

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Brian Alex Schlegel (Applicant)
AND Lely New Zealand Limited (Respondent)
REPRESENTATIVES David Taylor, Counsel for Applicant
Mark Hammond, Counsel for Respondent
MEMBER OF AUTHORITY Vicki Campbell
INVESTIGATION MEETING 26 January 2005
SUBMISSIONS RECEIVED 8 February 2005 from Applicant
7 February 2005 from Respondent
DATE OF DETERMINATION 28 February 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] In his statement of problem Mr Schlegel claims he was unjustifiably dismissed from his position and seeks remedies including reinstatement in resolution of his employment relationship problem.
- [2] Lely New Zealand Limited (“Lely”) deny Mr Schlegel was unjustifiably dismissed.

Background

- [3] Mr Schlegel was employed by Lely as North Island Area Manager. His employment commenced on 1 October 2004. Lely say that Mr Schlegel had a requirement to maintain a current drivers licence at all times in order to undertake his role.
- [4] To demonstrate this Lely point to the following:
- a. the advertisement used to attract applications for the position Mr Schlegel was appointed to, stated:

You will be required to assist our client's current dealers in retailing and servicing their products as well as being able to demonstrate these. This role has a requirement to travel throughout the North Island. [my emphasis]

- b. the written employment agreement between the parties contains a comprehensive Job Description. The Job Description sets out key requirements of the position including a requirement to “...travel through assigned territory to call on Dealers and prospective clients.”; and

This is a front line position where the company’s reputation is represented to existing clients and prospective clients. As such, company policies, principles and procedures must be adhered to at all times.

Considerable travel throughout the designated territory and time away from home is an integral part of this position and therefore effective time management is critical to the job’s success. Consistent reporting and communication to the General Manager and the Sales Manager is of prime importance to this position. [my emphasis]

- c. Mr Schlegel was provided with a fully maintained company vehicle to be used for carrying out his duties.

- [5] The individual agreement provided for the company car to be used for company use only with a requirement for Mr Schlegel to obtain authorisation from the General Manager for any private use.
- [6] The peak season for Lely is the period from August in one year until the following February. Mr Schlegel was employed in the midst of the peak season for the company being October.
- [7] I am satisfied that in order for Mr Schlegel to properly undertake the requirements of his position for Lely he was required to maintain a current drivers licence.
- [8] On 24 October 2004 (Labour Day) Mr Schlegel was clocked by the New Zealand Police travelling at 167km per hour. Mr Schlegel had his licence suspended immediately for a period of 28 days.
- [9] Mr Schlegel was driving a vehicle which he was road testing as he was considering whether or not he would purchase it. He was driving the vehicle from Auckland to Hamilton.
- [10] During 24 October 2004 and 4 November 2004 Mr Schlegel did not advise his employer that his licence had been suspended and that he was unable to drive any vehicles.
- [11] On 4 November 2004 the NZ Police contacted Lely’s General Manager, Mr Pieter Vis, and advised him that Mr Schlegel had lost his licence and was unable to drive.
- [12] Immediately following the phone conversation Mr Vis approached Mr Schlegel and asked him if there was anything Mr Schlegel wanted to tell Mr Vis. Mr Schlegel said “no”. Mr Vis then told Mr Schlegel about the phone conversation he had had with the NZ Police. Mr Schlegel admitted he had lost his licence. He told Mr Vis that his wife and daughter were driving him to work and therefore there would be no impact on his job.
- [13] Mr Vis was concerned about the information he had received and took time to seek advice about the most appropriate course of action.
- [14] After obtaining advice Mr Vis set up a formal disciplinary meeting. The notice inviting Mr Schlegel to the meeting stated:

I would like to call for you to attend a formal disciplinary meeting tomorrow, the 9th of November 2004 at 12.00pm to discuss a serious matter that was brought to my attention last week. This matter surrounds notification I received from the NZ Police that you have lost your drivers license.

The purpose of this meeting Brian is to discuss with you and receive from you, your account of these recent events.

Given this is a formal disciplinary meeting Brian, I would like to invite you to bring a representative or support person of your choice to this meeting.

Present at the meeting will be yourself and a representative or support person of your choice, myself and Jo Calder who will be assisting me on this matter.

