

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Kim Power (Applicant)

**AND** Areva (NZ) Limited, formerly Alstom (NZ) Limited (Respondent)

**REPRESENTATIVES** Amanda Gordon, Counsel for Applicant  
Justine O'Connell, Counsel for Respondent

**MEMBER OF AUTHORITY** Vicki Campbell

**INVESTIGATION MEETING** 24 January 2005  
25 January 2005

**SUBMISSIONS RECEIVED** 10 February 2005 from Applicant  
7 February 2005 from Respondent

**DATE OF DETERMINATION** 31 March 2005

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Mr Power was employed as a contract manager for Areva (NZ) Limited, formerly Alstom, Rotorua reporting to Mr Roger Foy, General Manager Transmission. The respondent referred to throughout this determination as "Alstom". Mr Power was one of three managers located at the Rotorua site and had held this position for just over three years. The Transmission division in Rotorua had one major client, Transpower.

[2] Mr Power was dismissed following an investigation by Alstom into the manner in which Mr Power was disposing of scrap metal and the use of funds received from such disposals. Mr Power claims his dismissal was unjustified. Further Mr Power claims Alstom has not complied with its good faith obligations imposed by the Employment Relations Act 2000.

[3] Alstom says in response, that Mr Power was dismissed after a full and fair enquiry led to Alstom concluding it no longer had the necessary trust and confidence in Mr Power to perform his role of manager. Alstom says the dismissal was justified in all the circumstances.

[4] The issues for determination in this matter are:

- whether the dismissal is justified in all the circumstances; and
- did Alstom breach its obligations of good faith when undertaking the disciplinary process?

**Is the dismissal justified in all the circumstances?**

[5] 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.

[6] 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.

[7] 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).

[8] Alstom has a comprehensive Quality Manual outlining the company's policies and procedures. Company managers and their staff are expected to adhere to these policies. This will necessarily require managers to be familiar with them. Mr Power told me at the investigation meeting that he hadn't read all the policies or become familiar with them all because he simply "...couldn't read everything."

[9] The applicable policies included:

- General Accounting
- Expense Claims and Entertainment Tax
- Delegations and Authorisations

[10] This matter relates to the manner in which Mr Power dealt with the disposal of scrap metal. Scrap metal is the metal purchased for a client for a specific purpose but is left over and not required for the purpose for which it was purchased. There is no policy explicitly dealing with disposal of minor amounts scrap metal. The disposal of large quantities of scrap metal is usually provided for specifically in the contract between Alstom and its client.

[11] The contract between Alstom and Transpower did specify the way large amounts of scrap metal from projects was to be disposed of but did not specify what is to happen to small amounts of scrap metal. It is not uncommon for Alstom staff to arrange for the disposal of small amounts of scrap metal on behalf of Alstom's clients.

[12] On 4 July 2003, Mr Bruce Trow, Business Manager Transmission, received information which raised concerns about the way the disposal of scrap copper at the Rotorua site was being handled. Mr Trow was about to depart on two weeks annual leave so he contacted Mr Foy and advised him about the concerns. It was agreed that Mr Trow would follow the matter up on his return from leave and would ascertain whether there was any substance to the concerns.

[13] In late July 2003, Mr Trow made some general enquiries. In the first week of August 2003 Mr Trow visited the Rotorua branch and met with a Mr Brendan Bennett, a 16 year old apprentice working in Mr Power's division. Mr Trow also met with two senior electrical services staff. Comments made during these meetings raised concerns for Mr Trow over Mr Power's process in disposing of scrap metal, the use of Alstom time and materials at the local BMX track, and the apparent disappearance of copper droppers and copper tubes from the Rotorua site.

[14] Following his enquiries Mr Trow then set about gathering information regarding monies received from scrap metal merchants in the Bay of Plenty and general practices used for the disposal of scrap metal by various service centres.

[15] Mr Trow consulted with Mr Foy regarding the results of his enquiries and it was decided to follow up the concerns the following week when both men would visit the Rotorua site and discuss the concerns with Mr Power.

[16] Mr Power heard rumours that the Rotorua site was being investigated. On 14 August 2003 he contacted Mr Foy who advised Mr Power that they were looking into some issues, without providing any specific information.

