

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 98/09
5143112

BETWEEN PAUL WOODHEAD
 Applicant

AND RESENE PAINTS LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Paul Woodhead on his own behalf
 Murray French for the Respondent

Investigation Meeting: 28 May 2009 at Wellington

Further Submissions
Received: By 11 June 2009

Determination: 23 July 2009

DETERMINATION OF THE AUTHORITY

Adjournment Application

[1] Another adjournment application was made on the applicant, Mr Paul Woodhead's behalf at the time of the investigation meeting, because of his alleged inability to get representation, two similar applications having been denied previously. I declined granting an adjournment on the basis that Mr Woodhead's failure to get representation was his own responsibility and that the respondent (Resene) would be unfairly prejudiced if the investigation meeting did not go ahead. Any default in the timetabling process was the responsibility of Mr Woodhead and not Resene.

[2] The starting time of the investigation meeting was deferred for an hour so that Mr Woodhead could fully acquaint himself with Resene's witness statements and other material provided by it. For its part, Resene had to respond on the spot to any comments Mr Woodhead made in his oral evidence, as he had not provided any

written statements in advance. The Authority was advised that the cost to Resene in dealing with the adjournment applications and the hour's delay was \$750 plus GST.

Employment Relationship Problem

[3] Mr Woodhead claims that he was unjustifiably given final warnings and then dismissed from his job with Resene. Resene claims that the warnings and dismissal were justified, particularly as Mr Woodhead had failed to engage in the disciplinary process that led to his dismissal.

Background and Relevant Facts

[4] Mr Woodhead was employed by Resene as a Colour Matcher in its paint factory. The two main types of colour matching done by Mr Woodhead were in relation to standard and other colours required for manufacturing, and advice, primarily to workers in retail outlets, on specific matchings required for individual jobs for customers in those retail stores.

[5] While Mr Woodhead's performance over fifteen years involved some discussions over attitude and performance, he only once received a warning, this being in 1998. It related to an alleged failure to update colour formulations. I note that while Mr Woodhead claims that he was never given any warning, the documentary evidence indicates otherwise. I also accept that Resene had had concerns over the variability of the quality of Mr Woodhead's colour matching over a number of years. This is evidenced by file notes and other documentation.

[6] Mr Woodhead's performance appears to have been under particular scrutiny from December 2007 onwards, after the General Manager considered that Mr Woodhead's work had resulted in a large order being completed incorrectly. He therefore required all Mr Woodhead's work to be supervised and checked from then on.

[7] Resene's worries about the standard of Mr Woodhead's work became greater in 2008. Mr Woodhead was called to a meeting to discuss *serious employment concerns* by letter of 24 June from Resene's Technical Manager. The meeting was to review what Resene considered were ongoing issues of inadequate colour matching, although he was told that other issues such as customer service levels, reading on the

job, failure to respond to calls and clearing phone messages might also be discussed. Mr Woodhead was informed that one potential outcome could be a formal warning.

[8] The above issues were all raised at the meeting. Mr Woodhead noted that he did not perceive there had been any drop in his performance or in the appropriateness of his interactions with his work colleagues.

[9] The Technical Manager made it clear that an excellent level of match was required for all types of work. There were three particular head office matches that were discussed, together with a general assessment by Mr Woodhead's supervisor that of 28 matches checked only 10 were acceptable. Mr Woodhead said that his own standard was that 95% of all matches would be acceptable to the client, whoever that may be. That standard was agreed to by the Technical Manager.

[10] Mr Woodhead was then told that he had to agree with his supervisor on feedback processes for the different types of colour matching work he did. The behavioural issues raised earlier were also discussed in general terms.

[11] On 3 July the Technical Manager sent Mr Woodhead a copy of her notes of the meeting and the future actions that had been agreed, and for which she had established timeframes. These were that the feedback systems from shops and head office matches were to be drafted by 11 July and implemented by 18 July. The feedback for shop managers was to be done a week later. Mr Woodhead took no issue with the notes of the meeting.

[12] One of the feedback forms was progressed as agreed, but the others were not, for various reasons that are not important here.