If you can please confirm your attendance to this meeting with me Brian as soon as possible, that would be appreciated.

I look forward to meeting with you tomorrow.

- [15] The disciplinary meeting took place as scheduled on 9 November 2004. As a result of the disciplinary meeting Mr Schlegel was dismissed.

Discussion and determination

- [16] In coming to my conclusions in this matter I have taken into consideration the evidence of the parties, their appearances at the investigation meeting and the submissions made on their behalf.
- [17] There is no dispute Mr Schlegel was dismissed, therefore the question for determination is whether that dismissal is justifiable in all the circumstances.

Substantive justification

- [18] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of Court decisions. When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus for the Authority is not whether there was misconduct but whether the employer had reasonable grounds for believing that there was misconduct.
- [19] The Authority may not substitute its views for those of the employer about the adequacy of the reason shown by the employer for the dismissal.
- [20] On 9 November 2004 Mr Schlegel was dismissed for a breach of trust for not sharing information about his loss of licence with his employer.
- [21] Mr Schlegel raised his personal grievance on 11 November 2004 through his representative Mr Taylor. In response to his alleged unjustified dismissal the company stated:

...[Mr Schlegel's] ability to drive a motor vehicle is critical to his performance. [Lely] estimates that during the first month of his employment he would have travelled between 1,000 and 2,000 kms. That same level of travel was required this month.

[Mr Schlegel] failed to disclose to his employer that his licence had been revoked. He reorganised his daily affairs to avoid driving in a deliberate attempt to deceive [Lely] as to the true state of affairs.

...

Most importantly, [Mr Schlegel] deceived [Lely] on matters which should have been brought to [Lely's] attention and dealt with in an upfront manner.

The effect of [Mr Schlegel's] behaviour is to destroy the fundamental term of the employment agreement that the parties deal with each other in good faith. In the context of the earlier discussions between [Mr Schlegel and Lely], this breach is significant and justified dismissal.

- [22] Mr Vis told the authority that it seemed that Mr Schlegel was hiding the information from his employer and that this behaviour amounted to misleading and deceitful conduct.
- [23] At the time he dismissed Mr Schlegel, Mr Vis was of the opinion that Mr Schlegel had continued to drive the company vehicle without a licence as he had seen Mr Schlegel driving the vehicle onto the company premises and other staff had confirmed that they had also seen Mr Schlegel driving his company car into work.
- [24] Mr Schlegel's duties included a requirement that he deliver machinery to clients. This was to enable relationships to be built with the clients. During the period Mr Schlegel was without his license Mr Vis asked him to deliver some machinery to a client who Mr Vis was aware had some relationship problems with Mr Schlegel. Mr Schlegel told Mr Vis that if he did the delivery it would take him three trips, however, it could all be delivered at once if they organised a truck to make the delivery. Mr Vis agreed, however, with the benefit of hindsight he now believes the real reason Mr Schlegel did not want to make the delivery was because he could not drive.
- [25] Mr Schlegel was aware of the importance of being out on the road. He, himself, told the Authority that Mr Vis had said to him on occasions that "...I need to get you out there" and during the first month of employment had told Mr Schlegel that he had to get out in the market selling.
- [26] Mr Schlegel told the Authority that during that first period of his employment his time was better spent getting to know the technical information. In answer to questions put to him Mr Schlegel told the Authority that on one occasion he was on the road and a client wanted some technical information and so he rang for the technical information and passed it on to the client at the time. Mr Corrie Adams, who is the Area Manager for the South Island confirmed that when he first commenced employment with Lely he also had to learn the technical information but that he did what Mr Schlegel had done. When clients asked questions he was unable to answer he would make telephone contact, obtain the required information and pass it on to the client all while at the client's premises.
- [27] During this same period Mr Schlegel asked Mr Robert Dittmer to accompany him when visiting clients to assist with the set up of the machines. Mr Dittmer did so on the understanding that he was providing Mr Schlegel with technical support even though it was unusual for Mr Dittmer to accompany the Area Manager. On these occasions Mr Dittmer drove. Mr Dittmer was not aware that Mr Schlegel had lost his licence and was unable to drive. When he did find out Mr Dittmer says he felt like Mr Schlegel's "taxi driver".
- [28] Mrs Schlegel attended the investigation meeting and told the Authority that either she or Mr Schlegel's daughter had driven Mr Schlegel to work. She told the Authority that they would drive the car to the gate and hand the vehicle over to Mr Schlegel who would then drive onto the company property and park the car. For all appearances Mr Schlegel was driving himself to work.

