

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 13  
5415400

BETWEEN IAN MOFFATT  
Applicant

AND P A AND S C STEENS  
LIMITED T/A STEENS HONEY  
Respondent

Member of Authority: P R Stapp

Representatives: Keith McClure Counsel for the Applicant  
Susan Jane Davies Counsel for the Respondent

Investigation Meeting: 20 November 2013 at Masterton

Submissions Received by: 4 December 2013

Determination: 5 February 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This case is about Mr Moffatt's use of honey and giving it away as gifts during his employment with PA and SC Steens Limited, trading as Steens Honey (Steens).

[2] Mr Moffatt claims his dismissal on 8 January 2013 was unjustified. This includes being suspended on 19 December 2012. He is claiming lost wages, compensation and costs. He is also claiming four and a half days annual leave that was paid during his suspension instead of full pay on special leave. He has also claimed the payment of overtime/*banked hours* held on accrual each year for extended hours worked outside the core hours during the season for 2010-2011 and 2011-2012 (withdrawn at the Authority's investigation meeting). The claim amounts to 61 hours overtime/*banked hours* for 2012-2013 (season).

[3] PA and SC Steens Limited denies all Mr Moffatt's claims and claims that the suspension has been brought as a personal grievance out of time.

### **Issues**

[4] What is the standing of the claim that the suspension was unjustified?

[5] Was the dismissal (including suspension) justified?

[6] Was Mr Moffatt correctly paid during his suspension?

[7] Is Mr Moffatt entitled to be paid back his holidays entitlement during his suspension?

[8] Is Mr Moffatt entitled to the payment of *banked hours* for overtime?

[9] If there is a personal grievance has Mr Moffatt contributed to his personal grievance, and has he mitigated his loss for any lost wages that he may be entitled to?

### **The law**

[10] S.103A (2) and s.103A (3) (a) – (d) of the Employment Relations Act 2000 apply since the employment relationship problem occurred after 1 April 2011. This requires the employer to meet the standard of what a fair and reasonable employer could do. Also, the procedural requirements are whether the employer sufficiently investigated the allegations, whether the employer raised the concerns with Mr Moffatt, whether the employer gave Mr Moffatt a reasonable opportunity to respond and whether the employer genuinely considered Mr Moffatt's explanation.

[11] This is a matter that rests on the decision made by the employer and it is not for the Authority to substitute its view for that of the employer. Also, the matter relates to whether the employer had sufficient evidence to meet the standard for serious misconduct having regard to the gravity of the allegation and reasonably believed that Mr Moffatt acted without authority to give honey away.

### **The facts**

[12] Steens is a wholly owned New Zealand company. It produces high end potent anti-microbial bio-active honey. It is a major exporter of its active Manuka honey under its own brand. It also supplies bulk Manuka honey to other New Zealand

distributors, who process and distribute the honey and honey products under their own brands.

[13] Steens has an extraction and packaging factory at the outskirts of Masterton. Mr Moffatt was an employee and his place of employment was at the extraction and packaging factory.

[14] Steens is not a large employer, and employs approximately eight people. It manages its own administration and outsources the human resources function and the payment and administration of wages.

[15] It is common ground that despite Mr Moffatt's job title of a Utility Leader, he was employed and had the responsibility for maintenance and work around the plant at Manaia Road, Masterton. Mr Moffatt's first role was as a part-time apiary assistant in the factory. That role required him to undertake various tasks related to the preparation of hive resources, honey extraction processes and site maintenance.

[16] Mr Moffatt signed off an individual employment agreement for the *Utility Leader* role at Steens. Mr Moffatt's duties had been previously discussed with a previous plant manager (on 20 April 2009) [document 4.1 SIR]. The previous manager left Steens in January 2011. Mr Moffatt has relied on previous practices with the manager at the time.

[17] Steens has its office in Tauranga, which is the registered address of the company, and this is where the owners (Mr and Mrs Steen) are located.

