

money to CHH had not been chased up personally by Mr Stevens. He acknowledged that he was firm and frank during the telephone call, but denies being abusive. Mr Stevens says the call affected him to such a degree that he attended his doctor who then put him off work for the following 28 days.

[4] Mr Stevens provided a medical certificate to CHH together with a letter dated 16 February 2006 advising Mr Mark Frankhauser, CEO of Packaging New Zealand that he had been subject to bullying and intimidation in the workplace. Mr Frankhauser responded on 6 March 2006 and suggested Mr Stevens consider whether his perception of what was happening in the workplace was related to the performance process being worked through or whether it was genuine bullying. Mr Frankhauser advised Mr Stevens that he had access to EAP if he wished to avail himself of that service.

[5] This matter was taken no further by Mr Stevens at that time.

Price increases

[6] In August 2006 CHH embarked on the implementation of a significant price increase for all its customers. Training sessions were developed and implemented to assist sales representatives and account managers to work through issues with their customers with regard to the proposed price increase.

[7] On 1 September 2006 Mr Bennett sent an email to all sales staff confirming CHH would be going to market with a general price increase. Mr Bennett set out the actions required to be undertaken by sales staff in conjunction with their Managers. The email was tagged as being of high importance and included Mr Stevens in the address list.

[8] At point three of this email Mr Bennett instructs the sales reps:

For all of you that have been through the price increase workshop, you should be well advanced on pulling together alternative options to be presented to your "Contracted Fixed Price" accounts. Please understand that all customers will need to be told of the price increase, and for those with a fixed price contract that has not reached a review date, they will be asked to support CHH in clawing back the increase through re-engineering etc that you will present at the time of your price increase discussion. [my emphasis]

[9] On 5 September 2006 Mr Stevens attended a training session on how to manage the proposed price increase implementation. During the training day participants received training in how to manage customer reactions to the news of the price increase.

[10] One of the specific training sessions included a presented on negotiation skills and role play exercises. Mr Stevens says the training was about how to promote alternative opportunities if the negotiation of a price increase was unlikely, and the need to look for other angles to improve the CHH margin arose. Witnesses for CHH say the training was about how to discuss the proposed increase in the face of opposition and to gain an acceptance of the price increase only.

[11] Mr Stevens understanding of the purpose of the negotiation skills training is, on the balance of probabilities, more likely correct than not. My conclusion is supported by an email from Mr Bennett dated 1 September 2006 where he sets out an expectation that some negotiations were going to be occurring during meetings where sales representatives and account managers are seeking the customers support. Mr Bennett states "...clawing back the increase through re-engineering etc that you will present at the time of your price increase discussion.

[12] That same day, 5 September, Mr Bennett resent his email from 1 September, this time attaching a timeline for delivery of the price increase to the market. There were three actions identified as requiring action "now":

- identify all contracted and non contracted accounts; and
- advise customer base of pending price increases; and
- to monitor customer and competitor responses.

Sanford deal

[13] One of Mr Stevens largest clients was Sanford Limited. Having completed his training, Mr Steven's began approaching his clients, including Sanfords, to discuss the possible price increase.

[14] Mr Stevens contacted his manager Mr Paul Dennison 3-4 days before his appointment with Sanford and asked whether the Sanford increase was to be negotiated on a local plant by plant basis or whether the matter would be handled by the National Sales Manager. Mr Dennison advised Mr Stevens to handle the Sanford account at a local level. Mr Stevens says he took this to mean that he was to negotiate an increase with Sanford at a local level.

[15] When Mr Stevens approached Sanford the price increase was rejected. However, after some protracted negotiations, on 14 September 2006, Mr Stevens closed a deal which increased Sanford's prices by 2% from 1 November 2006 subject to CHH supplying 100% of Sanford Tauranga packaging effective

immediately. Further, it was agreed that Sanford would engage in additional price negotiations at the end of January 2007. This agreement was not reduced to writing.

