

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Cedric Nelson (Applicant)

AND New Zealand Conference Association as Trustee for
Sanitarium Health Food Company (Respondent)

REPRESENTATIVES Penny Swarbrick, Counsel for Applicant
John McBride, Counsel for Respondent

MEMBER OF AUTHORITY Dzintra King

INVESTIGATION MEETING 5 August 2005
10 August 2005

SUBMISSIONS RECEIVED From applicant and respondent 13 September 2005

DATE OF DETERMINATION 06 October 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr Cedric Nelson, says he has been unjustifiably dismissed by the Sanitarium Health Food Company ("Sanitarium"). Until his dismissal on 27 May 2004 Mr Nelson had been with the company for nearly forty years. Mr Nelson had had annual performance reviews which were always favourable, with the exception of a review in 2000 which related to his resistance to a restructuring proposal when he refused to accept a lower position.

At the time of dismissal Mr Nelson was employed as the Flake Biscuit Process Manager. Flake biscuits are Weetbix. Sanitarium has very stringent requirements and processes relating to its food manufacturing processes. At the centre of this case is what was initially alleged to be Mr Nelson's failure to comply with quality procedures.

Background to the Disciplinary Investigation

A padlock had been found in a packet of Weetbix. When this was brought to Mr Nelson's attention he treated it as being primarily an occupational safety and health issue rather than a food safety issue. Mr Nelson ascertained where the padlock had come from and instructed staff to take greater care to ensure that the doors above the food packing lines were secured and the padlocks locked. This incident took place in March. It was brought to the company's attention in May. The reasons for this are unclear but may well be related to bad feeling amongst some staff and supervisors.

Mr Ed Escandor, a Process Controller ("PC"), brought the matter to Mr Nelson's attention in March when it occurred. Mr Nelson said Mr Escandor brought the padlock to his office which he shared with Mr Mike Bates, who was present at the time. Mr Nelson and Mr Escandor discussed the

matter then went to the packing heads to find where the padlock had come from. They found a number of padlocks hanging on a card dispenser tray immediately above the packing heads, rather than being on the doors to prevent access to the machines. Mr Escandor was instructed to refit the missing padlocks and Mr Nelson followed up by instructing his staff to ensure that padlocks were fitted and locked. He formed the view that the padlock had fallen into the packet at the entrance to the packing head. Subsequently, when monitoring the process he would check the padlocks and remind staff of the need to ensure they were fitted and locked. He said he thought it obvious how the incident had occurred and that the matter had been resolved.

New metal detection procedures had recently been put in place and Mr Escandor appears to have been unsure what to do regarding the padlock. He noted the metal detector log book with the words "no metal" and did not perform a Quality Impact Report ("QIR"). This notation and who was responsible for it formed the basis of much of the subsequent investigation carried out by the company.

The process of using the metal detection book had been taken over from Quality Control at the beginning of March 2004 and so at the time the padlock was found the system had been in use for less than a month. The Process Controllers had been trained how to fill out the book but Mr Nelson had not as it was not part of his job. He told staff that it was important that the padlocks were fitted to all machines while in use, including during cleaning at the end of the shift. He told them that unfitted and unlocked padlocks would attract the attention of the auditors, something the department did not want. This appears to have been misconstrued as an instruction to keep things quiet.

On 17 May Mr Nelson was called into the office of Ms Lucie Newport, the HR Advisor. Mr Mike Mancer, the Production Manager, was also present. They asked him about the incident and he told them he had dealt with it as a health and safety issue, not as a metal detection issue. He was asked whether he had instructed Mr Escandor to write "no metal" and he said he had not. He said he had instructed both Mr Alan Jayant, the night shift Process Controller, and Mr Escandor to ensure all padlocks were on the machines at all times and that he was satisfied that measures had been taken to ensure that such an incident would not recur. At the beginning of that meeting he asked why he was being asked about the padlock and was told that allegations had been made against Mr Jayant regarding his following of procedures relating to moisture checks and also that a padlock had been found in a packet on Mr Jayant's shift. Mr Jayant had handed the packet on to Mr Escandor to deal with as Mr Jayant's shift was coming to a close.

