

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Isakara Lalovai Aisake (Applicant)
AND Colyer Mair Limited (Respondent)
REPRESENTATIVES Justin Graham, Counsel for Applicant
Tim Cleary, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 4 August 2003
SUBMISSIONS RECEIVED 29 August, 9 and 16 September 2003
DATE OF DETERMINATION 17 September 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Isakara Lalovai (“Vai”) Aisake says he was unjustifiably dismissed by his former employer, Colyer Mair Limited (“Colyer Mair”). Since the parties agreed Colyer Mair was the employer, I have struck out Lowe Corporation Limited which was originally cited as a respondent.

Mr Aisake was dismissed for refusing to carry out a lawful and reasonable instruction to carry out certain work.

Background

Colyer Mair operates a tannery business at premises in Onehunga. It processes to a semi-processed finish cattle hides received either raw, directly from the freezing works, or salted. For historical reasons processing occurs in two separate but linked buildings on the premises, known respectively as ‘Southern Cross’ and ‘Sutherland’. On receipt hides are fleshed, put into tip bins, then collected and loaded into tanning drums. Drums at Sutherland are filled first, then Southern Cross takes the rest.

Hides are limed and tanned while in the drums. The associated chemical process takes 48 hours to complete, and in order to avoid the need for overtime the process needs to start before 2 pm on a working day.

At the relevant time Colyer Mair employed 8 drum hands over two shifts in Onehunga. Mr Aisake was a drum hand who worked in the Southern Cross area.

Drum hands worked in pairs, and since drums were mounted on a mezzanine floor the pairs usually divided their work by having one work on the mezzanine or ‘top’ and one on the ground or

'bottom'. In general the person on the top was responsible for monitoring and ensuring the chemical process in the drum kept running, while the person on the bottom was responsible for loading and unloading the hides into and out of the drum. When a forkhoist driver was available the driver would deliver hides to the drums, but this was not generally the case at Southern Cross so the drum hand on the bottom would also collect the hides. The two drum hands would swap the top and bottom roles from time to time. They were expected to assist each other where necessary, particularly when the work environment was quiet.

Within this scheme drum hand partnerships would develop their own practices. The partnerships did not always operate smoothly, as happened with Mr Aisake and a partner in May 1999. Warren Bell, who was the manager responsible for technical and training matters, convened a meeting between the two to resolve their issues. At the time Mr Bell recorded: "We need to define responsibilities so that one man takes responsibility for one task". There was an agreement that there be no interaction between the two men. Despite argument to the contrary I do not believe this assists Mr Aisake's present position – and nor does it detract from the general expectation that drum hands assist each other - because the arrangement was a 'one-off' made expressly to deal with the problem between the two men concerned. The other person was not Mr Aisake's partner at the time of dismissal. There was no evidence of a problem between Mr Aisake and Pasetto Viliamu, who was Mr Aisake's partner at the time of dismissal and the period leading up to it.

Moreover during the period relevant to this employment relationship problem the drum hands were covered by the Southern Cross Leathers and Sutherlands Tannery Collective Employment Contract ("the cec"), which commenced on 1 July 2002. Clause 19 of the cea provided:

"In order to ensure that the company can cope with changing work patterns and methods and to ensure the efficient utilisation of labour, employees party to this collective employment contract shall, if required by the employer, undertake any work within their capabilities anywhere on the premises or any other place of work that is required by the employer."

A number of incidents mentioned during the evidence, but not relied on as grounds for dismissal, occurred early in December 2002. I understood them to have been raised as part of the background to why the employer made the decision to dismiss rather than considering lesser disciplinary action.

The first arose over the period between 25 November and 5 December 2002, in response to a request from the management that drum hands on the afternoon shift clean pH probes and two effluent baskets as part of their daily duties. The task was expected to take 10 minutes. Mr Aisake strongly resisted the request and, although he was aware of clause 19 of the cec and had done such work in the past, neither he nor Mr Viliamu did the requested cleaning. John Knowles, the tanning department supervisor, had discussions with Mr Aisake about the matter, eventually issuing a formal directive that the cleaning be done. Mr Aisake insisted it was not his job to clean the baskets. On 5 December when Scott Mather, the tannery manager, asked Messrs Aisake and Viliamu why they were not cleaning the baskets, both advised they were too busy. Mr Mather had access to production records which indicated that could not be the case, and pointed the fact out to both men. Thereafter Mr Viliamu agreed to do the cleaning, as did Mr Aisake with considerably more reluctance.