[18] Mr Moffatt reported to Mr Hayden Green, the Masterton General Manager. Mr Green started at Steens in October 2012. He was a new manager and reports to Julie Cox, the company's Business Development General Manager, based at the head office in Tauranga. She was on maternity leave when the events occurred. Upon starting at Steens Mr Green formed an early view about Mr Moffatt that made him decide that Mr Moffatt needed assistance, counselling and mentoring in his role. He says he needed to spend much of his time with Mr Moffatt to manage what he did and when he did it. The impression given by Steens is that Mr Moffatt saw his role as more than it actually entailed. Mr Moffatt's evidence is that he was allowed to do what he did and had done nothing wrong, because a previous manager condoned what he did and no one informed him to do what he did any differently.

[19] Mr Moffatt says it was his practice in his role to try and build positive commercial relationships with contractors and suppliers and part of this involved gifting honey in return for any services that might be needed sometime. He says he collected a supply of waste honey for Christmas gifts to give to contractors and suppliers. In particular Mr Moffatt claims that he was allowed to make use of “rent honey” and waste honey from the extraction pipes. This is known as piped honey and included waste honey from filter bags. He says the filter bags contained lumpy honey and bee parts and foreign objects. He says honey that collects in the filter bags was either washed down the sink or that he potted it and labelled it “IF” honey which stands for “Ian Filter”. Also he says that honey that was put into jars, and the jars sometimes failed to get sealed properly when the screw threads were damaged. When this happened, shavings were deposited in the honey, and the jars were not suitable for sale and were put in a large cardboard box on the shelf in the extraction room. He says that the jars were not included in any stocktake. Despite Mr Moffatt saying that other people knew about this arrangement, the respondent’s witnesses have denied Mr Moffatt’s account; that is Ms Cox, Mr Green, Mr Gregory Anderson, the production supervisor and Mr Brian McCall, the hive manager. In particular it has been denied by the respondent that filter honey could be called waste honey when the filter bag in the honey filling machine is there to catch foreign bodies and large crystals such as bees going through before the honey is packaged. It is claimed that residual honey would not be up to the quality standards required for honey leaving the site and any “IF” honey would have been written on the lids without permission.

[20] On 7 December 2012 Mr Green and Mr Anderson say they saw Mr Moffatt put one bucket and three pots of honey in a van of a visitor attending at the premises. The references to one bucket and three pots were also made in the allegations letter dated 27 December 2012 and the dismissal letter dated 9 January 2013. The visitor gave Mr Moffatt about a half dozen scrap fire extinguishers. The extinguishers were initially put, by the visitor, in the workshop, until Mr Moffatt moved them to his van later. The exact sequence of events and what unfolded are in dispute, but it is common ground that Mr Moffatt gave away honey and that the visitor gave him fire extinguishers.

[21] Mr Green did not take the matter up with Mr Moffatt at the time, although Mr Green says that he was suspicious of Mr Moffatt’s actions. He decided instead to initiate some inquiries; commencing with the company where the visitor worked.

This inquiry confirmed that the employee concerned had received the honey and had not declared it with his employer as a gift. The visitor kept the honey for his personal use. Also, Mr Green checked invoices relating to the visitor's company where he worked.

[22] Second, Mr Green asked Mr Anderson about what he saw. Mr Anderson was on holiday at the time, but provided a short email statement of one sentence about what he saw. He confirmed that he had seen Mr Moffatt put the honey in the visitor's van. Mr Green reached the conclusion that it may have been in exchange for the fire extinguishers about which he was suspicious, but this aspect of his thoughts never became part of the allegations.

[23] Third, an investigation concerning the honey register book confirmed that Mr Moffatt had not properly declared and entered into the log book exactly the amount of honey that he gave to the visitor. Mr Green also checked the cash tally register to see if the honey had been paid for, and found that there was no payment for it.

[24] On 19 December 2012 Mr Green, assisted by Mr Brian McCall, the hive manager approached Mr Moffatt when he was working in the workshop. Mr Green's aim was to raise his concern about the giving away of honey to the visitor for Mr Moffatt to provide a response. Mr Green says he was concerned about his safety and says that before approaching Mr Moffatt he rang the Police with a warning about what Mr Moffatt might do, because he considered Mr Moffatt might act adversely once he was given the information. In support of his action Mr Green says he felt threatened by Mr Moffatt who was at the time holding a hammer when they approached him in the workshop.