Pertinent background information is that there had been problems with the filling out of documentation relating to the metal detection procedures, particularly on the night shift. This seems in large part to have been due to a lack of literacy and numeracy skills on the part of process workers. Courses for staff were instituted in March and April 2004. Mr Nelson had issued a written instruction to staff that any future failures regarding metal detection procedures would result in dismissal. This created a high level of anxiety.

The Investigation

On 20 May Mr Nelson received a letter inviting him to a meeting. It said:

You have allegedly breached company rules on 17 March 2004 by failing to follow quality procedures. The Company regards this incident as serious misconduct.

The Company carried out an investigation, which was conducted largely by Ms Newport and Mr Mancer, who, at the time of the investigation, was Acting Manufacturing Manager as the Manufacturing Manager, Mr Warren Jackson, was on leave. Mr Jackson did, however, attend the

final meeting with Mr Nelson when he was dismissed. Mr Norm Newport was also sporadically involved in some of the interviews that took place. In the course of the meetings allegations of incompetence and deceit were also raised.

Procedure

The contract provides that employment problems will be dealt with as per the procedure in the staff manual, which states that “The manager or supervisor will conduct the interview/investigation according to the Company guidelines”. The guidelines state that the person being investigated is to be given a specific allegation of misconduct and that allegations cannot be changed during an investigation. They set out the manner in which a disciplinary investigation should be conducted.

The supervisor is the person who is to initiate the disciplinary action, present the facts at the disciplinary meeting and comment on compounding or mitigating circumstances. The chairperson, who is the manager or department head, is to conduct the formal investigation, ensure that minutes are kept and documentation completed, evaluate facts objectively, decide whether the alleged misconduct has occurred and determine the appropriate penalty/action, ensure follow up and liaise with HR or legal counsel.

During a disciplinary meeting the employer is to ensure copies of relevant documentation are provided to the employee and is to call on witnesses to confirm facts and, importantly for this case, is to allow “cross examination” by the employee or representative. The employee or representative is to be given the opportunity to put any matters in mitigation before the employer.

This procedure was not followed by Sanitarium. Not only the names of witnesses but statements by witnesses were withheld by the employer. Mr Nelson was also told he was not to talk to other staff, thereby inhibiting his ability to obtain evidence favourable to him.

Ms Newport was neither Mr Nelson’s manager nor his department head and I am at a loss as to why Mr Newport was involved at all.

The company does not dispute that it did not follow this procedure. Ms Newport said she had not seen it. Neither had Mr Mancer. It was incumbent upon the people conducting the investigation to locate these guidelines and act according to them. No attempt was made to do so.

The company did not advise Mr Nelson of the specific allegations. The allegation was too broad. The company did not outline the framework of the investigation. Mr McBride acknowledged at para 2.6 of his submissions that Mr Mancer’s letter of 20 May did not expressly state the specific allegation. He said this was because the exact nature of the failure only came to light during the investigation; and that at the beginning the company only knew that the quality procedures had not been adhered to by Mr Escandor and Mr Nelson but was unclear as to who was responsible for specific aspects of that failure. This, however, is not an answer because the guidelines state that “allegations cannot be changed during an investigation” but that “allegations can be withdrawn and presented at a later date”.

Mr Mancer accepted that before the meeting Mr Nelson was not told what quality procedure he was alleged to have breached. Ms Newport said the allegation was generic. That assertion does not assist the company because the guidelines require that the allegations not be generic but specific. During the Investigation Meeting she said it was the failure to fill out a QIR and the writing of “no metal” in the log book that was the breach. However, both of these were the job of a Process Controller, not of Mr Nelson who could not be expected to double check all the work done by the Process Controllers.

Mr Mancer believed that Mr Nelson had told Mr Escandor, Mr Sepi Simi, Mr Mata Harrison and Ms Fialoa Tipoi to cover up the fact that a padlock had been found in a packet of Weetbix (although Mr Mancer also said that the instruction to keep quiet was probably not a reason for the dismissal); that he had told Mr Escandor to write “no metal” in the log book, although this allegation/conclusion seemed to alternate with the claim that if Mr Nelson had not done so directly his influence had somehow caused Mr Escandor to falsify the records; that there was a failure to regard the matter as a food safety issue rather than as an OSH issue; and that there was a belief that Mr Nelson was incompetent. This allegation was not made until 26 May, the day before he was dismissed. Mr Mancer said they did not believe Mr Nelson genuinely believed it was just an OSH issue. This was not put to him.