[13] There was then a delay until 29 July before the Technical Manager took any disciplinary action against Mr Woodhead. I accept that the reasons for this delay were because it took a while for the documents to be returned and that she had a heavy workload - meaning she did not have time to review the material. I also accept her evidence that she did not take anything that happened subsequently into account, as she was aware that was her obligation as a fair and reasonable employer.

[14] Mr Woodhead was issued with a final warning over poor performance by letter. Resene also claimed that the warning could be relied on for other forms of unacceptable behaviour or misconduct, beyond the issue that resulted in the warning.

[15] The opportunity was also taken by Resene, in the same letter, to raise some new serious concerns about Mr Woodhead's behaviour. In particular, these resulted from a company-wide analysis of overtime, because of the financial situation Resene, like many other businesses, was facing. Consequently, the Technical Manager became aware for the first time that Mr Woodhead regularly worked overtime on Saturday mornings, which was contrary to the Technical Manger's or the Supervisor's view of the need for overtime. They believed that overtime had to be specifically approved. The Technical Manager was also concerned about Mr Woodhead's apparent lack of productivity in those hours. On one occasion in particular Mr Woodhead was only at work for two and a half hours, yet claimed for four hours. It was also of concern to Resene that an unacceptable amount of time on Saturdays had been spent surfing the internet.

[16] Resene therefore decided to hold a disciplinary meeting to discuss unapproved overtime, productivity during paid overtime, time keeping, possible absences during claimed overtime and the use of internet facilities for personal use during overtime. Dismissal was raised as an option in the letter, should serious misconduct be found to have occurred.

[17] A meeting was arranged for 7 August. By that time Mr Woodhead had gone on sick leave. He provided a medical certificate to Resene that did not say why he was on sick leave, but stated that his doctor would reassess his health on 18 August.

[18] Mr Woodhead stated that he went to the meeting on 7 August, even though he was on sick leave, because the meeting had been rescheduled at his request. He made it clear, however, that he would not be at work until 18 August, when his medical certificate ran out.

[19] At the meeting, at which Mr Woodhead was represented, he told Resene that he was working on developing new colours and that he was unaware he needed approval to work overtime. His explanation for not necessarily working for the full four hours claimed was that he started early on Tuesdays and occasionally on Mondays. He could not explain why in his timesheets that only Saturdays were referred to. At the Authority's investigation meeting he explained that this was what the wages clerk put in on his behalf.

[20] In relation to another week, he claimed extra time for a team building exercise, which was accepted.

[21] His explanation for using the internet was that he only did that when the paint was drying and could not otherwise work.

[22] The Technical Manager accepted some of Mr Woodhead's explanations, but considered that he should have known that overtime needed to be authorised, that whatever interpretation he gave for his hours that he was claiming for at least half an hour's overtime a week that was not worked, and that there was other work to do rather than surf the internet.

[23] The conclusion the Technical Manager came to was that the final warning would be restated and/or extended. It was made clear to Mr Woodhead that this was his last chance and if there were any other concerns about his work performance or any other form of misconduct he would be subject to further disciplinary action, which would most likely result in his dismissal. He was also specifically told that overtime could only be undertaken if requested and approved by a supervisor, in advance. He would be required to complete a daily time record and he had to clock in and out each day and be paid accordingly. He was not allowed to use the internet for non-work purposes, other than in his lunch break, and he was to finish early on Tuesdays when he started early.

[24] Mr Woodhead was told of the conclusions of the meeting in a letter dated 12 August. Unfortunately, this again was not the end of the matter, and another letter was sent to him, dated the same date, relating to concerns over the quality of his colour matching again.

[25] In particular, Resene had concerns about failures in work done on *cool colours*, *woodsman* and *metallic* head office work. Over *woodsman* the one coat formulation applied by Mr Woodhead was said to be insufficient. Over the *cool colours*, 3 out of 6 matches were said to be unacceptable, while over *metallic* 5 out of 18 were said to be unacceptable. Mr Woodhead was told that his was well below the 95% acceptable quality matching expected. The lack of a feedback system for shops was also raised. By way of conclusion the Technical Manager questioned whether Mr Woodhead was capable of achieving the outcomes required for a professional

colour matcher. A meeting was proposed for 18 August, when Resene expected him back at work, to discuss these issues.