[17] On Friday, 15 August 2003, Mr Foy and Mr Trow attended the Rotorua site and met with Mr Power. Mr Power told the Authority that during their meeting Mr Foy advised him they were looking into the scrap side of the business and that things didn't appear to be "...*kosher to Alstom business.*"

[18] Mr Power was asked about the use of an Alstom carpenter undertaking work on his house. Mr Power denied this had happened. He was asked about some scrap metal which had disappeared – copper pipe. Mr Power was also asked about the BMX track and the apparent supply of equipment to the track.

[19] As a result of their meetings and discussions with Mr Power, Mr Brian Rankine, a supervisor at the Rotorua site, the lead administrator Ms Jill Withington, Mr Foy and Mr Trow decided that further enquiry was necessary.

[20] Mr Foy was dissatisfied with Mr Power's answers to questions regarding the copper pipes and the disposal of scrap. Mr Foy contacted Mr Power on 18 August 2003. Mr Foy advised him about his concerns over the disposal of scrape metal. In particular Mr Foy wanted to find out how the disposal of scrap metal was being managed, and he also wanted to ascertain the validity or otherwise of the allegations concerning the BMX track and the use of carpenters. Mr Foy also advised Mr Power that he was visiting Rotorua the following day and wished to talk to a cross section of staff and asked him to make arrangements for this to occur.

[21] Mr Power did not recall having the conversation on 18 August 2003. However, I am satisfied that the conversation did take place. Immediately following his telephone conversation Mr Foy sent Mr Power and Ms Withington an email with a list of the names of the 13 staff members Mr Foy wished to speak with. In that email Mr Foy asked Mr Power and Ms Withington to make arrangements for 20 minute meetings with each of the staff members named with the first commencing at 10.30am the following day.

[22] During Mr Foy's discussions with Mr Power, Mr Power had advised Mr Foy that he had an arrangement with Mr Arthur Broomhall, the local manager for Transpower whereby he would sell the scrap metal and give Mr Broomhall the proceeds in an envelop, in cash.

[23] Mr Foy contacted Mr Bob Coombes, Regional Manager of Transpower. Mr Foy advised Mr Coombes that he was investigating the management of scrap metal from Transpower projects and asked for evidence of money receipted from Alstom, Rotorua. Mr Coombes was unable to be of any assistance. The Authority understands that as a result of this telephone conversation Transpower embarked on its own internal investigation.

[24] On 19 August 2003, Mr Trow and Mr Foy attended Rotorua and interviewed the 13 staff. Mr Trow and Mr Foy also met and discussed the matters once again with Mr Power. Mr Foy outlined the results of their investigation to date including his conclusion that there was no process in place to accurately record and receipt the monies received from the disposal of scrap metal for Transpower. At that same meeting Mr Foy advised Mr Power of his conclusion that there was no substance to the allegations concerning the BMX track and the use of carpenters on his [Mr Power's] house.

[25] Mr Power was advised at the meeting that the only remaining issue was in relation to the management of monies received from the sale of scrap metal and further enquiries would be undertaken. Both Mr Foy and Mr Trow say Mr Power accepted the reasons for the ongoing investigation on 19 August 2003.

[26] On 20 August 2003 Mr Trow met with both Mr Peter Collier of Tally Ho and then Mr Jim Cook of Industrial Traders, the two companies used by Mr Power for the disposal of scrap metal.

[27] As a result of his enquiries Mr Trow established that Tally Ho, after a specific request to do so, paid cash for all scrap metal. Tally Ho provided Mr Trow copies of three dockets for amounts totalling \$1,754.20. Two of the dockets are clearly dated 19 May 2003. The date on the third docket is not clear but was taken by Mr Collier and Mr Trow to be the same date. Mr Collier advised Mr Trow that Mr Power collected the cash relating to the three dockets and had specifically requested three separate dockets. Mr Collier also advised Mr Trow that Mr Power had been present at the Alstom site on Saturday 17 May 2003 when the scrap metal relating to these dockets, had been collected.

[28] Industrial Traders confirmed that they also paid cash for the scrap metal. Mr Cook specifically recalled Mr Power picking up an envelope with cash in exchange for a trailer load of scrap.

[29] Mr Trow spoke to Mr Power and during that conversation he advised Mr Power about the dockets provided by Tally Ho. Mr Power indicated he would go and see Mr Collier himself.