The company did not allow proof of the allegations to be presented by Mr Mancer or allow Mr Nelson to either call witnesses or to interview the company’s witnesses. The identity of company witnesses was withheld. The company did not allow Mr Nelson to present any mitigating circumstances before making the decision to dismiss.

I accept Ms Swarbrick’s submission that the allegations made were so unclear that Mr Nelson could not have known what he had to answer. The cover-up allegation could have been put at the outset – it had been made by Ms Tipoi but this was not revealed until I asked that the informant be identified. It was highly pertinent for Mr Nelson to know that there had been an allegation of a cover up and who had made it. It is no answer to say that the people concerned did not want their identities disclosed.

Of the six matters referred to by Mr Mancer in dismissing Mr Nelson the only one raised as an allegation – and that was unclear – was that the metal detection procedure had not been followed. Matters of trust and confidence had not been raised at all, let alone as an allegation. The others were raised obliquely and in such a way that Mr Nelson could not have realised that they were specific allegations against him for which he could be dismissed.

Ms Newport and Mr Mancer acknowledged that that the allegations had changed as the investigation proceeded. They referred to “an unfolding story”. That “story” was not put to Mr Nelson in such a way that he could have realised that allegations were being made against him which could result in his employment being terminated. He did not, therefore, have a proper opportunity to respond to them. The allegation about his being indirectly responsible for what was called the falsification of records was not put to him at all; neither was the loss of trust and confidence.

Furthermore, neither Ms Newport nor Mr Mancer seemed at all clear about the reasons for the dismissal. The reasons for the dismissal must be those stated at the time of dismissal. The conclusion is that the company was unsure what the reasons were and the inconsistency in stating the reasons suggests that the allegations themselves were unclear. If the company was unsure as to why it dismissed him he could not know; and he could not respond.

Was Mr Nelson aware of how serious the situation was?

This case is unusual in that despite the fact that Mr Nelson was given a letter saying that the unspecified allegation could be serious misconduct and that he could be dismissed, there were circumstances that led him to believe that the situation was not potentially serious for him. The letter of 20 May was the sole indicator of seriousness. The seriousness was nowhere reinforced, although he was asked again whether he wanted representation. The interview notes show that Mr Nelson did not think his employment was at risk. This should have been clear to Ms Newport and

Mr Mancer. The respondent has categorised this as a wilful failure to see. If that were so, there was a concomitant failure by the company to see that he didn't see.

Mr Nelson thought the company might be contemplating disciplinary action against Mr Jayant or Mr Escandor. I accept that Mr Nelson saw the provision of the letter of 20 May to him as being simply one of standard procedure and wording. Had the company followed its guidelines and advised him at the outset of the meeting that his employment might be at risk and the specific reason for that, matters may well have proceeded differently.

At the first meeting he asked about how the meeting with Mr Jayant had gone, referred to "distressed PCs" and asked "does the investigation warrant the level of intensity"? Towards the end of the meeting on the first day Mr Nelson said "the timing of these allegations are mischievous, we need to resolve these issues as well." Ms Newport replied "what Mike said was if there isn't any substance to the allegation they shouldn't be concerned. If there is substance to the allegation then they do need to be concerned." Mr Nelson took "they" to mean the PCs. He also asked "what other allegations will be considered?" and was told by Ms Newport "We can't discuss those at the moment."

I do not think it surprising that Mr Nelson did not see that he was being accused of something serious. He was an employee of forty years' standing with an unblemished record and the investigation unfolded as an inquiry into what people's perceptions and views were, rather than specific allegations being put to him to reply to. At the close of the meeting of 26 May Ms Newport said "we need to wrap it up ... back to you tomorrow", but said nothing about the fact that the company would be making a decision about terminating his employment. On 27 May when Mr Jackson told Mr Nelson that there was an outcome, Mr Nelson's response was to say that it "would be nice - it has been very stressful". All throughout the process Mr Nelson showed concern about his staff, not about himself.