[26] On the same date as the letters were sent, Mr Woodhead's then representative contacted Resene's representative, Mr Murray French, in an email headed *Without Prejudice*, stating:

I would have preferred to have spoken to you about this as it didn't need to be in writing ...

Woody is still pretty apprehensive about his future with Resene as he thinks any slight misdemeanour by him will see him out of there.

He is still on sick leave and he tells me he has about 60 days accumulated, is there any way that we could agree on an exit deal which would include him being paid out some of that leave and him resigning?

[27] This was done in advance of the written warning and the restated warning and new allegations being sent to Mr Woodhead.

[28] Mr French's response was that he would speak with the Technical Manager, that a warning would put in writing and that further allegations would be also need to be dealt with.

[29] The representative's reply was:

What I would have said, he is so stressed he may take at least 30 days to recover.

[30] When the two letters were sent to the representative the next day, he responded:

I understand my client is still suffering from work related stress and I do not believe it appropriate to request him to attend or offer any explanation other than his medical certificates which he will supply.

[31] Mr Woodhead repeated that advice to the Technical Manager. He told her that he had a medical appointment on 14 August, which actually took place on 15 August. Mr Woodhead accordingly provided that medical certificate, which simply stated that he was medically unfit from 15 August and that the situation would be reviewed in four weeks, namely on 12 September.

[32] Mr French responded to Mr Woodhead's representative, stating that Resene did not agree that it was inappropriate to continue to seek an explanation from Mr

Woodhead. He noted that the medical certificates gave no reason for him being medically unfit and that Resene believed that Mr Woodhead could provide an explanation in writing by the end of business on 19 August. Alternatively, Mr Woodhead could respond through his representative.

[33] The Technical Manager was aware from other staff that at the same time Mr Woodhead was being seen regularly at the local tavern. In evidence Mr Woodhead accepted that he went to the tavern on Thursday and Friday afternoons for what he described (in his final submissions) as part of his rehabilitation.

[34] Mr Woodhead's representative responded on 18 August, stating that he could not discuss the issue with him until 20 August. In relation to the lack of specificity in the medical information, the representative asked:

What would Resene do/sack him? Are they entitled to know more than he has disclosed or rather the information the doctor has put on his medical form.

He is unfit for work and therefore he is unfit for work which surely includes writing an explanation and/or attending meetings.

[35] Mr French responded stating that he then believed it reasonable to seek an explanation in writing on the matters raised. He noted that the medical assessment was similar to that in force on 7 August when Mr Woodhead did in fact attend a disciplinary meeting. A written response was again sought, but it was noted that a response could wait until 20 August. I accept that copies of the work in question could and would have been provided to Mr Woodhead for him to be able to respond to Resene's concerns, had he asked for them.

[36] In reply, Mr Woodhead's representative stated on 20 August at 7.38pm:

I have not spoken to Woody today and I'm not going to make a special trip to see him, he is obviously not well and the continuing harassment by [the Technical Manager] does not help.

If you wish to proceed with the witch hunt while he is away on sick leave then so be it but I advise you he is not well.

[37] Resene then decided that in the absence of an explanation from Mr Woodhead it would dismiss him. It wrote to him accordingly on 25 August stating, *inter alia*:

...While your doctor has deemed you medically unfit we feel it is reasonable to seek an opportunity to discuss the performance matters raised and then when this was refused to seek a written explanation.

You would have already been aware of the specific examples raised in the letter dated 12 August as [your supervisor] had discussed them with you when returning work for improvement.

Prior to the notice dated 12th August your adviser asked if we would explore the possibility of an "exit" package and made note of your accrued sick leave and the possibility that this might be called upon. He later suggested that you might take at least 30 days to recover. This was prior to any medical appointments we were made aware of after the initial consultation for the first period of sick leave. I have also had comments repeated to me, which we can only attribute to you, that you would not work in a place where you are being closely monitored.