[25] Mr Green says he said to Mr Moffatt that he was commencing a formal disciplinary investigation into the honey and fire extinguisher matter and that it involved the possibility of serious misconduct. They had a discussion about the allegations and the lack of any approval for an exchange. Mr Moffatt accepted that he had given away honey, but the discussion became heated and tense and terse. Thereupon Mr Green immediately suspended Mr Moffatt from work and Mr Moffatt was required to leave immediately once his time sheets had been completed.

[26] Mr Moffatt wrote to Mr Green asking for the reasons for the suspension, and he requested as to what was to happen with his pay. A letter sent by Mr Green crossed in the mail with Mr Moffatt's letter. Steens decided to pay Mr Moffatt while he was suspended, but this was paid as five days annual leave that Mr Moffatt had previously applied for. Mr Moffatt claims that he should not have had to use his annual leave while on suspension and that this should be paid back as an entitlement for holidays because of the impact and his need to get ready for the investigation and disciplinary procedure. In the meantime Mr Moffatt obtained legal assistance and advice about 21 December 2012. Mr Green's letter outlined the outcome from his investigation and requested Mr Moffatt to attend a disciplinary meeting. Mr Green says that this decision was based on Mr Moffatt's admission that he had given honey to the visitor and that there was proof that he had done that without any authority. Mr Moffatt has denied making any admission of any wrong-doing.

[27] A meeting was delayed until 8 January 2013. This was to enable Mr Moffatt to obtain a letter from the previous manager about what Mr Moffatt was allowed to do. It was not produced during the employer's investigation and enquiry. Mr Moffatt and his support person attended the meeting. His support person and Mr McCall (for Steens) both wrote up their own notes of the meeting. Steens' notes have been produced in advance of the Authority's investigation meeting. It was not until the Authority's investigation meeting that it was discovered that Mr Moffatt's support person had written notes and then typed them up and gave them to Mr Moffatt. They have subsequently been produced. There has been no cross examination in regard to the additional information produced by the applicant and Mr Derek Morris, his support person at the time.

[28] During Steens' disciplinary process Mr Green had an adjournment with Mr McCall to consider a decision, and afterwards Mr Green dismissed Mr Moffatt. Mr McCall's evidence was that Mr Green decided to dismiss Mr Moffatt and there is an issue about whether or not Mr Moffatt had an opportunity to consider any options on the outcome before a final decision was made, and whether Mr Green genuinely considered anything that Mr Moffatt had to say at the time before making a decision. The final decision was conveyed in the letter dated 9 January 2013. A personal grievance was raised by Mr Moffatt's representative in writing in a letter dated 12 February 2013 concerning the "summary dismissal" and claiming that "the dismissal was unjustified". It did not refer to the suspension as a separate employment

relationship problem. The statement of problem filed in the Authority only referred to the dismissal. Both documents refer only to global remedies. In submissions the respondent has taken issue with the applicant now raising a personal grievance in regard to the suspension. There is no stand-alone unjustified disadvantage claim. No consent has been given for such an action to proceed. I will treat the suspension as background as it was out of time and was not clearly raised as an issue until the Authority's investigation.

[29] The substantive matter was not settled and it falls to the Authority to make a decision. Thus the claim for unjustified dismissal; the claim for four and a half days annual leave that was paid during his suspension instead of full pay on any special leave; and the claim for the payment of the 2012-2013 *banked hours* held on accrual each year for extended hours worked outside the core hours during the season remain live issues.

[30] The respondent's letter of dismissal did not provide the grounds for the dismissal and did not detail what the respondent claimed amounted to serious misconduct by relying on the employment agreement. More detail was provided in the statement in reply that referred just to "serious misconduct". At the time there was no reference made to the grounds and detail under the "Staff Handbook".

### **Determination**

[31] Prior to the Authority's investigation meeting in the statement in reply the employer raised a concern about some costs that it had been put to by Mr Moffatt's behaviour in the workplace in regard to an entirely separate matter that does not need to be referred to in any detail and Mr Moffatt giving honey away. Steens has alluded to the possibility of counter claims. There is no separate application for a counter claim in respect of any claims against Mr Moffatt from the respondent. When it became apparent during the Authority's investigation meeting that another employee had also given honey away and taken more honey than he was apparently allowed to for his own use, Mr Paul Steen, one of the owners, became agitated and raised his concerns about the development and the costs to the business. In particular Mr Steen expressed his anger and frustration about the costs incurred by Mr Moffatt's and the other employee's actions and the current process involving Mr Moffatt and his claim and the Authority's investigation. Be that as it may Mr Moffatt is entitled to raise his

personal grievance claim and the dispute on the “banked hours” and the law applies to Steens as an employer.