[16] Mr Stevens contacted Mr Dennison on the evening of 14 September and advised him that he had negotiated a deal of around 3% with Sanfords. Mr Dennison told me he thought Mr Stevens had jumped the gun but that it was a good result.

[17] Mr Stevens attended a CHH sales meeting the next morning, on 15 September by way of telephone conference call. During that meeting he outlined the outcome of his Sandford Tauranga deal to the rest of the sales staff. Mr Dennison expressed his approval of the deal and commented that the increase in business and the initiative Mr Stevens had shown was an example for other Account Managers.

[18] Following the sales meeting, Mr Dennison reported to Mr Bennett that Mr Stevens had reached a negotiated deal with Sanfords. Mr Bennett says he was pretty annoyed that Mr Stevens had negotiated a deal with Sanfords, as he had no authority to do so. Mr Dennison described Mr Bennett's reaction as extremely angry. Mr Bennett instructed Mr Dennison to deal with the matter.

[19] At 4.30pm Mr Bennett sent the following email to all his Sales Managers:

Guys –can you please ensure that your sales people follow the agreed process for price increase implementation as discussed at the workshops and subsequent emails?

1. Advise customers that a price increase is coming – looking like up to 6%.
2. Prepare re-engineering to deal with expected barriers i.e. contracts with fixed term pricing.
3. Go to market formally with price increase letter (and options where necessary) and present 5.5% increase.
4. Where negotiation is required, accept no increases less than 5.5% without sign off from their manager.

The timetable should be self explanatory but can you please re-emphasise the above.

[20] This communication on 15 September to Sales Managers was the first time it had been documented that sales staff could not negotiate a deal worth less than 5.5% without signoff from their Manager.

[21] Mr Dennison did not forward this email to his sales staff (including Mr Stevens) until 19 September 2006, the day before Mr Stevens was dismissed, and after the disciplinary process had been instigated.

[22] On 15 September 2006, Mr Stevens received a letter from Mr Dennison inviting him to attend a meeting on 20 September 2006 to discuss an allegation

that Mr Stevens had failed to comply with an instruction of a manager, resulting in serious financial consequences. Mr Stevens was advised that the matter was considered to be serious due to the serious financial consequences for the company and that dismissal was a possible outcome. Mr Stevens was invited to bring a representative to the meeting with him.

[23] Mr Stevens, confused about the disciplinary action, contacted his colleague Ms Odessa Rudge another Account Manager who had participated in the sales meeting on 15 September to seek her understanding of what Account Managers were trained to do during the training earlier in September. On 18 September 2006 Ms Rudge confirmed via email that Mr Dennison had commented during the sales meeting that Mr Steven's negotiation with Sanford had been a good achievement and outlined her understanding that the training included an instruction that if the full price increase was not achievable it was open for negotiation, through margin improvement, obtaining more business, or a combination with part increases.

[24] The evidence from witnesses for CHH at the investigation meeting is that Mr Bennett made it clear that while account managers were to raise the prospect of a sales increase, it was on the basis that they would monitor client reaction only, and report back to Mr Bennett.

[25] During the disciplinary meeting on 20 September 2006 Mr Stevens admitted that he had made a mistake, but also acknowledged that he had negotiated the deal with Sanfords with the best intentions. The minutes from the meeting show that Mr Stevens was remorseful and apologetic.

[26] Mr Steven's reminded Mr Dennison that he [Mr Dennison] had been very positive about Mr Steven's efforts with Sanford at the 15 September Sales Representative meeting. Remarkably, when Mr Guy and Mr Bennett asked Mr Dennison during an adjournment of the disciplinary meeting, if he had expressed his approval for the deal negotiated by Mr Stevens, he lied and denied he had done so. Mr Dennison has been unable to explain why he lied to his managers about this.

