Determination Number: AA 432/05
File Number: AEA 1054/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Werner Comes (First Applicant) **AND** Werner Comes (Second Initiating party)
AND	National Pacific Radio Trust (First Respondent) **AND** National Pacific Radio Trust (Second Responding party)
REPRESENTATIVES	Jim Roberts, Counsel for Applicant Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY	Y S Oldfield
INVESTIGATION MEETING	26 October 2005
DATE OF DETERMINATION	31 October 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Comes was the Financial Controller of Niu FM from September 2004 until September 2005 when he was dismissed. He says this dismissal was unjustified and seeks reinstatement to his position. Niu FM say that he failed to follow a reasonable request from Chief Executive Sina Moore and that this justified dismissal for serious misconduct. The issues for determination are:

i. Whether it was open to the employer to conclude that Mr Comes failed to carry out a reasonable instruction;

ii. Whether the disciplinary process was fair, and

iii. Whether the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time.

(i) Was it open to the employer to conclude that Mr Comes failed to carry out a reasonable instruction?

[2] In around May 2005, at Mr Comes's instigation, Niu FM adopted a travel policy which provided that transport to the airport during normal working hours was to be by shuttle rather than taxi. In August, when checking the taxi company account, Mr Comes realised that a member of the sales team ("Mr W") had used a taxi to get to the airport at a time when he should have used a shuttle. Mr W had a history of making contentious expense claims. On 23 August Mr Comes emailed Mr W requesting that he pay the difference out of his own pocket. A

week later no payment had been forthcoming so without further discussion with anyone Mr Comes arranged for a deduction from Mr W's retainer of the $30.00 in question.

[3] Ms Moore signed off the payroll for that week but did not pick up the arrangements for the deduction. (It was not her practice to check the payroll in any detail.) It is not disputed that she (along with Mr Comes) must bear responsibility for the making of the deduction.

[4] Mr W immediately protested to Ms Moore that a deduction had been made from his salary without his consent. She investigated and confirmed that this was the case. She also investigated the alleged breach of the travel policy, speaking with Mr Comes, Mr W, the sales manager (to whom Mr W reported) and the receptionist who had booked the taxi. She considered what she had heard and decided that the money should be repaid to Mr W. On Friday 2 September she met with Mr Comes to tell him what she had decided. He responded by saying that if he was asked to reimburse Mr W he would not do it.

[5] Ms Moore followed this up by sending him this email at 1.48pm that day:

*"Werner I have thought further about the shuttle/taxi issue and will not be asking [*Mr W*] pay to pay [*sic*] this amount given the circumstances:*

1. *[*Mr W*] said he asked [*the receptionist*] to book 'transport' to airport (his word against hers) but more importantly,*
2. *deduction made from his salary/retainer was without prior discussion with [*Mr W*].*

I do not want to run the risk of getting into employment dispute/problem over point 2, esp as point 1 could be disputed as well as to where responsibility lies.

*Just letting you know before I email [*Mr W*].*

We will need to reimburse him electronically … if you can set up the payment."

[6] Just four minutes later Mr Comes responded:

"Sina,
*Just to remind you – I will NOT prepare a payment, nor will I authorise it, if you chose [*sic*] to prepare it."*

[7] Ms Moore had left for a meeting after sending the Friday email and did not see this response then. She replied on the morning of Monday 5 September at 9.33 as follows:

*"As per my email and request on Friday – I would like you to prepare the payment for [*Mr W*] so it can be paid today."*

[8] Two minutes later Mr Comes replied:

"I haven't changed my mind on that."

[9] Later in the morning he followed up with:

*"Sina I have prepared a payment, which includes PAYE and $71.66 reimbursement to [*Mr W*]. As I said before, I do not accept [*Mr W*]'s explanation, nobody asks for 'transport' and in my opinion he is responsible for using the taxi, contrary to our policy. Accordingly the $30.00 is and will not be included in the payment."*

(The payment of $71.66 rectified another erroneous deduction for cell phone calls and is of no relevance here.)