[32] I hold that the dismissal incorporated the suspension in the sequence of events as background. The decision to suspend Mr Moffatt was poorly executed by Mr Green and Mr McCall when they approached Mr Moffatt in the workshop. I accept that no one else was present then, but if Mr Green felt any concern for his safety prior to attending that meeting his decision to approach Mr Moffatt without any notice of the concerns, no opportunity for Mr Moffatt to have a representative of his own choice and to confront him on the matter without notice, was a situation of Mr Green’s own making, I hold.

[33] Mr Moffatt has claimed back his holiday pay for the time he was suspended. This claim is declined because Mr Moffatt had applied for holidays before any action was taken. There is nothing to prevent an employer using such leave when an application had been made and the leave was taken and approved. This would distinguish Mr Moffatt’s situation from other employees who had not applied and taken leave and where there are no arrangements in place for taking annual leave prior to a suspension and taking any leave due as a requirement. Effectively Mr Moffatt was paid wages during the time in any event because he had applied for the leave and intended to take it.

[34] It is common ground that Mr Moffatt got upset when he was suspended. Any differences on the events between everyone involved was not helped by the lack of any proper documentation from Mr Green such as a letter of notice (including the possibility of suspension) beforehand, arrangements for a proper meeting and not providing Mr Moffatt with the right to a representative, even if there was no requirement to have a representative. I will return to these points later.

[35] I hold that Steens as a fair and reasonable employer could raise with Mr Moffatt the issue of Mr Moffatt gifting honey and/or giving honey away and the authority for him to do that based on the one event that caused suspicion. Steens was entitled to raise the issue with Mr Moffatt based on Mr Green’s observation of Mr Moffatt putting honey into a visitor’s van. Mr Green was in charge as the manager. While a fair and reasonable employer could be entitled to take such action as suspension, the law requires an employer to follow a proper process for its action.

[36] The lack of a formal process has meant that Steens left itself open when Mr Moffatt had differences about what happened during their first workshop meeting.

[37] I hold that the respondent is correct that there has been no separate cause of action for an unjustified disadvantage personal grievance raised in regard to the suspension. It was not directly raised as an unjustified action personal grievance separately in the letter raising the personal grievance as it has to be; the statement of problem and the amended statement of problem. Also the claims for remedies only relate to the claim that the dismissal was unjustified for lost wages and compensation globally. Therefore the suspension matter is only background.

[38] Where the witnesses differ in their evidence I prefer the evidence given by Julie Cox in the first instance. She has been employed by Steens since September 2005. She has given evidence of her knowledge of the authorities and entitlements for employees to give any honey away and the arrangements that she personally put in place that required authority and a record to be kept. There was nothing in writing about gifting honey, except some correspondence that Ms Cox wrote to the Administration Officer in Masterton as proof of there being a policy according to Ms Cox, Mr Green and Paul Steen. This supports Steens' position:

- (i) that authority was required for giving honey away;
- (ii) that staff were entitled to two jars per year; and
- (iii) that records needed to be completed in writing of the amount being taken. Indeed Mr Moffatt purported to use the record for the honey he gave to the visitor.

[39] Mr Green and Mr Anderson were not shaken in their evidence when it was challenged. There was sufficient linkage in their evidence to form a consistent thread about what happened at the time, I hold. There is no doubt that Mr Moffatt gave the visitor honey, and I hold he did so outside the rules. He acted unwisely in taking the extinguishers for his personal use from the visitor at work. It seems inevitable that this raised a suspicion about what he was doing, but the extinguishers I hold were not the reason for his dismissal, and indeed the extinguisher matter was not put to him as the employer's concern and reason for the disciplinary process and subsequently the decision to suspend and dismiss him.