[27] Mr Stevens was dismissed on 20 September 2006. His dismissal was confirmed by letter dated 25 September 2006. That letter states that Mr Stevens was dismissed for "...gross negligence...".

Justification of dismissal

[28] The principles to be applied are those set out by the Employment Court in *Air NZ Ltd v Hudson* [2006] ERNZ 415 which were summarised in *Angel v Fonterra Co-operative* [2006] ERNZ 1080 at page 1092:

- Justification for dismissal must be determined on an objective basis from the point of view of a neutral observer. It is not enough that an employer makes a decision which falls within an acceptable range of responses.
- The standard against which the actions of an employer are objectively judged is that of a fair and reasonable employer.
- The Court may reach a different conclusion from the employer provided it is the result of an objective inquiry rather than a substitution of the Court's decision.
- The inquiry into justification must focus on all the circumstances which were relevant at the time of the inquiry and the dismissal.

[29] Serious misconduct is the most serious breach of the employment relationship and often results in the most serious outcome of dismissal because if the employment relationship is deeply impaired or destroyed it is untenable. The trust and confidence which is at the heart of the relationship is gone.

[30] As stated in *Angel v Fonterra Co-operative*, the classification of serious misconduct becomes problematic where an employee acts out of ignorance, carelessness, or accident but causes serious or potentially serious consequences for the employer or the employer's business.

[31] In *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 at page 319 the Court stated:

The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.

[32] Further, in *Angel v Fonterra Co-operative* the Court commented that where an employer investigates an employee's failure to adhere to a policy or

code of conduct, the employer should investigate whether there was genuine room for misunderstanding as to what the policy meant.

[33] Mr Stevens has maintained, throughout the disciplinary process, and at the Authority's investigation meeting, that when he negotiated the price increase with Sanfords he believed he was acting in accordance with the training he had received on 5 September 2006. I am satisfied that CHH made no efforts to rule out whether it was a possibility Mr Steven's had misunderstood the instructions.

[34] Mr Dennison considered the deal Mr Steven's had struck with Sanfords to be a good deal and did not raise any objections on the 14th or 15th when Mr Steven's advised him what he had done. On the contrary, Mr Dennison had expressed his approval for the deal with the rest of his sales team.

[35] During the disciplinary meeting Mr Steven's identified Ms Rudge as another account manager who believed negotiations were open to the account managers where it was obvious the 6% increase was not going to be accepted. CHH managers did not check with Ms Rudge about her understanding as part of its investigation into the allegations against Mr Stevens. Had they done so it may well have highlighted the possibility that the email correspondence was ambiguous and Mr Stevens should be given the benefit of the doubt.

[36] During the disciplinary process CHH relied heavily on the emails sent by Mr Bennett on 1 and 5 September 2006 as support for the allegations that Mr Stevens had failed to follow company policy.

[37] Mr Stevens is critical of CHH for not undertaking further enquiries to ensure Mr Stevens had received and read the email. However, both emails were sent to Mr Stevens as "high priority". Mr Stevens was on clear and unequivocal notice that he was expected to adhere to all company policies, procedures and instructions. Given that he had been issued with a final written warning seven months earlier for not following company procedures, Mr Stevens should have ignored the emails at his peril.

[38] The email communications are ambiguous about whether sales representatives were entitled to negotiate with Sanfords or not. Certainly, from Mr Dennison's reaction on 14 and 15 September, Mr Dennison obviously considered Mr Stevens to have been acting within the guidelines.

[39] Having said that, the timeline provided under cover of the email on 5 September made it clear that the only steps to be taken by Mr Stevens, up to 15 September, was for him to make the price increase known to his customers, report back to CHH on those customers who he believed he would have problems with, and why.

[40] The emails stressed the importance of achieving the price increase as being "critical" to CHH. This importance is borne out by the considerable investment made in training all sales representatives and account managers in how to approach customers about the pending increase and the steps to be taken throughout the implementation phase of the price increase to the market.