Even as late as the second meeting on 26 May, the meeting which preceded his dismissal, he said "I have to say honestly why are we having so much attention on this?" Ms Newport's answer was nothing to do with the possibility of dismissal: "The reason, Cedric, is that we have failed 4 audits on metal detection...".

Failure to Put Information to Mr Nelson

Not only was certain information not put, but other information which was put was misleading and untrue. The fact that Ms Tipoai had alleged on 13 May that Mr Nelson had instructed operators and process controllers to cover up the padlock incident was not put at all, but it was information on which the company relied in making the decision to dismiss. None of the statements made by the witnesses nor their names were provided until after his dismissal and the interview notes were not provided until November 2004. It was clearly difficult for Mr Nelson to rebut any allegations when he did not know who had made them and the context in which they had been made.

I do not accept the submission that the assertions made by the so-called "whistleblowers" were not relied on. Mr Mancer said, when dismissing Mr Nelson, that they had received a number of allegations, which clearly included the claims made by the unidentified staff. It was also submitted that Sanitarium was "hamstrung". Sanitarium was obliged, per virtue of its own procedures and in the interests of fairness, to release that information to Mr Nelson.

Mr Mancer told Mr Nelson on 24 May that Ms Minna Gascoigne and the PCs had thought that everything should be written in the log. However, at that stage Mr Escandor and Mr Jayant had also been interviewed and Mr Jayant had said he would not have put the padlock in the log because it

was not designed to capture items of that sort. It is perfectly evident that Mr Escandor only said that it should have been recorded once he became aware, from the line of questioning, that that was what the expectation of the questioners was rather than what he had believed at the time.

On the third day, 26 May, Mr Mancer said that the process controllers, technical officers and process managers had all said that all metal went into the log book. Neither Mr Jayant nor Mr Escandor had said that and Mr Mata Harrison had said on 25 May that he would not have recorded the padlock. Ms Gascoigne and Mr Bates had noted that the training had been very recent. Mr Sepi Semi was not asked. Ms Tipoi, the source of all the dubious information, was not interviewed until the third day and then only by phone.

The manner in which the interviews were conducted

Ms Swarbrick made a number of comments about the manner in which the interviews were conducted. I agree entirely with those submissions. Open questions were not asked but leading ones were. Responses were general and Mr Mancer admitted during the Investigation Meeting that “We had trouble getting responses to a lot of things”. The interview notes demonstrate vague, evasive responses and there was little or no follow up or attempt to clarify what were unhelpful and unclear assertions. I cannot see how any conclusions could reasonably be drawn from the statements made to the company and I accept the submission that it appears from the questioning that the company had a view of what the answers should be. All this is readily apparent from an objective reading of the notes. The repeated questioning is of the sort that inevitably skews any answers given and renders them unsafe.

Mr Harrison

Ms Newport’s conversations with Mr Harrison are telling. On 25 May Mr Harrison was asked whether he has been asked to keep quiet. He denied it, then called Ms Newport at 9pm that night and again stated he didn’t hear anything about keeping it quiet. At 10am the following day there was another phone call during which Mr Harrison said:

I had a talk to Fia... I was thinking about everything else was happening – what was said yesterday – about was it a cover up? It was mentioned to keep quiet.

And I wasn’t really listening but as far as I remember Cedric said to keep quiet ... Just keep quiet – I don’t know the words.

You know Lucie I even picked up my Bible last night.

The following exchange then took place between Ms Newport and Mr Harrison:

LN: Praise the Lord.

MH: I was reading all about truth and I’ve thinking that’s what I’ve been telling my kids, you have to tell the truth, and it made me see I have to as well.

LN: The Bible says Mata, the truth will set you free. We really appreciate your honesty, and you coming forward.

Mr Harrison could not say who had been spoken to or exactly what had been said. I agree with Ms Swarbrick that Ms Newport’s comments are entirely inappropriate for someone purporting to be an

independent investigator. It is very clear that the answer obtained was the answer she wanted to elicit because it was what she believed.

Ms Tipoi

Even more interesting is the fact that shortly thereafter there was a telephone conversation with Ms Tipoi who said that she had “got to” Mr Harrison the previous night. That assertion in itself should have cast doubt on the veracity of any response given by Mr Harrison, but it did not, because, again, it was what Ms Newport wanted to believe and did believe. Mr Mancer said he knew that Ms Tipoi was a dominating person but that did not seem to be taken into account when considering what she and others had said.

