managing director may have been able to dismiss. However, that was clarified by Mr Piper who confirmed that there was a reporting requirement to the New Zealand managing director and the Japanese head office, but that did not require either to be the decision maker.

[87] I do not consider this issue to be an impediment to Bridgestone's argument that it had justifiably dismissed Mr Rudling.

Failure to provide notes

[88] Mr Neville did not provide Mr Rudling with the notes he had made before the disciplinary meeting. It was submitted that Mr Rudling was not given fair opportunity to respond to what Mr Neville had in his mind before the meeting.

[89] The notes were a couple of pages from Mr Neville's diary, where he had summarised a chronology of events and then identifying concerns. Mr Piper, along with Bridgestone's lawyer, wrote on 13 February inviting Mr Rudling to the disciplinary meeting. The letter includes three pages of background including the

alleged events, the specific allegation which were being investigated and the next steps.

[90] Whilst it may well have been preferable to have shared Mr Neville's notes with Mr Rudling before the meeting, the 13 February letter outlines in more detail the concerns which Mr Neville identified in his notes. Mr Rudling was also provided with the witness statements of Mr Volschenk, Mr Mackintosh and Mr Piper.

Failure to refer to discussion with Mr Mackintosh

[91] Mr Drake submits that the failure to say that Mr Neville had re-interviewed Mr Mackintosh during the meeting adjournment was unfair as Mr Rudling was not given the opportunity to comment on what was said.

[92] I do not accept that. Mr Mackintosh was asked about the same events he had commented on in his statement and gave the same information regarding what Mr Rudling had said about his actions in relation to the Michelin offer. He was also asked about the state of his relationship with Mr Rudling which he said was good. Mr Neville did say after the adjournment that Mr Mackintosh was adamant about what he was saying, particularly that Mr Rudling had said that he had verbally accepted the offer. Mr Rudling confirmed that he had no issue with Mr Mackintosh.

[93] Had Mr Mackintosh been asked about different matters or given answers which were inconsistent with his written statement, the matter would be different.

[94] If I am wrong and the failure to provide Mr Neville's notes or refer to the adjournment interview are seen as defects in the process I regard them as a minor matters which did not result in Mr Rudling being treated unfairly.⁴

Questioning of Mr Rudling in disciplinary meeting

[95] Mr Drake objected to what he describes as cross examination during the disciplinary meeting of Mr Rudling by experienced employment counsel.

[96] Mr Neville had asked Bridgestone's lawyer, Michael O'Brien, to ask questions. He explained that this was so he could reflect on the answers. Although this approach does open up the prospect of criticisms of the nature made by Mr

⁴ S 103A(5) of the Act.

Drake, looking at the questions asked by Mr O'Brien I do not agree that there was inappropriate questioning.

[97] Mr O'Brien and Mr Neville put the evidence of others to Mr Rudling, seeking a response. Mr Drake could and did, interject on occasions. The discussion flowed between factual matters and submissions made on Mr Rudling's behalf, with Mr Drake taking an active role.

Inadequate interviewing

[98] Mr Neville is criticised for failing to go back to Mr Volschenk. However, Mr Rudling accepted at the disciplinary meeting that he had told Mr Volschenk that he had an offer from a competitor and was minded to accept the offer. This discussion was not the crux of the allegation of misleading behaviour, which related to the discussion with Mr Mackintosh. I see the failure to go back to Mr Volschenk as a minor matter which did not cause unfairness to Mr Volschenk.

[99] Mr Drake suggested that Mr Neville should have put it to Mr Volschenk and Mr Mackintosh that they might have been mistaken about what Mr Rudling said or that Mr Mackintosh might have fabricated his statement. In the circumstances of this case I do not consider that to have been critical. Mr Mackintosh was approached during the adjournment and questioned about what had happened and the state of his relationship with Mr Rudling.

Conclusion

[100] Was it open to a fair and reasonable employer in the circumstances to dismiss Mr Rudling? The test under s 103A of the Act is whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time. Was Mr Rudling's conduct such as to deeply impair or destroy the basic trust and confidence that is essential in employment relationships?⁵

[101] For Mr Rudling, it is accepted that lying to your employer would deeply impair the trust and confidence they have in you.

⁵ *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at 487

[102] At the investigation meeting Mr Rudling agreed that he could have said on 23 February 2018 that he had verbally accepted the offer subject to the relocation issue. He admirably accepts that he does not want to say anything in evidence that he is not sure about. He accepts he does not recall the meeting very well.

[103] It is not impossible that Mr Rudling was in such a state during the 23 February meeting that he does not recall saying that he had accepted the Michelin offer, although compelling evidence would be needed. However, his difficulty is that his subsequent defence to Bridgestone, in emails and at the disciplinary meeting, was not approached in this way. Rather his defence was that he had not said it. This continued in submissions made on his behalf. I must assess the dismissal on the basis of the information known to Bridgestone at the time.

[104] I accept that the evidence supporting a finding by an employer of dishonesty must be convincing, given the serious nature of the charge⁶. I conclude that Bridgestone had sufficient basis to conclude that Mr Rudling had misled it, either when he said originally that he had verbally accepted the offer of employment, or when he subsequently said on several occasions that he had not done so.

[105] Having determined that Bridgestone's concerns about misleading conduct were substantiated, the decision to dismiss was one a fair and reasonable employer could have made. The dishonesty was not trivial, Bridgestone had lost trust and confidence that Mr Rudling would be honest about crucial matters impacting on the employment relationship and there were commercial risks to the company. No comment was received by the company on the prospect of alternative outcomes if it was satisfied that Mr Rudling had misled it.

[106] I also conclude that the elements in s 103A(3) of the Act were met. Bridgestone sufficiently investigated, raised its concerns with Mr Rudling, gave him a reasonable opportunity to be heard and genuinely considered his explanations.

[107] Mr Rudling was not unjustifiably dismissed by Bridgestone.

⁶ *Honda New Zealand Ltd v New Zealand Boilermakers etc Union* [1991] 1 NZLR 392 CA

Costs

[108] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Bridgestone shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Rudling shall have a further 14 days in which to file and serve a memorandum in reply. Submissions claiming costs must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Nicola Craig

Member of the Employment Relations Authority