[30] Mr Trow contacted Mr Foy and advised him of his conversation with Mr Power. Mr Foy contacted Mr Power immediately and instructed him not to visit Mr Collier. Mr Power acted against that instruction and visited Tally Ho on 21 August 2003, and spoke with Mr Collier.

[31] The company investigated Mr Collier's assertion that Mr Power had been on site on Saturday 17 May 2003 when scrap metal relating to the three dockets had been picked up. Armourguard confirmed from its own records that it was Mr Power's access codes which had been used to open and close the yard on Saturday 17 May 2003.

[32] On 20 August 2003, a detailed account of the investigation to date was compiled by Mr Foy and Mr Trow. This document was never made available to Mr Power. Under the heading "*Scrap Metals*" the report identified inconsistencies in the handling and documentation of scrap. The report also commented that the money received for the scrap metal is either given back to Transpower, split between Transpower and Alstom to be used for staff shouts, or used entirely on staff shouts. The report stated that no documentation is used to show the flow of the money into or out of Alstom.

[33] The report also records that there are "*stirrers*" in the Rotorua workforce who are motivated by jealousy and who look for opportunities to criticise management. The jealousy is said to arise from the fact that in the past they managed the very people who are now managing them.

[34] On 22 August 2003 Mr Trow visited with Mr Collier once again. Mr Collier advised that he had had a discussion with Mr Power the previous day relating to the three dockets. Mr Collier confirmed to Mr Trow that Mr Power was the only person who collected the cash for scrap metal and that on 20 June 2003 Mr Power had collected a further \$779.00 for some copper brought down on 19 June 2003. Mr Power had not mentioned this money being received. It was this information which became the catalyst for the company escalating the matter to a disciplinary process.

[35] On 22 August 2003 Mr Foy requested Mr Power to attend a formal disciplinary meeting. It was agreed that Mr Power would be stood down on pay until the process had been completed. He was also told that his on-going employment may be affected and was encouraged to seek professional representation. Mr Power told Mr Foy he had received \$2,600 at Christmas 2002 which was used on the staff Christmas function and that Mr Rankine, had receipts for \$300 and \$1,752 which had been used to secure the venue for the 2003 Christmas Function. Mr Power did not mention the \$779.00.

[36] Mr Foy and Mr Trow spoke with Mr Rankine who produced the two receipts. They also spoke with the proprietors of Aorangi Peak where the 2002 Christmas function had been held. The proprietors confirmed that the food account for the function was \$4,620.00. This amount was paid

for by Alstom and had previously been authorised expenditure. Mr Foy and Mr Trow were advised that a further \$2,114.50 for drinks was spent and paid for on two credit cards, one belonging to Mr Power and the other belonging to another manager of the respondent. Another cash tab for \$439.00 was also spent during the function. Including the \$2,600 which Mr Power says was used to purchase 70 bottles of wine (but for which no receipts were provided) the total amount spent on the 2002 Christmas function was \$9,773.50. This amount is in excess of the contributions made by Alstom for Christmas functions for staff not located in Rotorua.

[37] On 26 August 2003 Mr Power attended the disciplinary meeting with his lawyer, Mr Lawson. Mr Power says that at the meeting Mr Trow would not listen and would not accept his explanations. Mr Power says that Mr Trow became heated during the meeting, to the extent that Mr Foy had to calm him down. Mr Foy agrees that the meeting deteriorated but he blames that on Mr Lawson. Mr Trow says he became frustrated that Mr Lawson would not allow Mr Power to answer any questions.

[38] The meeting was adjourned. Mr Foy says he wanted to continue to discuss the matter with Mr Power, but Mr Lawson requested instead a copy of the questions the company had prepared prior to the meeting, and advised that Mr Power would respond in writing.

[39] Mr Power responded in writing on 27 August 2003. Mr Foy was not satisfied with the response and requested a further meeting with Mr Power to seek clarification on areas of concern. The meeting took place on 28 August 2003. This meeting also deteriorated and ended with a request by Mr Lawson for the company to put any further questions in writing. Instead Mr Foy verbalised to Mr Lawson the questions which he was still seeking answers to.

