

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Leonard Edward Bright (Applicant)

AND Eastern Equities Corporation Limited t/a Farmers Transport Limited
(Respondent)

REPRESENTATIVES David Joseph Sharp, Counsel for Applicant
Trent Petherick, Counsel for Respondent

MEMBER OF AUTHORITY Y S Oldfield

INVESTIGATION MEETING 26 July 2005

SUBMISSIONS 3 August, 5 September, 9 September

DATE OF DETERMINATION 21 December 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] From October 2002 until October 2004 Mr Bright was manager of the respondent's Gisborne branch. He was dismissed for poor performance after a series of meetings between him and the General Manager, Brian Kelsey, between March and September 2004. Mr Kelsey told me that after having been given time to settle in to the role Mr Bright had failed to come up to the standard required of a branch manager. He said that Mr Bright was told what was required of him and given a reasonable period of time in which to improve but did not and dismissal was unable to be averted.
- [2] Mr Bright disputes that his performance was inadequate. He says it was not made clear to him what improvements were required, he was not given support and training and he was not warned that his job was in jeopardy. He says that his dismissal was procedurally and substantively unjustified.

Issues for determination

[3] As both Mr Petherick and Mr Sharpe have argued in submissions, the task in front of me is to determine whether the respondent has met the requirements set out in *Trotter and Telecom Corp of NZ Ltd [1993]2 ERNZ 659*. These are:

- i. Did the employer in fact become dissatisfied with the employee's performance of his or her duties?

- ii. If so, did the employer inform the employee of that dissatisfaction and require the employee to achieve a higher standard of performance?
- iii. 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?
- iv. Was a reasonable time allowed for the attaining of those standards?
- v. 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?

(i) Was there genuine dissatisfaction with Mr Bright's performance?

[4] Mr Bright first went to work for the respondent company as a driver in the late 1980s. He stayed in that role for ten years before becoming an Operations Supervisor in 1999. He did that for about a year and then left to pursue other opportunities. In late 2002 he returned to take up the position of Branch Manager. Mr Kelsey told me that this sort of career path is a common one in the industry and many other branch managers have come to their roles through the same route. At the time of Mr Bright's appointment, the company anticipated that there might be a settling in period but expected that in time, Mr Bright would be able to step up to the challenge of the branch manager's role.

[5] Mr Bright told me that he had no reason to suspect that he was not doing just that. His remuneration was increased twice during 2003 and he believed this to indicate that his performance was satisfactory, in part because his employment agreement contained the following:

"14 PERFORMANCE APPRAISAL

"The Employer reserves the right to regularly conduct an appraisal of the Employee's work skill's, attitudes and habits. This appraisal, although it will form the basis of a review of the Employee's remuneration, is also specifically intended to determine the Employee's ongoing ability to perform the duties requested of him or her. Where required, the Employer undertakes to initiate a programme of job training to assist the Employee to more effectively perform his/her duties."

[6] Notwithstanding the pay increases senior managers told me they were not seeing Mr Bright settle into the role as they had hoped. During late 2003/early 2004, Mr Kelsey said, there were ongoing problems with the management of the Gisborne Branch including increased employment problems and customer complaints.

[7] Mr Kelsey assisted with these as they came up, usually over the telephone. Mr Bright was also able to access help from Alistair Gray, who filled an Operations Support Role for the servicing of all branches. However by March 2004 there had been no improvement and Mr Kelsey felt that a face to face meeting was called for.

Determination

[8] I have no doubt that there was initially a strong relationship between Mr Bright and his employer, as evidenced by the long prior working relationship and the respondent's willingness to re-employ him in a more senior role. However, after a year in the role, he continued to require a high level of support in fulfilling the responsibilities of branch

manager. **I accept that the respondent developed genuine concerns with his performance as a result.**

(ii) and (iii): Was Mr Bright properly informed of the employer's dissatisfaction and of the standard required?

[9] Mr Kelsey's notes of his March meeting with Mr Bright record that he "challenged" Mr Bright about his management of and communication with staff, his "confrontational" approach, his relationships with clients and buyers, his marketing of the business, Mrs Bright's support for the company, and his alleged drinking on duty. Mr Kelsey also questioned how well Mr Bright worked with Mr Gray.

[10] Mr Kelsey gave Mr Bright examples of what was causing him concern in relation to each of these topics, and counselled him about how to deal with them in future. He also urged him to draw more on Mr Gray for assistance. This was however very much a coaching session with no suggestion of a warning, written or oral.

[11] Over March and April 2004 Mr Kelsey found that he was dealing with Mr Bright in relation to the same sort of "*ongoing day to day*" issues as before. Mr Gray was also assisting Mr Bright. On 6 May, therefore, a further meeting was convened, at the respondent's Hastings office. This time executive Chairperson, Peter Roebuck, and another senior manager, Dick Heasley, attended along with Mr Kelsey.