[10] Ms Moore responded, again by email, at 1.09pm on Monday 5 September:

"Talofa Werner

The issue at hand is not whether you accept [Mr W]'s explanation but the request I have made twice now for you to reimburse for the deductions you unilaterally made without consulting me or the sales manager, on behalf of the organisation that this organisation was not entitled to make.
*Whether [*Mr W*] should be liable for reimbursing NiuFM for the difference in the taxi/shuttle fare is something I have investigated and after discussion with both you and [*the sales manager*] I have decided that in this instance he won't be held responsible. I know what the policy is, have reminded [Mr W] and have reminded [*the receptionist*] who books the taxis/shuttles to ensure that this does not happen again in the future.*

*I have outlined what I would like you to do, and am directing you to include in [Mr W]'s payment the $30.00 he is owed, and to have this ready by 3.30 pm today for me to authorise along with the other payment to [*Mr W*]*…

Determination

[11] Mr Comes has never disputed that he refused to follow Ms Moore's direction. His argument was that he should not have to do so. Early in my meeting with the parties, after taking advice, he conceded that the instruction was lawful and proper. For completeness however I make the following points on this issue.

[12] Niu FM was obliged to remedy what amounted to a breach of the Wages Protection Act 1983. On that basis alone it was both reasonable and lawful for Ms Moore to instruct Mr Comes as she did. In addition, it was open to Ms Moore to conclude a breach of the travel policy had not been established, in which case there was no question of Mr W owing his employer anything anyway.

[13] Ms Moore's emails amount to clear and unambiguous instructions to Mr Comes to arrange to repay Mr W. His responses show that on more than one occasion he failed (indeed, refused) to comply with these clear and reasonable instructions. His non-compliance was calculated and intentional.

[14] Mr Comes failed, openly and deliberately, to carry out a lawful and reasonable instruction.

(ii) Was the disciplinary process fair?

[15] Ms Moore's 1.09pm email to Mr Comes on 5 September continued as follows:

In relation to the two instances where you have advised me that you were not prepared to carry out my instructions with respect to the reimbursement I regard these as extremely serious. I request your attendance at a disciplinary meeting on Monday 12 September 2005 at 10am, the outcome of which may impact on your future employment. If this time is not suitable, then please advise. If you wish you may like to have a support person to attend with you."

[16] Later that day Mr Comes took ill. As a result the disciplinary meeting was deferred until 19 September. Before he went home Mr Comes emailed Board Member Ken Williams as follows:

"Hi Ken
*I wonder if I could ask you to attend the meeting as well, not necessarily as my advocate but as a board member, and a person who I can trust to be fair. I have doubts that if I sit opposite of Sina and Simativa [*the Board chair*] I wouldn't get a fair hearing, because I now doubt [*sic*] about their intentions"*

[17] Mr Comes told me that he also spoke with Mr Williams on the phone on or around 12 September whilst still on sick leave. He says they talked about several matters and he mentioned to Mr Williams "*the possibility that they could sack me*." He said that Mr Williams assured him that "*Sina is a long way from that*." Mr Williams disputes that this exchange took place.

[18] Also on 12 September Mr Comes sent Ms Moore a lengthy email responding to her request for him to attend the disciplinary meeting. In it he made the following points:

- The original deduction from payroll had been authorised by her and so responsibility for this lay with her;
- In his role as financial controller he was responsible for the authorisation of orders, approval of invoices and verification of expense claims and had delegated authority to approve payments of up to $1,000.00. He therefore considered himself able to approve or decline a payment of $30.00;
- The CEO had the right to overrule him but this should be reasonable, and be done only in exceptional circumstances and in good faith.
- He did not think these factors applied here as the staff member concerned was not entitled to repayment according to the travel policy;
- He wanted to "*check the conditions which I believe would be attached to an event of you overruling my decision."*

[19] At Mr Comes's request the disciplinary meeting was held away from the respondent's premises, at the offices of the respondent's solicitor, Mr France. Prior to the meeting Ms Moore asked Mr Comes to let them know if he was bringing a support person.