It is clear that Ms Tipoi’s recollections are vague, confused and uncertain. She reported what she thought Mr Nelson had said to Mr Escandor but she was not there so this is hearsay and unreliable. Ms Newport did not subject Ms Tipoi’s statements to any stringent examination and simply stated “thanks Fia for your honesty”. That clearly indicates an acceptance by Ms Newport of the veracity of the inchoate assertions made by Ms Tipoi. Mr Mancer asked Ms Tipoi whether Mr Escandor knew all metal had to be recorded. Her reply was “yes”. Quite how she knew this, or thought she knew this, was never questioned. It also begs the question of why Mr Escandor would have gone to see Mr Nelson in the first place if he knew that all metal had to be recorded and a QIR done. I agree with Ms Swarbrick that it is ironic that Ms Tipoi’s and Mr Harrison’s statements should have been accepted as truthful when they were both subsequently the subject of an investigation wherein their truth and honesty was found to be lacking. Mr Harrison chose to resign and Ms Tipoi surprisingly managed to escape a dismissal.

Mr Escandor

It is surprising that the company chose to believe Mr Escandor rather than Mr Nelson regarding the allegation that Mr Nelson had told Mr Escandor to write “no metal” in the log book. Mr Escandor’s evidence was inconsistent and it was not until he suddenly realised that he could be in danger of being dismissed that he began to say that he was acting under instructions from Mr Nelson. There was an inconsistency as to whether the alleged conversation took place in person or on the phone. Before Mr Escandor realised matters were serious he was saying “I don’t recall his words, he didn’t say don’t write it down, but I don’t know what he said, something like not to.” Mr Mancer said he was trying to understand why he had not recorded the padlock and why he hadn’t followed procedure. Mr Escandor is recorded as shrugging. Mr Mancer then said “So you don’t know either?” and Mr Escandor replied “I don’t know”. If Mr Nelson had had access to Mr Escandor’s interview notes he would have been able to clarify and rebut the allegations. The company totally failed to turn its mind to the possibility that other employees were protecting themselves and that their evidence was inconsistent, unclear and vague.

Ms Tipoi’s initial allegation included the assertion that Mr Nelson had instructed Mr Escandor to write “no metal”. If that was correct, the question that should have sprung to mind was why Mr Escandor initially denied that.

Predetermination

The manner in which questions were asked and in which answers were solicited and obtained is disturbing and indicative of predetermination. Not only was there a failure by the company to put all allegations to Mr Nelson and to seek proper clarification and responses but the final interview was carried out when the company had already decided that Mr Nelson had in some manner been responsible for falsifying documents. Mr Escandor’s meeting notes on the third day show that he

was told that the company believed him. That meeting took place at 1.22pm, which was prior to the meeting with Mr Nelson, but Mr Nelson was not told that that was the view that Sanitarium had already formed, so could not attempt to rebut it.

Although Mr Nelson was aware that there was an issue regarding who was telling the truth he was not made aware that if he was not believed he would be dismissed. Mr Nelson gave what was very clearly a proper explanation for what had happened, that is, that there had been confusion and misunderstanding. Interestingly, Mr Owen Ashby, who represented Mr Escandor, is recorded as saying “Ed has interpreted a 2 month old conversation as Cedric calling the shots.” Mr Nelson said, when there was reference to the company’s “dilemma”:

Yes, and I have to take full responsibility for that misconception. He does misunderstand some things, and it was three months ago, he has taken my instruction at the time and had taken it literally and my fault for not clearly spelling it out to him. I don't doubt Ed's honesty and sincerity if that is what he thinks I said then that is it. But that was not my intention at the time. It all comes back to what was our intent – no intention to deceive.

Ms Newport replied to this:

The alternative is then – if there is no intention to deceive – that there is gross incompetence. It also questions your competence as a manager.