In the context of the broader situation I have formed the belief that you have disengaged from the process of resolving any issues regarding your performance and I am in the position that I need to resolve this situation for Resene Paints Limited. I cannot rule out that the delays in failure to respond to me are part of a strategy to frustrate a conclusion being reached or to encourage our agreement to an "exit" deal.

The letter dated 12 August outlined three projects where work was returned for improvement. 30 to 100% of the matches delegated to you were deemed unacceptable. At the time the work was undertaken you were aware of the review process for your work and the seriousness of the situation, and had every opportunity to ensure that your first matches represented your capabilities.

There are final warnings in place for the quality of your colour matching. You received confirmation of this on 29th July 2008. You also received a re-stated/extended final warning on 7th August which was later referred to in another letter dated 12th August 2008.

I have been denied any explanation from you and must conclude that either you don't have an explanation or are unwilling to provide one. Given the level of review that you knew your work was subject to and the errors and omissions demonstrated I am of the opinion that you are not demonstrating or willing to reach and maintain a reasonable level of professional performance.

I am dismissing you from the service of Resene Paints Limited and will pay you one week in lieu of notice as allowed for in the Weekly employment agreement applying to you. This is effective immediately and final settlement will be paid in due course.

[38] Mr Woodhead subsequently raised a personal grievance and has been to mediation to try and resolve his employment relationship problem. This was unsuccessful and accordingly a determination from the Authority is required.

Correspondence Headed *Without Prejudice*

[39] Correspondence can not be *without prejudice* and therefore protected from disclosure in the absence of an existing dispute between parties. For a dispute to exist there must be a significant difference between the expressed views of the parties about a matter concerning them both, although litigation need not either be commenced or threatened (*Bayliss Sharr & Hansen v McDonald* [2006] ERNZ 1058).

[40] Simply labelling correspondence *without prejudice* does not attract the protection of without prejudice correspondence. Similarly, the privilege will not protect correspondence designed to prevent a dispute arising, rather than to compromise an existing dispute.

[41] In this case, no personal grievance had been raised in relation to the two warnings and the issues of the investigation meeting for 18 August could not yet have been in the representative's mind. Even if they were, there is no evidence of any dispute. The contents of the email itself merely relate to Mr Woodhead being apprehensive about his future because he felt any slight misdemeanour would see him dismissed, which is an event in the future. Therefore I conclude that this was a situation where while it was clear that a dispute may have arisen it had not and the communication was created to prevent such a dispute arising. Hence I have taken into account the document headed *without prejudice* and those that followed.

The Law on Personal Grievances

[42] The minimum requirements of procedural fairness are as set out in *NZ (with exceptions) Food Processing etc v. Unilever New Zealand Ltd* [1990] 1 NZILR 35 at 46, being:

- (1) *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequence if the allegation is established;*
- (2) *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
- (3) *An unbiased consideration of the worker's explanation in the sense that that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

[43] A failure to respond when a reasonable opportunity has been given entitles an employer to draw an adverse inference from that failure, *Northern Club Auckland v. Northern Hotel etc IUOW* [1989] 1 NZLIR 764.

[44] In *Trotter v. Telecom Corporation of NZ Ltd* [1993] 2 ERNZ 659 dismissal for poor performance was held to involve an employer reaching a view on a number of questions, which included, at 681:

- (1) *Did the employer in fact become dissatisfied with the employee's performance of his or her duties?*
- (2) *If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?*
- (3) *Was the information given to the employee readily comprehensible in the sense of being an objective criticism of the work so far and an objective statement of standards requiring to be met?*
- (4) *Was a reasonable time allowed for the attainment of those standards?*
- (5) *Following the expiry of such a reasonable time and following reasonable information of what was required of the employee, did the employer turn its mind fairly to the question whether the employee had achieved or substantially achieved what was expected, including:*
 - (a) *Using an objective assessment of measurable targets;*
 - (b) *Fairly placing the tentative conclusions before the employee with an opportunity to explain or refute those conclusions:*
 - (c) *Listening to the employee's explanation with an open mind;*
 - (d) *Considering the employee's explanation and all favourable aspects of the employee's service record and the employer's responsibility for the situation that had developed (for example, by not detecting weaknesses sooner or by promoting the employee beyond the level of his or her competence); and*
 - (e) *Exhausting all possible remedial steps including training, counselling, and the exploration of redeployment?*

Determination

[45] I need to assess each warning to see if it was justified, in order to assess whether the dismissal itself was justified. In each case I accept that Resene had become dissatisfied with Mr Woodhead's performance of his duties. In the case of both warnings, he was entitled to representation, given fair notice of the allegations and an adequate opportunity to explain his position.