- [29] In answer to questions at the investigation meeting Mr Schlegel told the Authority that he had not checked to see if either his daughter or his wife were allowed to drive the company vehicle. He didn't seem to think it was important or necessary to do so. I found this difficult to accept given that he then told me that in a previous job he had checked before letting his wife drive his company vehicle when he wanted her to drive home from a company function. The difference between the two situations being that at Lely Mr Schlegel only had use of the car for company purposes whilst at his previous employment he had full personal use.
- [30] Mr Schlegel maintained throughout the investigation meeting that the reason he did not tell his employer about the loss of licence is that he was too embarrassed to do so. Having listened to the taped conversation of the disciplinary meeting, the Authority is satisfied that this was not the reason provided to Lely at the time the decision to dismiss was made. At the disciplinary meeting Mr Schlegel gave as his reason the fact that the loss of licence would, in his view, not interfere with his ability to do the job and also that he didn't want the information relating to his loss of licence to get out into the market place.
- [31] Mr Schlegel went to great lengths to hide the loss of licence from his employer. Mr Schlegel told me he "...*wanted to keep it quiet; [he] did not want anyone to find out.*" He achieved that objective, at least until 4 November 2004.
- [32] It must be obvious to the meanest intelligence (and Mr Schlegel is considerably more intelligent than that) that for practical reasons, if for no other, it would be necessary to inform the employer of such a significant impediment to the carrying out of work duties.
- [33] Mr Schlegel was in a senior position in the company and his position allowed him to act with a great deal of autonomy. He was expected to spend a significant amount of his time out of the office and unsupervised. He was in a position of trust. Mr Schlegel's poor judgement in acting the way he did falls far short of meeting the standard that can be reasonably expected of someone in such a position. Mr Schlegel showed such poor judgement that he destroyed the trust and confidence necessary to the employment relationship.

I am satisfied that although others may have considered imposing a lesser consequence than summary dismissal, Mr Schlegel's dismissal was a consequence within the fair and reasonable range of sanctions open to Lely.

Procedural fairness

- [34] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal (*NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35).
- [35] Mr Vis wrote to Mr Schlegel inviting him to attend the disciplinary meeting. While the letter did not outline for Mr Schlegel the possibility that his job was in jeopardy, I have listened to the tape of the disciplinary meeting and I am satisfied that Mr Schlegel was well aware that his job may be in jeopardy.

[36] It was submitted on Mr Schlegel's behalf that Mr Schlegel did not have notice of the specific allegation of misconduct. I am satisfied that Mr Schlegel was aware that the purpose of the meeting was to discuss the suspension of his licence.

[37] During the disciplinary meeting Mr Schlegel is heard to say:

Let's cut to the chase – bottom line - what do you want to do? I've been instructed by my solicitor of what you can and can't do and he wants to know today as well.

[38] This was followed by Mr Schlegel saying:

...I've got a right to have my say as well considering my job is on the line. [my emphasis]

[39] After the decision to dismiss had been advised to Mr Schlegel there was discussion regarding payment of notice during which Mr Schlegel stated:

...Mr solicitor told me last night that if you terminated my employment today then I'm on a month's salary which means you have to give me a month in lieu of notice. [my emphasis]

[40] Mr Schlegel's comments on the tape of the disciplinary meeting conflicts directly with Mr Schlegel's evidence at the investigation meeting that he did not know that his job was in jeopardy before the disciplinary meeting and that if he had known he would have brought his solicitor to the disciplinary meeting with him.

[41] Mr Schlegel told the Authority that he was aware "...*there would be consequences...*".

[42] I am satisfied that Mr Schlegel was aware that attending the disciplinary meeting would have consequences for him and that one of those consequences was the possibility that the meeting may result in the termination of his employment.

[43] I am satisfied that Lely carried out a full and fair investigation of Mr Schlegel's misconduct.

Mr Schlegel does not have a personal grievance and I can assist him no further.

Costs

[44] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority