

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry Te Huia (Applicant)
AND Elastomer Products Limited (Respondent)
REPRESENTATIVES Brad McDonald, Counsel for Applicant
Scott G Wilson, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 11 April 2006
DATE OF DETERMINATION 4 May 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Kerry Te Huia, was employed by the respondent, Elastomer Products Limited, as a production labourer/extruder operator. Mr Te Huia initially obtained employment with the respondent through an employment agency and was then offered a full time position on 23 June 2003 as a level 1 plastics employee. He progressed from level 1 to level 1A on 15 September 2004 when he achieved 34 NZQA credits.

[2] During his employment Mr Te Huia was party to an individual employment agreement based on the terms and conditions in the collective employment agreement between Elastomer Products Limited and the New Zealand Engineering Printing and Manufacturing Union Inc.

[3] The respondent, Elastomer Products Limited (“Elastomer”), is a privately owned company. It has operated since 1974 and has been manufacturing cable since 1978. Elastomer manufactures a wide range of approximately 7000 extruded plastic and silicone rubber products which it supplies to about 800 customers domestically and internationally. Elastomer is ISO 9000 certified and its systems are audited by third parties. There is a strong emphasis within Elastomer on training and employee movement in terms of remuneration is on the basis of training and unit standards acquired through the plastics industry training organisation.

[4] The general manager of Elastomer, Mark Field, believes that the company has had long term success in the competitive electrical cable market by consistently manufacturing high quality cable.

[5] On 28 April 2005 Mr Te Huia was advised that he would be issued with a written warning for failing to carry out standard quality check procedures during the production of electrical cable. A letter dated 29 April 2005, confirming the written warning, was handed to Mr Te Huia on 2 May 2005.

[6] Mr Te Huia says that the warning was unjustified.

[7] On 24 May 2005 Mr Te Huia was given one weeks notice that his employment with Elastomer was to terminate and his dismissal would take effect on Monday 30 May 2005. Mr Te Huia was not required to work out his notice period but was paid in lieu of working for that week.

[8] The reasons given in a letter of 25 May 2005 for the termination of Mr Te Huia's employment were that he manufactured a carton with mixed wire colours on 27 April 2005 and that on 18 May 2005 he did not carry out required wall thickness tests on cable, did not complete job cards and manufactured cable with incorrect markings/printing and also failed to isolate or notify of the incidents.

[9] Mr Te Huia says that his dismissal was unjustified.

[10] Mr Te Huia seeks reimbursement of three months lost wages in the sum of \$5,760.00 (gross), compensation in the sum of \$6000.00, a reference and costs.

The Issues

[11] I need to determine whether the written warning and the dismissal were justified both substantively and procedurally.

[12] Section 103A of the Employment Relations Act 2000 provides that whether a dismissal or action was justifiable must be determined on an objective basis by consideration of whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

Was the warning issued to Mr Te Huia on 28 April 2005 justified?

The background to the warning

[13] On 22 April 2005 Mr Field received an email from an Asian based client, Perennial Cables, advising that there was a quality problem with some wire deliveries from Elastomer. There were undersize wires in two cartons of product delivered.

[14] Perennial Cables advised in the email that thousands of sets of the finished goods had been quarantined however some finished goods fitted with the batch of wires had been shipped out to customers. Perennial Cables advised Elastomer that it had incurred additional costs as a result of the quality problem. Photographs of the undersize wires were attached to the email.

[15] As a result of preliminary enquiries undertaken by the company it appeared as if the cable had been manufactured by Mr Te Huia on 10 April 2005.

[16] Mr Te Huia was asked to attend a preliminary inquiry meeting on 26 April 2005 into the incorrect conductor being used.

[17] Notes were taken at the meeting on 26 April 2005 and subsequent meetings by management of Elastomer. Mr Te Huia did not see these notes prior to the warning being issued. He told me that he disagreed with the integrity of the notes.

[18] Unfortunately I found it difficult to get a straight forward answer from Mr Te Huia to many of my questions throughout the investigation meeting. Having heard from the various respondent witnesses as to the note taking at the meetings I accept the respondent's notes form the best record of the various meetings with Mr Te Huia and accordingly I rely on them.

[19] Mr Te Huia's initial explanations were not deemed to be satisfactory and the preliminary meeting was followed by three formal disciplinary meetings, two meetings on 27 April and one on 28 April 2005.

[20] There was a brief adjournment of the meeting on 28 April 2005. Prior to that adjournment Mr Te Huia told Elastomer that he believed it was an accident, and a mix up occurred although he did not have any idea how it occurred. An adjournment was then taken to consider the explanation and the meeting reconvened a short time later when the decision to issue Mr Te Huia with a written warning was advised to him.