[20] Present at the meeting were Mr Comes, Ms Moore and Mr France. Much of what took place at that meeting is not in dispute. Mr Comes had not brought along a support person so at the beginning of the meeting Mr France asked if Mr Comes wished to have a lawyer or representative with him. Mr Comes confirmed that he did not. Ms Moore then "*outlined the allegations of serious misconduct and that three times Mr Comes had refused to follow my instructions."* She said that there were a number of possible options. Ms Moore says that she mentioned dismissal as one of the options but Mr Comes cannot recall this. Mr France, who took notes, has no record of a comment relating to dismissal so I give Mr Comes the benefit of the doubt on that point.

[21] Ms Moore went on to say that no decision had yet been made as she wanted to hear what Mr Comes had to say. Mr Comes referred to his email of 12 September and said that he had nothing to add. Ms Moore told him that as CEO she had the right to overrule him and asked if he would follow her instructions in future. Mr Comes was not prepared to commit to this saying that it would depend on the context.

[22] Mr Comes then made the comment that he would need to get legal advice. Both Ms Moore and Mr France understood him to mean that depending on the circumstances, he would need to

get legal advice before following an instruction from Ms Moore. Mr Comes now says that this was not what he meant; in fact he wanted to adjourn the disciplinary meeting and get legal advice on his employment rights. However I am satisfied that if this was what he wanted, he did not make it clear at all. Mr France gave evidence at my investigation meeting. He stressed that he was present on 19 September to ensure that proper procedure was followed. He says that there was no hint that Mr Comes had changed his mind about wanting representation or advice; if there had been the meeting would have been halted immediately.

[23] In my own meeting with Mr Comes I asked why he had not been prepared to give Ms Moore a commitment that he would follow instructions. He said that he could not give a 100% commitment as he thought there might always be situations where he could not follow instructions.

[24] The meeting ended with Ms Moore advising Mr Comes that she would get back to him within a day or two. Over the next day Ms Moore considered the issues. She told me that she felt that Mr Comes's failure to follow reasonable direction constituted serious misconduct. She said that Mr Comes had not acknowledged this nor (when given the opportunity) had he given any undertaking or assurance that in future he would follow reasonable direction. She felt that in these circumstances the relationship had broken down and she had no choice but to terminate his employment. She told me that she considered a written warning but did not feel this was appropriate given his unwillingness to commit to following her instructions in the future. She felt, therefore that "*there was insufficient trust between us to enable us to have a proper functioning working relationship as is required between a CEO and a CFO."*

[25] On 21 September he was called into a second meeting. This time instead of Mr France, Mr Simativa Perese (who chaired the respondent's governing Board) was present with Ms Moore. Ms Moore read from a letter confirming that Mr Comes was dismissed for serious misconduct, effective immediately.

Determination

[26] Mr Comes has two principal concerns with the procedure that was followed. One is to say that the disciplinary meeting of 19 September should have been adjourned at the point where he raised the issue of needing legal advice. I have accepted the evidence of Ms Moore and Mr France on this point and conclude that Mr Comes said nothing to make them aware that he had changed his mind about wanting legal assistance. It is incumbent on employers to take responsibility for ensuring that the entire process is fair but in this case I am satisfied that Ms Moore with assistance from Mr France did all that could be expected. There was no procedural unfairness in relation to this issue.

[27] Mr Comes's other concern is, he says, that he was never clearly put on notice that dismissal was a possible outcome of the disciplinary process.

[28] The email of 1.09 pm on 5 September informed Mr Comes that a disciplinary process was about to commence. It is correct that it did not expressly mention the word dismissal. However it describes his conduct as "*extremely serious,*" notes that the outcome of the meeting may "*impact on his employment,*" and advises him of his entitlement to bring a support person to the meeting. Taken as a whole the email does convey that the situation is serious and that his employment (including the very fact of employment) could be affected. My findings in relation to this point are reinforced by Mr Comes's evidence of what he said to Mr Williams on 12 September, and his email to him on 5 September, both of which demonstrate that he was well aware of and concerned about the possibility that he could be dismissed.

[29] I am satisfied therefore that he went in to the meeting of 19 September on notice that his employment was potentially in jeopardy. At the meeting Ms Moore put to him the allegation of serious misconduct: that he had three times refused to follow her instructions. The facts of the refusals were not in themselves disputed (being recorded of course in the emails.) He was given a further opportunity to be heard (his email of 12 September also forming part of the material within Ms Moore's consideration.) I find nothing improper with the way that meeting was conducted. It provided Mr Comes with an adequate opportunity to explain why he had not followed Ms Moore's instruction and why he felt it was not one he should have to follow.