[41] However, much of the focus of CHH's disciplinary investigation was on the potential consequences of the negotiated settlement with Sanford which in my view were overstated from the outset and not proven.

[42] At the time the decision to dismiss Mr Stevens CHH did not know what, if any impact, Mr Steven's negotiation would have on other industries, such as the kiwifruit industry. It is surprising, given CHH's obvious concerns with regard to the increase negotiated by Mr Stevens, that no steps were taken at the time to advise Sanford that Mr Stevens had negotiated outside his authority. Indeed, Mr Bennett's oral evidence was that Sanford's considered the deal with Mr Stevens was so loose it was not binding on it.

[43] Standing back and taking an overall view of the dismissal and the process used to reach the conclusion to dismiss Mr Stevens, I am satisfied an employer acting fairly and reasonably would not have reached the same conclusions in all the circumstances of this case. Mr Stevens' dismissal was unjustifiable in all the circumstances. An employer acting fairly and reasonably in these circumstances would have taken into account the fact that the email correspondence was ambiguous, especially when taken in concert with Ms Rudge's understanding that to negotiate was acceptable; Mr Stevens acknowledgements at the disciplinary interviews that if he had made a mistake it was unintentional; and that Sanfords did not consider the deal to be enforceable in any event.

Remedies

Contribution

[44] I have given careful consideration as to whether the awards set out in this determination should be reduced for contributory conduct on the part of Mr

Stevens. In all the circumstances of this case, I do not believe there is any blameworthy conduct on the part of Mr Stevens such that a reduction in remedies should be ordered.

Lost Wages

[45] Mr Stevens was 64 years old when he was dismissed from his position at CHH. Mr Stevens became eligible for guaranteed retirement income on 31 May 2007. He had been employed with the company for 20 years. Given his age at the time of his dismissal, I accept it was difficult for Mr Stevens to secure alternative employment.

[46] Mr Stevens did find work at a lesser rate of pay, undertaking a temporary contract which started on 25 September 2006 and which ended on 31 May 2007. During this time Mr Stevens earned \$30,846.96. The difference between what Mr Stevens earned from his alternative employment and his employment at CHH up until his retirement date was \$10,153.04.

Carter Holt Harvey Limited is ordered to pay to Mr Stevens the sum of \$10,153.04 pursuant to section 123(1)(b) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Compensation for benefits lost as a result of the dismissal

[47] Mr Stevens seeks reimbursement of benefits lost as a result of his dismissal. Mr Stevens was part of the CHH superannuation scheme with expected company contributions of \$3,768.63 for the period 1 October 2006 to 31 May 2007.

[48] Mr Stevens was also in receipt of health premiums during his employment at CHH. The expected company paid premiums total \$379.52 for the period 1 October 2006 to 31 May 2007.

[49] Mr Stevens also had the benefit of a company car. He has valued that benefit as \$1,250 per month. That is a reasonable valuation on the use of a company vehicle. This equates to a lost benefit of \$10,000 for the period 1 October 2006 to 31 May 2007.

Carter Holt Harvey Limited is ordered to pay to Mr Stevens the sum of \$14,148.15 pursuant to section 123(1)(c)(ii) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Compensation

[50] Mr Stevens gave compelling evidence as to the effect the dismissal had on him. This was the first time in his long working life that he had been fired and he says he was left feeling like a criminal. Mr Stevens was embarrassed to have to advise family and friends, including some customers that he had dealt with over the 20 years of his employment at CHH, that he had been dismissed. Mr Stevens hurt and humiliation was exacerbated by not having an opportunity to farewell work his colleagues after such a long period of employment.

[51] In arriving at my conclusions in relation to a suitable amount for compensation I have taken into account Mr Stevens' 20 years service with CHH and his advanced age when being dismissed.

Carter Holt Harvey Limited is ordered to pay to Mr Stevens the sum of \$15,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[52] Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.



Vicki Campbell
Member of Employment Relations Authority