At the second meeting on 26 May at 1.50pm Mr Nelson was told that there were allegations that he had asked people to be quiet “with regards to metal detection and the padlock in the product.” Mr Nelson responded by saying “I would like to know who my accusers are and what they said. I have discussed it – said fix it.” He also said he had had a discussion in his office with Mr Escandor but nobody else. Ms Newport then said she might try and get written statements from people so they could be verified with him. By the time the statements were provided Mr Nelson had been dismissed. Mr Nelson’s response is indicative of the fact that the allegations were vague. Who had said what when was not specified.

I find it very difficult to understand why the company did not believe Mr Nelson. The records of the interviews show that the view formed that Mr Nelson was lying was not a view that could reasonably have been formed on the evidence available.

I can understand, therefore, why Mr Nelson was concerned that there was an ulterior motive which related to a dispute he had had with the company over an attempt to make his position redundant and not offer him full redundancy in 2000. A disturbing document came to light when release of information was sought. This indicated senior management’s intention to terminate Mr Nelson’s employment using “the disciplinary route over time”. It also said “Stated that KS [Kevin Smith] preferred to dismiss”. The note was made by Mr Kevin Smith, who is still a senior manager, and to whom Mr Mancer has a direct line of reporting through his own manager, Mr Jackson, who conducted the 2000 meeting in question. Mr Jackson was kept informed throughout the investigation process and was present when the dismissal took place. Ms Nelson and Mr Mancer denied knowledge of this document. Such an intention is contrary to the relationship of trust and confidence and it is particularly disturbing to find such intentions being evidenced with a company that has stated Christian principles.

Disparity of treatment

Mr Escandor was treated more leniently than Mr Nelson; he was given a final employment warning. This was based on the company’s view that he had done what he did, which it saw as

“falsification” of documents, under the direction of Mr Nelson and was therefore less culpable. The onus is on the employer to justify differential treatment: Northland Co-Operative Dairy Co Ltd v Rapine [1999] 1 ERNZ 361. Had the company conducted a fair enquiry that enabled it to reach the conclusion that Mr Nelson had issued the direction that would have justified differential treatment. I accept that that is the conclusion the company reached and upon which it treated Mr Escandor more leniently. I do not think that ground of alleged disparity can stand.

Of more concern is the fact that Mr Mancer was issued with a final warning for an OSH related issue. Ms Newport’s explanation for the difference seems spurious. Food safety and OSH issues are equivalently serious and should attract equivalent penalties.

The procedural defects were so severe as to render the dismissal nugatory.

Substantive justification

Mr Nelson has sought reinstatement and it is therefore pertinent to consider whether there would have been substantive justification. Mr Nelson was not responsible for filling in the metal detection log book or for filling out a QIR. Mr Nelson was not an incompetent manager. I found the attempts by Ms Newport in particular to lay the blame for all manner of subsequently discovered errors and transgressions at Mr Nelson’s door disturbing and quite unacceptable. She had come to the conclusion that there was a “culture of dishonesty” and that Mr Nelson was responsible for it. Ms Newport seemed to hold the view that the mere making of allegations somehow constituted proof. This was the same unfortunate mindset that appeared to have prevailed throughout the investigation process.

While I accept that the maintenance of food safety and adherence to the appropriate procedures for a food manufacturer is of the highest importance there is nothing that Mr Nelson did that put that at risk. The claim that the alleged failure amounted to serious misconduct cannot stand. Mr Nelson genuinely believed that he had treated the matter appropriately. I accept that the company may reasonably have held the view that there was a misunderstanding by Mr Nelson but he not attempted to avoid or subvert any procedure. The training was recent and staff had obviously formed inconsistent views. That was a matter to be rectified by training, not by dismissal.

The test of whether behaviour equals serious misconduct is always a matter of degree: BP Oil NZ Ltd v Northern Distribution Workers Union [1989]3 NZILR 276. It must amount to conduct that deeply impairs or is destructive of the basic confidence and trust that is essential to the employment relationship.

Not only was the responsibility for the logbook and the QIR not Mr Nelson’s but given his honestly held view that the padlock had not been through the metal detector and that it was not a metal detection issue but a health and safety issue, he handled the matter as he genuinely saw fit and did not attempt to cover anything up. Mr Nelson said his comments along the lines of “make it disappear” meant “Just that, fix it, fix the problem, the problem being that we had locks on doors with open padlocks. That was the problem they were to make go away”. This was not a difficult issue to clarify but Mr Nelson was never asked the question until it was asked it at the Investigation Meeting. He patently had not attempted to cover anything up; he had sent an email about the matter to his staff.