[40] There was an employees' handbook produced during the Authority's investigation (called the "Staff Handbook"). There is some doubt that Mr Moffatt had read the handbook with the suspension and disciplinary policy contained in it. Although the employment agreement referred to a schedule for disciplinary action, such a document was not able to be produced by anyone. However, I hold that his actions were enough for an employer to conclude that the matter was of sufficient seriousness to invoke a disciplinary process encompassing an investigation and subsequently a decision to dismiss Mr Moffatt. However I am not at all sure Mr Green knew about any details in the Staff Handbook, and Mr Moffatt never referred to it. What Mr Green did refer to was the provisions of the employment agreement with regard to trust in the employment relationship and the obligation on Mr Moffatt to conduct himself in the best interests of the employer. At first Mr Green was equivocal on whether the allegations would amount to "misconduct" or "serious misconduct", before finally coming to a conclusion that the ground was serious misconduct following the investigation and disciplinary process.

[41] Next I hold that Mr Green has done enough to support his decision that it was solely based on Mr Moffatt giving honey away without appropriate authority, even although the respondent's minutes and statement in reply confused the matter by referring to another performance issue and the suspicion of exchanging honey for the fire extinguishers. Indeed there is some doubt that what was called by Mr Moffatt as "IF" honey and filtered honey was allowed, and its existence was denied by Steens' witnesses.

[42] Background matters that relate to Messrs Moffatt's and Green's relationship have been raised that suggest Mr Green wanted to terminate Mr Moffatt's employment. However, Mr Green adamantly denied this claim, and his letter of dismissal supports him, as does Steens' consistent defence in the employment relationship problem and Mr Green's attempts to manage Mr Moffatt. Steens' focus was on the allegations where there was a sufficient basis to raise them at the time, because Mr Moffatt created the suspicion, and Mr Moffatt's claims have to be balanced with Mr Green's explanation and goals of counselling Mr Moffatt through the issues that Mr Green had identified with Mr Moffatt in his employment. I hold that all the other issues were entirely separate matters. I observed that while Mr Green was not an eloquent witness with his answers to questions that is not enough to draw a conclusion that he was unreliable and/or dishonest with his answers. He

unfortunately introduced some matters that Mr Moffatt quite rightly took exception to because they had never been raised with him during his employment and there was no real reason for them to be raised in the Authority's investigation, especially as reinstatement was not claimed. It does leave the impression that Mr Green was setting out to malign and/or attack Mr Moffatt in Steens' defence of the claims, but even though the matters have been raised during the Authority's investigation I hold that the matters are not enough to prove that Mr Green was biased and predetermined the outcome, despite how personal some of the matters are.

[43] I hold that Mr Green was entitled to make a decision, although he was the investigator and a witness having regard to the employer's resources. This is because Mr Moffatt accepted that he had given honey away. Mr Anderson was also a witness to the event. Although Mr Moffatt accepted immediately that he had given the honey away, albeit he believed and assumed that he had authority to do so, a fair and reasonable employer could reject the explanation from Mr Moffatt, I hold. I have considered:

- (i) That Mr Green genuinely believed that Mr Moffatt gave the honey away knowing he did not have authority to do so. This is supported by the existence of the honey register, Mr Moffatt's casual entry for the honey and Ms Cox's evidence. Indeed Mr Green considered at the time something was amiss that supports him having knowledge of the existence of requirements for giving honey away.
- (ii) That Steens' witnesses did not support Mr Moffatt's version.
- (iii) That Julie Cox was a reliable witness with experience and sufficient knowledge of the workplace practice. She gave genuine evidence of her understanding of the arrangements for employees to have honey and the requirements for approval to give honey away.
- (iv) That a honey register existed.
- (v) That Mr Moffatt made an entry in the honey register.
- (vi) That Mr Moffatt had the opportunity to put forward any letter from the previous manager and chose not to do so at the time.

[44] I conclude that Mr Green came to an honestly held belief that Mr Moffatt did not have the approval and/or authority required to give honey away to the visitor, and I hold it was more likely than not that Mr Moffatt had a procedure that he was required to follow for obtaining approval and authority and that he was required to keep a record. I hold that the employer has supported the claim that “IF” honey and/or waste honey was not allowed to be given away.