[46] Before the first warning was issued Mr Woodhead had been told on a number of occasions that the standard of his work was not up to scratch. In particular, he was advised that his work had to be closely supervised after concerns were raised by the General Manager following a costly error attributed to Mr Woodhead.

[47] Given what it saw as substantial errors creeping into his work, Resene was justified in calling him to a disciplinary meeting on 27 June 2008. At that meeting Mr Woodhead did not have an explanation for the poor standard of work that was acceptable to Resene. I accept that it was entitled to reject his explanations, such as they were. The explanations given at the Authority's investigation meeting about an unreliable computer were never made at the disciplinary meeting. Resene then set about setting about monitoring his performance, using an objective assessment of measurable targets, which Mr Woodhead agreed to (the 95% target).

[48] The warning was issued far later than best practice would dictate. This is not fatal, however, because of my acceptance of the Technical Manager's reasons for the delay and the need to not subject the process to pedantic scrutiny (*Unilever*).

[49] There was nothing in the employment agreement between Mr Woodhead and Resene which required the issuing of more than one warning for poor performance. In the particular circumstances of this case, given the ongoing issues over colour matching and Mr Woodhead's undoubted ability when he applied himself, I accept that it was reasonable for Resene to conclude that a final warning was justified.

[50] The second disciplinary meeting followed the same process. Mr Woodhead was advised of the details of the concerns about him and was represented at the meeting, where he was given a full opportunity to explain his position. In many ways it could be said that Resene took a generous view towards his explanations for working overtime on Saturdays without authorisation, not working the full four hours claimed, and surfing on the internet while claiming to be working. It was justly

entitled to restate/reissue the final warning. I accept that there was no disparity of treatment compared to a colleague who also worked some Saturdays without specific approval, as there were no issues with the hours claimed being for time not actually worked, or misuse of the internet.

[51] I would note, however, that the warning should have been accompanied by some time period, with a maximum duration of one year perhaps, but Resene did not try and rely on any warnings that could possibly be seen as stale in dismissing Mr Woodhead. Furthermore, it was wrong of Resene to incorporate fresh allegations into the first final warning letter. The allegations were not, however, of the same nature as those that led to the restated final warning and therefore this was not a case of Resene not providing a reasonable time for Mr Woodhead to improve his performance. Furthermore, simply failing to put two separate issues into separate letters is not so substantial a failing as to make either of the warnings unjustifiable, as minor deviations from the standards of perfection do not make warnings unjustifiable.

[52] I turn now to the disciplinary issues which led to Mr Woodhead's dismissal. Given Mr Woodhead's long period of service, I accept that the month given was a reasonable time for Mr Woodhead to maintain the standards required of him throughout his employment. Given the number of poor matches of concern to Resene over such a short period it was appropriate for it to turn its mind as to whether Mr Woodhead had substantially achieved what was expected of him. It did use an objective assessment of measurable targets. The 95% standard was an agreed target and was measurable by Mr Woodhead's supervisor and the Technical Manager.

[53] In all the circumstances, I consider that Mr Woodhead had a fair opportunity to explain or refute the employer's concerns, which had been properly put before him in writing. He could have sought to look at the matches - for instance they had been made available at the first disciplinary meeting. He instead chose not to participate in the employer's investigation on the basis that he was ill. I accept, in a general sense, that it is stressful for employees to have to attend disciplinary meetings, especially when they are on formal warning. The fact is, however, that Mr Woodhead was able to do gardening and attend the local tavern twice a week. In these circumstances the disciplinary investigation can not be seen as so stressful to Mr Woodhead that he was unable to respond, at least in writing. Good faith runs both ways as between employers and employees. An employer is entitled to consider an employee is not

acting in good faith if they take sick leave and will not attend a disciplinary meeting when they are able to socialise at the local tavern twice a week.