[30] I conclude that there was no breach of procedural fairness.

(iii)Was the dismissal what a fair and reasonable employer would have done in all the circumstances at the time?

[31] Mr Comes's employment agreement contained the following;

"33.1 Conduct

(a) The employee shall be bound by, and comply with all lawful and proper instructions given by or on behalf of the employer….

…

33.2 Misconduct

(a) The following are offences which amount to serious misconduct and which may give rise to instant dismissal:

(iii) "Refusal to undertake the duties of the employee's position, or to carry out any proper and lawful instruction given by the employer or any other person acting with the authority of the employer

[32] The employment agreement also provides that Mr Comes reports to the Chief Executive.

[33] He says however that against these provisions must be weighed the fact that the respondent's policy was that any payment to be made on an electronic basis had to be authorised by two people. Mr Comes and Ms Moore were two of the three individuals with the necessary authority, the other being the Board chair. Mr Comes told me that his position required a degree of independence and argued that there was no point there being a requirement for two authorities if he could not disagree with the Chief Executive.

[34] In this case, he told me, he rejected the payment because he felt that it was not correct and felt that Ms Moore had undermined his position by asking him to make it. At the Authority's investigation meeting, after taking advice, he conceded that the instruction was lawful and proper. He remained unprepared to concede that in addition Ms Moore was entitled to the view that no breach of the travel policy had been made out.

[35] Ms Moore conceded that dual authorisation meant that as part of a system of checks and balances Mr Comes had a responsibility to challenge a payment if he thought it should not be made. She told me that in the event that a Chief Executive were to give an instruction of

questionable propriety and/or lawfulness, a concerned Financial Officer could approach the Board for assistance.

[36] Mr France told me that he felt that Ms Moore had been pushed into a situation where she felt she had to do something. He said his perception of the meeting of 19 September was that she wanted to give Mr Comes an opportunity to acknowledge that the direction was fair and one she was entitled to make, and to say it would not happen again. Unfortunately she was met instead with outright refusal and defiance: Mr Comes was not about to change his view.

Determination

[37] Mr Comes is in my view entirely correct when he says that the system of financial checks and balances which was in place entitled (indeed obliged) him to challenge the Chief Executive if he had concerns about the propriety of a payment she instructed him to make. However if such concerns turn out to be without substance her authority should prevail as set out in Mr Comes's employment agreement.

[38] No blame attaches to Mr Comes for the original deduction, it was authorised by Ms Moore. Nor does blame attach to him for giving a strongly expressed view about whether a repayment should be made. However, after taking what he had to say into consideration, and explaining her reasons, Ms Moore gave him an instruction. It was direct, lawful, proper and reasonable. This should have been abundantly clear to him. His refusal to comply with it was deliberate and without any justification. There can be no doubt that this was serious misconduct in terms of paragraph [33] of his employment agreement.

[39] Mr Comes says that this was much too trivial a matter to warrant his dismissal. I disagree. The surrounding circumstances point to an irretrievable breakdown in the employment relationship. This was not a disagreement that could be resolved (as Mr Comes asserts) by better management on Ms Moore's part. She asked him not once, but three times, to do as she asked. She did him the courtesy of explaining her reasons (and they were in my view entirely the right ones.) Finally, she asked him to commit to accepting her authority in the future. He would not. It is hard to see how she could have run the organisation with a financial controller whom she could not rely on to action the simplest and most straightforward of requests. By his conduct Mr Comes irreparably damaged the trust and confidence which is essential to the employment relationship.

[40] I accept the argument that Mr Comes effectively backed Ms Moore into a corner and left her with no choice but to dismiss him. I am satisfied that the dismissal was what a fair and reasonable employer would have done in all the circumstances at the time. There is nothing more that I can do to assist Mr Comes with his employment relationship problem.

Costs

[41] This issue is reserved. If the parties are unable to agree costs any submissions on the issue should reach the Authority within 28 days of the date of this determination.

Y S Oldfield
Member of Employment Relations Authority