[45] I now consider the procedure followed by Steens, and in particular Mr Green.

[46] First an investigation was carried out. Mr Green approached the visitor’s employer for information. Mr Green had Mr Moffatt’s admission that he had given honey away. Mr Green obtained, albeit brief, comment from Mr Anderson and what he witnessed at the time.

[47] Second, the concerns were raised with Mr Moffatt. The concerns were put in writing. The parties met to discuss the concerns.

[48] Third, Mr Moffatt had an opportunity to comment (on 8 January 2013) in regard to Mr Green’s outline of his investigation and conclusions. He had that opportunity to put forward any letter from the previous manager and chose not to do so at the time. Although the disciplinary process and decision making has been blurred, Mr Moffatt would have been under no misunderstanding as to what was at issue and the risk to his employment.

[49] Finally, I hold that Mr Green did genuinely consider with Mr Anderson, Mr Moffatt’s response. This is supported by the adjournment taken during the meeting and Mr Green’s letter confirming the dismissal supported by the minutes. I hold that there was no predetermination in the decision for any other reasons, albeit other reasons may have existed. This is further supported by the decision that Mr Green was better placed to investigate and conduct the disciplinary process rather than Paul Steen, because of the extremely poor relationship between Mr Steen and Mr Moffatt and that Mr Steen did not get on with Mr Moffatt (Green statement at paragraph 37). Also, Ms Cox was on maternity leave at the time. Mr Green was relatively new to the business and had been counselling Mr Moffatt in regard to performance issues. So in regard to the employer’s resources it was open to the employer to use Mr Green in the process.

[50] The employer's process was by no means perfect or even exemplary and indeed the background in the poorly executed suspension might give rise to an opinion that the dismissal process was also wrong. I do not accept that view. The inadequacies and omissions in the dismissal process were not fatal because Mr Moffatt accepted that he had given away the honey, and the employer reasonably concluded that Mr Moffatt lacked authority to do so. I understand that Mr Moffatt believes he had an explanation based on what he thinks he was allowed to do, and was entitled to give it away, but a fair and reasonable employer could reject the explanation I hold based on Ms Cox's, Mr Green's and Mr Anderson's evidence and that no evidence was put up by Mr Moffatt at the time in regard to the previous manager's handling of Mr Moffatt's behaviour and what he might have been allowed to do in the past.

[51] I hold that Steens has been able to support that Mr Moffatt did not have the right to give the honey away as he felt fit to do, without authority and prior approval, given the owners' rejection and disapproval of Mr Moffatt's actions and the arrangements put in place that allowed some honey for personal use. Mr Moffatt's failure to seek any approval was sufficiently serious for the employer to reach a conclusion that he had committed serious misconduct going to the very core of the relationship of trust and confidence because there was no benefit identified for the employer and there was an issue about the approval required and Mr Moffatt took no responsibility in regard to that.

[52] I now turn to the matter of banked overtime hours. Mr Moffatt was paid by salary. There is nothing complex about the "banked hours" overtime arrangement, although on first impression it seems unusual. The payment was clearly discretionary during employment and over and above the salary, which is the term of the arrangement that had been agreed to by the parties signing off the employment agreement. There is only a provision for salary, and any over time is expressed as a discretionary payment in terms of banked hours. Mr Moffatt is not entitled to the "banked hours" as they have been forfeited through the employer's discretion not to pay. For completeness this is not a separate personal grievance in the employment relationship problem, and thus I am not able to determine what a fair and reasonable employer "*would*" [sic] (applicant's claim) do as has been claimed and submitted by Mr Moffatt for the 2012-2013 (season).

## **Conclusion**

[53] Mr Moffatt's claim for unjustified dismissal is dismissed.

[54] Mr Moffatt's claim for claiming back the holiday payments is dismissed for the reasons provided earlier in the determination.

[55] I also note that the claim for 7.5% interest on the amount claimed is wrong when under the Judicature Act regulations there is provision for 5% per annum interest. The current rate of interest applied from 1 July 2011 (Judicature (Prescribed Rate of Interest) Order 2011). The Authority's jurisdiction applies under Clause 11 Schedule 2 of the Employment Relations Act 2000.

## **Costs**

[56] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority