Determination Number: AA 274/05
File Number: AEA 1245/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Ron Hughes (Applicant)
AND	Instant Office Products Depot Ltd (Respondent)
REPRESENTATIVES	Keshwant Kaur, for Applicant No appearance for Respondent
MEMBER OF AUTHORITY	Alastair Dumbleton
INVESTIGATION MEETING	15 July 2005
DATE OF DETERMINATION	18 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Mr Ron Hughes was dismissed from employment with the respondent company on 9 September 2004. He quickly engaged an advocate, Ms Kaur, who wrote to the company raising a grievance. To remedy Mr Hughes complaint that the dismissal had been unjustified, Ms Kaur sought reimbursement for the loss of wages, and compensation of $15,000 for the humiliation, loss of dignity and injury to feelings, resulting from the dismissal. A payment for legal expenses was also sought.

[2] The General-Manager of the respondent, Instant Office Products Depot Ltd, (referred to as "IOPD") wrote back on 23 September 2004 rejecting the grievance claim.

[3] A statement of problem was lodged in the Authority in December 2004. It said there had been no attempt to resolve the employment relationship problem with mediation because at the last minute the respondent had twice postponed dates set for that to take place.

[4] IOPD lodged a statement in reply repeating the advice in the letter of dismissal that had been given to Mr Hughes, that the reason for dismissal was his continuing poor performance despite several warnings he had received. Annexed to the respondent's statement were four letters written to Mr Hughes between August 2002 and October 2003. These were about his performance, which he was requested to improve.

[5] Although the letters used the word "warning", they were not explicit as to what was being warned of.

[6] Mr Hughes grievance eventually did receive mediation, but as the claim was not resolved an investigation was commenced by the Authority. IOPD was given several opportunities to advise

the Authority as to a suitable date for a meeting and to generally take part in the usual preliminary stages of the investigation, but it did not respond despite attempts made to contact it by letter, voice-mail and email.

[7] A Notice of Investigation Meeting was served at the IOPD premises where Mr Hughes had worked, giving at least 4 weeks notice of the investigation meeting that was fixed to take place on 15 July 2005. However no representative of IOPD attended at that meeting which therefore proceeded as if the respondent employer was present. That course is permitted by clause 12 of Schedule 2 of the Employment Relations Act 2000.

Determination

[8] Mr Hughes was employed as a storeman-driver in October 2001. Until his dismissal in September 2004 he worked at the same premises, but not for the same employer. In about July 2004 he accepted employment with IOPD which had bought the assets and business of his previous employer. A letter dated 30 June 2004 from Aquiline Holdings Ltd to Mr Hughes confirmed the transfer and offered him continued employment.

[9] While he was working on 9 September 2004, early in the afternoon Mr Hughes was called to a meeting with the General-Manager of IOPD, Mr Frank Moore. The meeting lasted only a few minutes and appears to have been little more than an occasion for Mr Moore to hand to Mr Hughes a pre-prepared dismissal letter. He was told by Mr Moore that his employment was being terminated because of mistakes he had made.

[10] I accept Mr Hughes sworn evidence that Mr Moore told him he was not interested in any explanations regarding the specific allegations in the dismissal letter and also told him that he had made up his mind about the dismissal. Mr Hughes was asked to sign the dismissal letter but refused.

[11] I find that the dismissal was unjustified for the following reasons. The pre-prepared letter of dismissal referred to mistakes allegedly made by Mr Hughes in his handling of the Brookfield's and McNair Imports orders. Mr Moore was not prepared to listen to any explanation so was not in a position to decide whether Mr Hughes had been responsible for the alleged mistakes. If he had listened to an explanation he would most likely have heard Mr Hughes ask for more information so that he could identify the orders and say what if any involvement he had had with the handling of them. Given the nature of his job, the volume of orders dealt with and the fact that Mr Hughes was not the only one packing, the names of the customers by themselves was, I accept, not sufficient to inform him of the particular work being complained about.

[12] The Brookfields and McNair Imports orders were said to be "examples" and Mr Hughes was not told about other mistakes which presumably Mr Moore held him also to be responsible for.