[21] Mr Field read his decision which he had prepared in writing and issued Mr Te Huia with a written warning to remain in place for one year.

[22] Mr Te Huia was given a letter to confirm the warning on 2 May 2005. He would not sign the letter confirming the warning as he considered it to be unjustified and said in his evidence that he was both shocked and surprised as he had no real idea of the seriousness of the situation. He also said that he was not the person responsible for loading the wire spool.

[23] The letter advised Mr Te Huia that any further poor performance would render him liable for more serious disciplinary action and that he was required to complete all quality procedures as required of him and to ensure that all related quality documentation is completed.

Analysis and conclusions in terms of the warning

[24] The respondent carried out a preliminary investigation when it received the complaint from Perennial Cables and established that Mr Te Huia had made the cables. The matter was discussed with Mr Te Huia on an informal basis and his initial explanations were not accepted. From the outset I am satisfied that Mr Te Huia knew what he was being required to give an explanation about.

[25] The matter then proceeded to a series of formal disciplinary meetings. Mr Te Huia was not advised in writing of the meetings but I find that he was adequately advised before each meeting of its purpose, his right to representation and the seriousness of the matter. He was asked for his explanations and there was, I am satisfied, consideration given to these.

[26] The submissions on behalf of the applicant that Mr Te Huia thought he was attending training and development meetings are simply not supported by the evidence. Any power imbalance suggested by Mr Te Huia could have been minimised if he had either obtained a representative or a support person. He was given this opportunity but chose not to bring anyone to the meetings.

[27] There was a period of time between the making of the cable by Mr Te Huia and the email from Perennial Cables but, once the email was received from Perennial Cable, Elastomer moved promptly to investigate the matter. I am not satisfied that Mr Te Huia was unduly disadvantaged by the delay because he was shown and then given copies of all the relevant paper work. A meeting was adjourned overnight so that Mr Te Huia could consider that paperwork more fully. This was an industry where the keeping of proper records was required so there was written documentation about the manufacture of the particular order.

[28] Mr Te Huia was to make an order for cable with 1.00 mm² wire however the cable was manufactured with undersize wire of 0.75mm².

[29] Elastomer concluded, I find reasonably, that Mr Te Huia should have ascertained the whereabouts of the correct conductor wire and performed in accordance with standard procedure an end count of the strands to make sure the correct wire was used regardless of who physically placed the spool. In terms of placement of the spool it was accepted that Mr Te Huia did not have a forklift licence.

[30] Mr Te Huia did not disagree in answer to my questioning that this type of testing was part of his job and he had been performing the role for two years.

[31] Elastomer concluded that there were opportunities during the process of manufacture for Mr Te Huia to recognise as a result of quality testing that the wire was undersize before it left the company. I find that it was open to them to do so. Although Mr Te Huia told me that wall thickness tests are not always a reliable indicator he was also asked during the disciplinary process why, when he made the next order requiring wire of 0.75mm², he was not alerted to the fact that the previous order must have had undersized wire. Mr Te Huia had no real explanation for this except that he could not recall.

[32] Mr Te Huia said that there were systemic problems at Elastomer. Mr Field said that as a result of enquiries he made he was not aware of any previous incidents of undersize conductor being used for the past 16 years. I am not satisfied that there was evidence to support that there were quality problems at Elastomer. In any event Mr Te Huia was reluctant to tell me what these were as he did not want to assist the company.

[33] On behalf of the applicant Mr McDonald submitted that the matter should have more properly been dealt with as a performance management issue.

[34] There was though, as Mr Field outlined in his evidence, potentially serious ramifications for Elastomer from the supply of the cable with undersized conductors justifying the taking of the matter seriously. The faulty cable supplied to Perennial was green cable which is typically used as earth cable in appliances. Using an undersized conductor in an appliance could have been life threatening or could have led to product recalls. There was also the potential for damage to Elastomer's reputation with Perennial and another customer to whom some of the faulty product in finished appliances had been supplied and who were copied into the email sent to Elastomer from Perennial. Elastomer had contracts with these clients worth in excess of a million dollars per annum.

[35] The company also relied on the fact that Mr Te Huia was spoken to by his supervisor Mr Arps on the same day that Mr Te Huia made the cable with the undersized wire (10 February 2005) about the need for proper completion of his documentation with respect to his production recording sheets for 8 and 9 February 2005. On 10 February 2005 Mr Te Huia's production recording sheet again omitted the detail Mr Arps had spoken to him about being set up and run times.

[36] There was a training programme in place within the company and Mr Te Huia was participating in training toward achieving a National Certificate in Plastics Processing.

[37] I find that Elastomer made it clear that they were treating the matter seriously. Mr Te Huia failed to perform the standard quality checks that were part of his responsibilities and/or be alerted throughout the manufacturing process to the fact that the conductor wire was undersized. The

carrying out of these procedures was important and there were serious consequences to the company as a result of Mr Te Huia failing to undertake the standard testing procedures. Elastomer had to reimburse Perennial cable for the rejected product and sorting costs in the sum of \$2,195.28.

[38] I conclude that Elastomer was justified in treating the matter seriously and issuing Mr Te Huia with a written warning.

Determination as to whether the warning was justified?

[39] The issuing of Mr Te Huia with a written warning was an action that a fair and reasonable employer would have done in these circumstances where Mr Te Huia had failed to carry out standard testing procedures to confirm to Mr Te Huia the importance of carrying out quality checks and completing quality related documentation.

[40] The procedure overall adopted to investigate the concerns that resulted in the warning was fair.

[41] The warning issued to Mr Te Huia on 28 April 2005 was justified.

Was the dismissal justified?

The reasons for dismissal

[42] The reasons Mr Te Huia was dismissed were as follows:

- Manufacturing a carton of mixed wire colour on 27 April 2005.
- On 18 May failing to carry out wall thickness tests on cable, failing to complete job cards and manufacturing cable with the incorrect markings/printing.
- In terms of all these incidents, failing to isolate or notify of them.

Analysis and conclusions in terms of the dismissal

[43] Mr Te Huia says that the dismissal was unjustified amongst other reasons because he was not notified in writing of the instigation of a disciplinary process, advised sufficiently of the allegations of misconduct he was facing and told that there was the possibility of dismissal. Mr Te Huia also says that the alleged misconduct should have been treated as a performance issue and that termination was out of proportion to the actions complained of.

[44] The production manager of the silicone and cable department is Wayne Meaclem. In late April or early May 2005 it was brought to his attention that a carton containing about 4000 metres of wire had two different coloured ends light and dark green hanging from the two corners of the carton.

[45] Colour is important because it is used to distinguish different types of conductor. An incorrectly coloured cable could mean the wrong wire type or length is fitted into a loom. Mr Meaclem asked Mr Arps to rewind the cable and determine how many metres had been affected. Mr Arps was able to ascertain that 90 metres had been affected. He said that the change in colour from light green to dark green was gradual and the job sheets and quality detail suggested that the wire had been produced by Mr Te Huia on 19 April 2005.

[46] The difference in colour suggested that the cable had not been checked when the box was started.

[47] On 5 May 2005 Mr Te Huia was given the relevant job sheets related to the colour issue and asked to think about the possible causes. There was to have been a meeting on 9 May to discuss the matter but Mr Te Huia was on sick leave until 17 May so there was no meeting until he returned to work on 17 May 2005.

[48] Mr Meaclem was not satisfied with Mr Te Huia's explanation that *maybe it was the stock*. Mr Te Huia was told that a formal investigation would be carried out into the problem of the different coloured wire and he was advised to obtain a representative. He was told there would be a meeting on 18 May 2005 at 3.30pm.

[49] Mr Te Huia was asked at the meeting on 18 May whether he wanted representation. Mr Te Huia did not want representation for this meeting. He was asked questions about the different coloured cable. Mr Meaclem felt that Mr Te Huia was vague and obstructive in his answers. I find, as recorded in the quality or accident near miss investigation report, that Mr Te Huia was asked at this meeting if there was anything inside or outside or his employment that could be a cause to his quality control problems and that he said he would think about that and the meeting was adjourned.

[50] Mr Te Huia then worked out his shift on 18 May 2005 during which there were some further issues. Mr Te Huia produced eight boxes of cable but only recorded three wall fitness tests instead of the eight required. Mr Te Huia also produced seven kilometres of electrical wire printed with the incorrect temperature rating of 150° C instead of what the order required of 180° C. The wire would have taken about 3 hours to run and should have been checked visually about every 10 minutes or so. The production recording sheet had "cancelled" but no other information about the cable. A job card was in a box of cable without the relevant part number or job number written on it which meant it was unable to be identified and there was no traceability for the product. The faulty cable had not been isolated or notified to anyone.

[51] Mr Meaclem met with Mr Te Huia on 19 May and advised him of the discrepancies from the shift on the previous day and asked him how they occurred. The quality or accident near miss investigation report records that Mr Te Huia:

- *Deflected the question.*
- *He had no recall of the incidents occurring.*
- *He had not had time to think the issues over as he was an hourly rate worker and did [not] think of anything related to his employment outside of work hours.*

[52] Mr Te Huia was advised by Mr Meaclem that the issues arising on the shift of 18 May 2005 would form part of the investigation that they were undertaking in conjunction with the mixed colour wire issue. Mr Te Huia was not advised of the meetings in writing but I am satisfied that he knew what the nature of the allegations were and was provided with the necessary paper work.