[12] No notes were taken at this meeting. Mr Kelsey told me he went over the same topics as before and explained that "*the company was still receiving feedback for the same problems.*" He said Mr Bright did not dispute the existence of the problems but seemed to take the view that they were not serious. Mr Kelsey told me that the three senior managers took a "*rehabilitative focus*" and "*endeavoured to offer solutions to the current problems.*" Particular attention was paid to Mr Bright's failure to follow standard practice in respect of accidents in which his drivers had been involved.

[13] Like Mr Kelsey, Mr Roebuck and Mr Heasley provided written statements to me and attended my investigation meeting to answer questions. Mr Roebuck told me that prior to the meeting of 6 May he instructed Mr Kelsey that he should warn Mr Bright that if his performance did not improve, his employment would be in jeopardy. However Mr Kelsey told me that he did not take as hard a line (in the meeting of 6 May) as Mr Roebuck had suggested. Mr Roebuck acknowledged that Mr Kelsey never delivered such a warning in his hearing. Mr Roebuck told me that he thinks he himself may have said something to Mr Bright to the effect "*shape up or ship out.*"

[14] At Mr Bright's request, Mr Kelsey met with him again on 11 May for further discussion. Mr Bright told me he wanted this meeting because he wanted to ask for the opportunity for his wife to come in and "*explain that she didn't do what had been alleged*" (that she had spoken about the company in a derogatory fashion within the community.) However Mr Kelsey did not think this was necessary and instead the discussion widened out to cover the same topics as before as well as a number of operational issues.

[15] Mr Kelsey told me that Mr Bright gave him the impression he was not coping when he said he "*gets bogged down with operational issues*" and felt his management role suffered as a result. In response to a direct question from me Mr Kelsey acknowledged that there was nothing in this meeting, either, that would have indicated to Mr Bright that his job was on the line.

[16] Between May and August Mr Kelsey concentrated on “*spelling out what was required, coaching and managing performance.*”

[17] On 4 August, along with every other branch in the country, the Gisborne branch underwent a full audit and review of all its operations. This process included a four-hour meeting between Mr Bright, Mr Kelsey and the person engaged to complete the company-wide audit. A range of issues relating to the operation and performance of the branch generally were discussed at this meeting, including some that touched on Mr Bright’s performance in his role. For example, the need for a regular vehicle maintenance plan (something which should already have been in place) was raised.

[18] In his witness statement, Mr Kelsey told me that he “*made it abundantly clear that this meeting was to review [Mr Bright’s] performance. I advised him that this was a complete branch review.*” However, Mr Bright also knew that as part of the audit every other branch was also being reviewed in the same fashion as his. (The Gisborne review came about half way through the audit process.) A full report on each branch was prepared as a result of this process but these reports were not made available to the Branch managers.

Determination

[19] With two pay increases in 2003, Mr Bright had no cause to suspect his employer was dissatisfied with him at that time. In addition, as I have noted, the March meeting between Mr Kelsey and Mr Bright was (by Mr Kelsey’s own description) a coaching and counselling meeting.

[20] By May, when this coaching and counselling had not resulted in the desired improvement, Mr Roebuck formed the view that a disciplinary process should be commenced. In submissions Mr Petherick has argued that that this happened at the meeting of 6 May, if not before. I do not accept that there is evidence support this submission.

[21] Unfortunately, notwithstanding what Mr Roebuck had discussed with Mr Kelsey, Mr Bright was not advised beforehand that the 6 May meeting was disciplinary in nature. Nor was he warned, once in the meeting, that his job was in jeopardy if he did not meet certain standards. The strongest evidence that Mr Bright was warned was that Mr Roebuck thought he had said “*something like shape up or ship out.*” Unfortunately this does not meet the requirements set out in *Trotter* at page 680 as follows:

“where there is unsatisfactory performance, warnings should precede action...a warning to be fair must be explicit. It should describe how an employee’s behaviour is deemed to be unsatisfactory and give clear information about what improvement will meet the employer’s requirements and how it will be measured. This process may be more difficult for management positions whose output is often somewhat broadly comprehended. Clarity and objectivity are all the more necessary.”

[22] Despite the Mr Roebuck’s intentions, neither the 6 May meeting nor the follow up meeting on 11 May amounted to more than a further discussion of performance issues; in effect a continuation of the coaching and counselling stage.

[23] As for the meeting of 4 August, it was one of a series of audit meetings being conducted at every branch around the country. I am not satisfied that Mr Bright was put on notice that this meeting had a secondary (disciplinary) purpose or that this would in any event have

been an appropriate forum to address disciplinary issues. Once again there was no suggestion to Mr Bright at that meeting that his job was in jeopardy.

[24] The employer has not satisfied me that at any stage up to or including the 4 August meeting, Mr Bright was properly informed of the employer's dissatisfactions or of the standard it required.

(iv) and (v) Was a reasonable time allowed for the attaining of the required standards and did the employer turn its mind fairly to the question whether the employee had achieved them?

[25] On 1 September Mr Bright was called to a meeting at the Hastings office. He was told that it would be a good idea to have a support person but otherwise given no details of what the meeting was about. Mr Bright arranged to have a friend attend with him.

[26] Mr Kelsey began the meeting by running over a list of concerns (similar to those which had been gone over previously) and by summarising what had been discussed at the previous meetings. Mr Kelsey also told Mr Bright that a number of key staff had expressed dissatisfaction with him as Branch Manager. Staff and customers with concerns were not named. A week beforehand, an external training provider had assessed all participants on a training course, including Mr Bright. Mr Kelsey now passed on the trainer's feedback, which was not favourable, to Mr Bright.

[27] Mr Bright responded that he was experiencing some stress associated with the role. After this, Mr Purcell suggested a short break. Upon their return to the meeting, Mr Purcell asked what the company would like to see happen. Mr Roebuck responded with a rugby analogy, saying that a good provincial player is not necessarily a top Super 12 player. He then offered to move Mr Bright to an Operations Supervisor role on \$54,000.00 per annum. He would retain the use of a company vehicle although not the one he currently had.

[28] The meeting ended on the basis that Mr Bright would go home and talk the offer over with his wife. What would happen if he did not take the offer was not spelt out, although Mr Bright told me he thought it likely that if he did not accept he would be dismissed.

[29] Mr Bright felt so stressed by this meeting that he visited his doctor immediately afterwards and obtained a medical certificate for the period to 7 September. The respondent wrote to Mr Bright on 7 September documenting the process to that date. Mr Bright responded by solicitor's letter on 9 September, which raised the following points:

- Mr Bright had not been provided with specifics of complaints and did not have a proper opportunity to respond to allegations;
- An explanation was provided in relation to one issue (relating to an accident by a Gisborne branch driver) for which specifics were given, and
- The proposed demotion was unfair.

[30] Mr Kelsey responded by letter on 13 September. In it he went over the Company's concerns again in some detail but again declined to identify individuals who had complained about Mr Bright. He also said that he believed Mr Bright was well aware of the purpose of the meeting of 1 September and had ample opportunity to respond to concerns against him. He concluded by confirming that the offer of an Operations Supervisor role remained open.

- [31] On 14 September Mr Bright advised by fax that he would not accept the demotion. He was then called to a further meeting on 15 September. Mr Kelsey told Mr Bright that since he had declined the offer of a Supervisor's position, he had not other option but to terminate his employment.
- [32] Mr Bright received two months pay in lieu of notice. Within a few weeks he started work with the respondent's main competitor. His salary was \$50,000.00 pa (\$12,000.00 less than he received as Branch Manager and \$4,000.00 less than he would have received as Operations Supervisor for the respondent.) He has also lost the benefit of the use of a company vehicle.

Determination

- [33] Consistent with the complete absence of a warning, Mr Bright was given no timeframe for his performance to improve. There is therefore no question of whether he had sufficient time to come up to the required standard.
- [34] As I have indicated already, no proper disciplinary process had been embarked upon prior to 1 September. For the first time, on that day, Mr Bright was on notice that the employer's concerns were so serious that the termination of his employment was in contemplation.
- [35] At this stage, a fair process could still have been undertaken. Unfortunately it was not. Mr Bright was expected to respond to a series of matters without prior notice of what they were. In addition, the employer refused to give him full details of some of the concerns it had raised. This meant that Mr Bright was not given an adequate opportunity to respond. The respondent would have struggled to justify even a warning in these circumstances.
- [36] Had it succeeded in doing so, Mr Bright would still have been entitled to time to address the respondent's concerns. Between 1 September and 15 September no such opportunity was available to him. He had no chance to try to save his job. Instead, the employer moved directly to offer one option only: demotion. In such circumstances there can be no doubt that the employer failed to turn its mind fairly to the question whether the employer achieved the required standards.
- [37] Consideration of alternatives to dismissal will weigh in an employer's favour but only when a fair process has shown that the employer is justified in moving the employee out of his or her original role to begin with. No such process was followed in the months leading up to 1 September 2004.
- [38] For all these reasons, it follows that the dismissal was procedurally unfair and cannot be justified.

Remedies

- [39] Mr Bright's evidence was that he found his dismissal very distressing however he found other work very quickly. He had also conceded that he found his role as Branch Manager stressful. From what I heard, moving out of it has not been an altogether bad thing for him. In all the circumstances I consider a mid range award of compensation to be appropriate.
- [40] **The respondent is therefore ordered to pay to Mr Bright the sum of \$5,000.00 compensation for hurt and humiliation.**

[41] Mr Bright also makes a claim for lost earnings, relating to the loss of use of a motor vehicle and the reduction in his salary.

[42] Had Mr Bright accepted the respondent's offer of redeployment, his losses would have been less than they were in going to work for another firm. The difference between a branch manager's salary and that of an operations supervisor role was \$8,000.00 per annum. (The supervisor's job also came with a vehicle.) I consider it reasonable to award Mr Bright a further three months' loss at this level, that is, \$2,000.00 gross.

[43] The respondent is therefore ordered to pay to Mr Bright the sum of \$2,000.00 gross lost remuneration.

Costs

[44] This issue is reserved. If it cannot be agreed between the parties, the party seeking costs should ensure that submissions are lodged with the Authority within 28 days.

Y S Oldfield
Member of Employment Relations Authority