Mr Mancer said they had taken the instruction to make it go away as being synonymous with a cover up. Quite what was to be covered up and why was never clear. Ms Newport said she thought Mr Nelson had told people to keep quiet about the fact that the padlock had been found, but he clearly had not. Mr Mancer said he could not think of any reason why Mr Escandor had written “no

metal”, yet the explanation was simple. Even if Mr Nelson had told him to write “no metal” it would not have been to “falsify” anything but because Mr Nelson, Mr Escandor and Mr Jayant all thought that only processed metal went into the log book. No one seems to have considered what the point of instructing the writing of “no metal” would have been.

If there were failings they were certainly not of such gravity as to justify summary dismissal. The dismissal was unjustified and Mr Nelson has a personal grievance.

Reinstatement

Reinstatement is the primary remedy and is mandatory unless it is not practicable. In Woud v Department of Corrections AC24/05, 16 May 2005, Goddard CJ said:

The test involves asking whether the employee can be accommodated without undue disruption beyond the consequences that the employer who caused the situation can be expected to bear in equity and good conscience.

The test is an objective one. Sanitarium did not carry out a fair and reasonable investigation and could not, therefore, have reasonably concluded that Mr Nelson was guilty of any behaviour which justified dismissal. Given that, the company cannot now say that it has lost trust and confidence because it has no grounds upon which to make that assertion. It may well be embarrassing for the company to have to reinstate Mr Nelson but that is not the same as its being impracticable. This is a large company and I accept the submission that although another person has been appointed to the position Mr Nelson held that is no bar to the company being able to accommodate the reinstatement.

I accept that a considerable time has elapsed since the dismissal but that in itself is not sufficient for reinstatement to be impracticable. In Woud (supra) reinstatement took place after four years. Mr Nelson was understandably stunned and shocked when his employment was terminated. He has spent all his working with the company and it would be virtually impossible for him to obtain other employment at a similar level. In addition, he had social links within the company and those remain important to him. He deposed that he maintained good relationships with people at Sanitarium and had received a positive reception while working there on a temporary posting.

The company has claimed that staff would be fearful of retribution. There was no evidence to this effect and, having seen and heard Mr Nelson, I do not believe that this is even a possibility.

Although I am sure it will come as a great disappointment to the respondent, I hereby order that the applicant be reinstated. He is to be reinstated either to his former position or placed in a position no less advantageous to him.

I am mindful that there will in all likelihood need to be some discussion between the parties as to a suitable position for Mr Nelson. This is not to preclude the immediate reinstatement of Mr Nelson to the payroll. Discussions about the reinstatement of Mr Nelson should take place forthwith.

Reimbursement

Mr Nelson gave evidence of his attempts to find alternative employment. I am satisfied that he took appropriate steps to attempt to mitigate his losses. Mr Nelson is to be reimbursed for all the losses incurred as a result of the dismissal. Ms Swarbrick has said that his contractual entitlements are relatively complex and asked that I leave it to the parties to calculate the actual loss incurred, with leave to revert for further directions in the event of a dispute or disagreement over that issue. That

seems a sensible course of action and I leave the matter of the calculation of the losses to the parties. The losses are to be calculated from the date of dismissal to the date of his reinstatement. The effect should be such that no loss has occurred as a result of the unjustified dismissal.

Compensation

Mr Nelson suffered extensively as a result of the dismissal. Mrs Nelson gave evidence regarding this and I was provided with statements from his children and doctor. His church connections were inextricably bound up with his employment and he has had to face the consequences of his dismissal each week when attending church. He has had forty years unblemished employment. This calls for a high award and I order the respondent to pay Mr Nelson the sum of \$25,000 pursuant to s. 123 (1) (c) (i).

Contribution

Mr Nelson did not do anything blameworthy that gave rise to the personal grievance. There is to be no reduction in the remedies ordered.

Costs

These were reserved. The parties should try and negotiate costs. If they are unable to do so, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King
Member of Employment Relations Authority