[53] There was then another meeting on 23 May 2005. Mr Meaclem was present with Mr Ching who was at that time the production manager for the cable plant but is now deceased.

[54] I am satisfied that Mr Te Huia was verbally advised prior to this meeting to have a representative and that he could face a disciplinary outcome including dismissal. Mr Te Huia did not give any real explanations in response to questioning about all the quality issues. On one occasion when asked for the truth he responded *for you to work out*. Mr Te Huia seemed to accept however that he was required to do the tests on the manufacturing order.

[55] Mr Te Huia said in his evidence to the Authority that many issues and failures he was blamed for are in fact quality system failings and a lack of clear policy and procedures on the part of Elastomer. I am not satisfied that he gave this explanation at the time and further the evidence from the respondent supports that there were clear policies and procedures about quality testing.

[56] After the meeting on 23 May Mr Ching and Mr Meaclem met with Mr Field to discuss the matter. Mr Field, who I found to be a reliable and straightforward witness, told me that all three arrived at a decision to dismiss Mr Te Huia after the meeting on 23 May 2005.

[57] There is a right for Mr Te Huia to be heard by the decision maker. Although Mr Field confirmed that all three men made the decision to dismiss only two, Mr Ching and Mr Meaclem had been present at the meeting on 23 May 2005. I would have found the fact that Mr Field was not present at the meeting on 23 May 2005 procedurally unfair had there not been a further meeting with Mr Te Huia on 24 May 2005 and all three decision makers.

[58] That further meeting on 24 May 2005 was to give Mr Te Huia a final chance in light of his previously unsatisfactory responses to explain the quality issues or offer matters in mitigation. He was advised he was entitled to representation. Mr Te Huia did not provide anything further although Mr Field tried on several occasions to encourage him to provide a response or explanation. At one stage Mr Te Huia requested *not to talk*. Mr Field made it clear that they needed to come to a decision and that there was the possibility that Mr Te Huia would lose his job. Finally an adjournment was taken and then Mr Te Huia was read the decision that there were several instances of misconduct and that Mr Te Huia's employment was terminated on one weeks notice.

[59] The mixed wire colour incident occurred prior to the issuing of Mr Te Huia with a written warning but was discovered after the warning was issued. The date for that incident was incorrect in the dismissal letter. It should have been 19 April 2005. I am not satisfied that incident alone would have justified dismissal in those circumstances. However while that matter was being investigated Mr Te Huia failed to undertake several standard quality checks and tests and complete necessary documentation on the shift of 18 May 2005. Elastomer lost one night's production on an extruder on 18 May 2005 because it was not confident that other quality control tests had been carried out by Mr Te Huia.

[60] In my view there was merit in Elastomer's conclusion that the failure on Mr Te Huia's part to complete the quality checks on 18 May 2005 was serious, that Mr Te Huia had no explanation for the failure to carry out the tests and that as a result his actions and inactions placed Elastomer's business at risk.

[61] Mr Te Huia had a few weeks prior to these failures been formally warned about the need to complete all quality checks and documentation. Given that warning concerned quality issues it was open to the employer to take it into account. The letter confirming the warning provided that further poor performance would render Mr Te Huia liable for more serious disciplinary action. Mr Te Huia had been advised at the meeting on 28 April that this could include dismissal.

[62] Further, when the quality issues occurred on 18 May, Mr Te Huia knew there was an investigation into another quality issue of mixed wire colour. He had that day met with Mr Meaclem and Mr Ching about that matter.

[63] It was reasonable for Elastomer to conclude that Mr Te Huia knew how to carry out the tests/checks and that they formed part of his job responsibilities. Elastomer had to have trust in Mr Te Huia who operated the extruder unsupervised that he would carry out his job and perform the

necessary quality checks on the wire produced and complete the required documentation. Elastomer decided that it could not have that necessary trust and confidence in Mr Te Huia.

[64] The procedure adopted by Elastomer to investigate the quality issues was fair.

[65] I conclude for the above reasons that the decision of Elastomer to dismiss Mr Te Huia for the quality issues that occurred on 18 May 2005 was one that a fair and reasonable employer would have taken given those circumstances.

Determination as to the justification of the dismissal

[66] I find that the dismissal of Mr Te Huia on notice was justified. He does not have a personal grievance and there is nothing further I can do to assist him.

Costs

[67] I reserve the issues of costs.

[68] Mr Te Huia is legally aided. It may be that agreement can be reached to resolve the issue of costs without the need for submissions to the Authority.

Final comment

[69] Mr Te Huia told me that he wanted a certificate of service from Elastomer to assist in applications for positions. I do not anticipate Elastomer would have any difficulty with the provision of such a certificate.

Helen Doyle
Member of Employment Relations Authority