[13] Although IOPD was not at the hearing to support its decision to dismiss, the Authority as an investigative tribunal is bound to have regard to all evidence before it, including any that is adverse to the applicant. IOPD had supplied copies of the letters written to Mr Hughes on four occasions before dismissal to complain about his performance.

[14] Even from the face of those letters it can be seen that they can have little if any bearing on the question of justification for Mr Hughes dismissal. There are two reasons for this. First, the letters do not comply with the requirements of Mr Hughes employment agreement about the way disciplinary warnings were to be issued to him. None of the letters specifies, as required by clause 19 of the Employment Contract, "the proposed action by the Employer if corrective action is not

taken". It was not enough to state in the letters that some "further action" of an unspecified nature would be taken unless improvement was shown.

[15] The second reason why the purported warning letters add little to the decision by IOPD to dismiss is that all four were written by an earlier employer of Mr Hughes. IOPD only became his employer in July 2004, about eight months after the last letter had been written.

[16] Generally a subsequent employer cannot simply adopt as its own, warnings given by an earlier employer, assuming they were validly given to begin with. Generally an employee's record, whether good or bad, remains personal and private to the parties to the employment relationship. I am satisfied that Mr Hughes did not consent, expressly or impliedly, to having the purported warning letters follow him into future employment with new employers. What he was carrying forward to IOPD was listed in a schedule attached to the Aquiline Holdings letter which offered him continued employment. Warnings he had accrued were not mentioned as being among the "terms and conditions" that he would be subject to in the continued employment.

[17] Another fundamental problem with the purported warnings is that Mr Hughes disputes their justification. There is no evidence from IOPD about this and I accept what Mr Hughes has said.

[18] Before an employer may take disciplinary action up to and including dismissal against an employee for reasons of poor performance, there are some key steps it must take if the action is to be justifiable. These have become widely known by employers, especially after they were explained plainly and clearly 12 years ago by the Employment Court in *Trotter v Telecom* [1993] 2 ERNZ 659, at page 681.

[19] Mr Hughes unjustified dismissal was badly handled by IOPD, for even when he had tried to preserve some dignity in the face of it IOPD continued to have no regard for his basic feelings. At first Mr More had allowed him to choose between leaving immediately and staying to work out the notice period of one week. Mr Hughes elected to stay but a short time later, after he had returned to his workplace and was trying to recover from the shock of his dismissal, Mr Moore told him he was not wanted at work and that he would be paid for the week. Mr Hughes left as directed.

Orders

[20] In assessing remedies any contributory behaviour by the employee must be considered. I find that Mr Hughes did not contribute to the situation that gave rise to his grievance. He did not cause the so-called warnings to be defective. As the most recent of those letters was written nearly a year before the dismissal, it may be assumed his performance had not been a continuing concern. Also, Mr Hughes did not contribute to the predetermination of his dismissal by Mr Moore. Neither was it any failure on the part of Mr Hughes that IOPD did not tell him the full extent of the performance problems or give him an opportunity to explain what he had done. He did nothing to contribute to the lack of substantive justification for the dismissal that arose from these failings of IOPD.

[21] In keeping with his character as I saw it to be, Mr Hughes in his evidence understated the effects the dismissal had on him. Mrs Hughes however gave an impassioned account of how badly he had reacted. His pride, dignity, confidence and self-respect were shattered and his physical health suffered seriously. Mrs Hughes also suffered and obviously this simply increased her husband's distress.

[22] I order IOPD to pay $11,500 as compensation for emotional distress and harm including considerable and aggravated humiliation and loss of dignity caused to Mr Hughes. This remedy is awarded under s.123(c)(i) of the Employment Relations Act 2000.

[23] Mr Hughes showed the Authority an impressive list of jobs he applied for after his dismissal. Despite his efforts Mr Hughes, who is 50 and supports a family, remained unemployed until recently. I therefore order IOPD to reimburse to him six months wages, which at $510 per week is a total of $13,260. This award is made under s.128(3) of the Act. Interest at 9% per annum is to be paid on that sum, which is not the full loss of wages that could have been awarded.

Costs

[24] IOPD is ordered to pay a contribution of $1,500 to Mr Hughes advocacy costs, and the $70 fee for lodging his application.

A Dumbleton
Member of Employment Relations Authority