[54] Resene thus had good grounds to doubt that the degree of Mr Woodhead's illness was such that he could not attend a disciplinary meeting, because of its knowledge that he was regularly attending the local tavern twice a week in the afternoons, and because of the suggestion from his representative that he would leave, provided he was paid out some of his sixty days accumulated sick leave.

[55] Mr Woodhead was given plenty of time to attend such a meeting. In the alternative he was given an opportunity, should he have been so unwell that he could not attend a meeting, to provide submissions in writing. It may be, with the benefit of hindsight, that a bit longer (say another week) could have been provided to Mr Woodhead to give a response, but in actual fact that would have made no difference as his representative's position on this matter had hardened.

[56] In the absence of an explanation from Mr Woodhead, Resene was entitled to conclude, as it did, that Mr Woodhead should be dismissed on notice (*Northern Club Auckland*). The amount of unsatisfactory work on colour matching was very high and gave Resene, as a fair and reasonable employer, grounds for dismissing Mr Woodhead. There were no reasons why Mr Woodhead could not have met the standards he agreed to, had he applied himself. I accept that Resene genuinely and fairly concluded that redeployment was not a viable option in the current economic circumstances and there did not appear to be any likelihood that Mr Woodhead's performance would improve. It was also open to Resene to conclude that training was not the issue and therefore further training would not assist.

[57] I do not accept that Mr Woodhead was dismissed in order to save Resene from paying him sick leave. Mr Woodhead was not dismissed for an ongoing illness. Neither do I accept that Mr Woodhead was dismissed so that the matter could be dealt with before the Technical Manager went on maternity leave. The Technical Manager was not due to take leave until October. Furthermore, I accept that there are other managers at Resene who could have pursued this matter to its conclusion.

[58] A claim was also made in submissions that a new computer system would be coming in and therefore Mr Woodhead's position would have been made redundant. I do not accept that the reason why Mr Woodhead was dismissed was to save Resene

from making him redundant. Rather I conclude that because of the present economic situation Resene has been able to carry on without Mr Woodhead, because of lessened demand for its products and services and more work being given to other staff.

[59] Finally, contrary to submissions from Mr Woodhead, Resene was entitled, under clause 11(c) of the employment agreement, to pay him in lieu of notice.

[60] Mr Woodhead's dismissal was therefore justified as it was what a fair and reasonable employer would have done at the time in all the circumstances.

[61] Even if I am wrong in this conclusion, I would note that Mr Woodhead's evidence was such that it was clear that he had not mitigated his loss. Therefore he would not be entitled to any compensation for lost remuneration. In particular, he only looked for a small number of jobs and declined one on the basis that he did not want to work on weekends. Furthermore, his evidence was that he had not registered with the Department of Social Welfare, even although he knew that it could have assisted him to prepare a proper curriculum vitae, which was one reason for him missing out on another job. He appeared satisfied with working part time hours in the local tavern. He also relied on his savings. He kept himself busy maintaining his house and helping out at the cricket club. While these are both laudable activities, they do not constitute mitigation of loss as required by law. He was, in my conclusion, not actively seeking work when he was required to do so.

[62] Furthermore, Mr Woodhead gave limited evidence of the impact of the dismissal on him and therefore any award of compensation would be at the lower end of the scale.

[63] Finally, were Mr Woodhead to have been successful in his claim of unjustified dismissal, there would have been considerable scope for reductions of any remedies because of contributory fault. In particular, Mr Woodhead's standard of work was unacceptable compared to what he was capable of, and he could have done more to either provide the information Resene wanted in the disciplinary processes, or give more detailed responses as to why he could not meet with it. Had he been successful therefore, it is likely that any remedies he would have recovered would have been minimal.

Costs

[64] Costs are reserved.

G J Wood
Member of the Employment Relations Authority