[40] On 29 August 2003, Mr Foy confirmed in an email to Mr Lawson his understanding that the questions would be responded to by 1 September 2003. Mr Lawson responded by return email advising Mr Foy that Mr Power was suffering from stress as a result of the meeting the previous day. Mr Power had been advised by his doctor not to be involved in any work or work related issues and based on that advice he would not be answering any further questions until a medical clearance had been obtained.

[41] On 5 September 2003 Mr Foy wrote to Mr Lawson confirming the three questions requiring answers outstanding from the 28 August 2003 meeting. Mr Foy acknowledged the notification that Mr Power was suffering from stress. Mr Foy advised that the company intended to conclude the matter in a timely manner and offered Mr Power an opportunity to provide answers to

the questions by 8 September 2003. Mr Foy stated that a decision would be made based on the information available to it, at that date.

[42] Also in this letter Mr Foy set out the company's preliminary view that Mr Power should be dismissed from his employment due to the Company losing trust and confidence in Mr Power and set out the reasons for this conclusion.

[43] Notwithstanding his medical advice Mr Power responded on 8 September 2003. The following day, on 9 September 2003, Mr Power's employment with Alstom was terminated as a result of a finding by the company he had failed to comply with financial management procedures and that Alstom had lost trust and confidence in Mr Power because of a conclusion that Mr Power had not always been truthful in his responses.

[44] On 11 September 2003 an envelope addressed to "*Transpower*" containing \$779.00 cash was found in Mr Power's filing cabinet under a file labelled "*Arthur TP*".

[45] Mr Power's view of the matter is that the scrap metal belonged to Transpower and therefore any money received from the sale of the scrap belonged to Transpower. He says therefore, Transpower could direct how that money was to be spent. If Mr Broomhall said the money could be used on shouts or for the Christmas function then Mr Power could attribute the money in that way.

[46] Alstom's view is that any money received by Mr Power, as an employee of Alstom, whether it is to be given back to Transpower or used on staff social activities, had to be duly accounted for through the accounting system. It is Alstom's view that there was no need to be dealing in cash at all, it was more usual for cheques to be provided for the sale of scrap metal and that the dealing in cash by Mr Power was uncommon.

[47] While the documented policies relied on by Alstom were not as specific as they needed to be the General Accounting policy required the receipting of cash into the business and the retention of sufficient records to comply with Entertainment tax law. Christmas functions fall into this category.

[48] Mr Power had an obligation to account for the funds he received from the sale of scrap metal. The money from the scrap metal was, according to Mr Power, to be used for the benefit of the employees of Alstom. Once it became money for that purpose, the money had to be accounted for in a proper way. Mr Power failed in his obligations to account accordingly.

[49] The conduct of the disciplinary process was less than satisfactory for the following reasons:

- At both disciplinary meetings, Mr Foy had to calm a heated Mr Trow;
- Mr Foy and Mr Trow accepted the advice from Mr Lawson that Mr Power was undergoing medical treatment and had been advised by his doctor not to be involved in any work related matters until he had received medical clearance. Notwithstanding that, Mr Foy was still insistent on receiving further responses to questions. Mr Power had no option to respond as Mr Foy had been very clear that he would be dismissed based on the information already available if he did not respond.
- Mr Foy spoke with the two managers at Rotorua regarding decisions relating to the 2002 and the 2003 Christmas functions. The information provided by the managers was inconsistent with the information provided by Mr Power. However, this information was never put to Mr Power for his explanation.

[50] However, the employer's enquiry should not be subject to pedantic scrutiny. The focus is whether overall principals of fairness have been complied with.

*Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person. NZ Food Processing Union v Unilever NZ Ltd [1990] 1 NZILR 35*

[51] It is my conclusion that as a matter of degree, the deficiencies on the part of Alstom were not so great that an otherwise justified dismissal should be found to be unjustified.

**I find the dismissal to be justified in all the circumstances. I am unable to assist Mr Power further in this claim.**

**Did Alstom breach its obligations of good faith when undertaking the disciplinary process?**

[52] There was scant evidence from Mr Power of any breach of good faith by Alstom in the conduct of the disciplinary process. I am not satisfied the respondent did breach its obligations and make no finding against it in this regard.

**Costs**

Costs are reserved.

Vicki Campbell  
Member of Employment Relations Authority