The next incident occurred on or about 10 December 2002. While carrying out certain duties employees wore protective face pieces which could become contaminated with animal flesh and start to smell if the flesh rotted. To avoid this the face pieces were salted, but on 10 December someone had forgotten to add the salt to the container holding the face pieces. Eddie Fotu, a forkhoist driver and the recognised site delegate for the union, found the smelly face pieces on the Sutherland premises at about 6.30 am on 10 December. He reported the problem to Mr Knowles, who took action by opening an outside door for ventilation, and advising Mr Bell of a need to order

a supply of a deodorising chemical. Mr Bell placed the order, but the chemical was not delivered until 11.30 am. The smell was eventually dealt with by about midday.

As a member of the health and safety committee for the site, Mr Aisake complained to Mr Knowles about the smell at about 9 am. Mr Knowles pointed out that the outside door was open for additional ventilation, and that an order for the deodorising chemical had been placed. This did not satisfy Mr Aisake. It seemed to me his real concern arose from the fact that the smell persisted, since there was extra ventilation and he was told of the placement of the order for the chemical. Overall the relevance of the incident was that from the company's point of view Mr Aisake was refusing to accept the incident was under control in the face of information to the contrary, while Mr Aisake believed his dismissal was imposed because he had raised his concerns.

Later the same day Mr Mather received a facsimile message from Peter Ritchie, branch secretary for the New Zealand Meat and Related Trades Union (Auckland Branch), advising that the drum hands had elected Mr Aisake as the drum hands' delegate. Since the cec made provision for one site delegate, and the delegate was known to be Mr Fotu, any delegate status Mr Aisake held could be no more than informal. Indeed Mr Ritchie went on to state in his facsimile: "... any issues that he may wish to raise on drum hands' behalf (only) he must refer it in the first instance to Eddy Fotu." Mr Ritchie himself had not played any part in an 'election' of Mr Aisake, rather Mr Aisake had spoken to some (but not all) of the drum hands and informed Mr Ritchie of their wish that he act as their spokesman. At the time Mr Mather noted, correctly, that the company was not obliged to recognise any more than one delegate.

On the morning of 11 December 2002 Mr Aisake was working on 'the top' when Mr Knowles telephoned from another area of the tannery and advised a load of hides was ready for collection. This was his usual practice when a load for Southern Cross was ready, and he provided the advice by way of general information in the expectation it would be acted on and the hides collected without further instruction from him. Usually that happened. On 11 December, instead of merely passing the information on to whoever would be collecting the hides, Mr Aisake informed Mr Knowles he should get the forkhoist driver to collect the hides.

Mr Knowles did not seek to debate the point immediately. He merely asked to speak to the drum hand on 'the bottom', Mr Viliamu, and instructed Mr Viliamu to collect the hides. He was concerned about Mr Aisake's response, however, and went over to the Southern Cross mezzanine to speak to Mr Aisake. When he asked Mr Aisake why Mr Aisake had not simply advised Mr Viliamu a load was ready for collection, the reply was that Mr Aisake could not do that because he was not a charge hand. He also said the job was one for the person on 'the bottom'. Mr Knowles asked Mr Aisake why he was being so difficult, Mr Aisake denied being difficult, Mr Knowles told Mr Aisake to stop fucking him around and the conversation went nowhere.

Underlying the discussion about Mr Aisake's being a charge hand was the fact that, even though he was not a charge hand, Mr Aisake received a charge hand's rate of pay. Hence there was an incident in August 2002 with another drum hand, Iona Ioelu. Mr Ioelu had reported for work at 2 pm for the afternoon shift, as Mr Aisake was completing his morning shift. Mr Viliamu, who was working as Mr Ioelu's partner at the time, was also present in the control room with the other two. Mr Aisake complained to Mr Ioelu about the way in which Mr Ioelu had prepared the tanning chemicals, and became angry. He told Mr Ioelu he had not prepared the chemicals properly and issued what Mr Ioelu took to be an instruction on the matter. Mr Ioelu took exception to this, disagreed with what Mr Aisake was saying in any event, and also became angry. He left the room, slamming the door behind him.

A few days later Mr Ioelu was at work using a knife to cut labels. Mr Aisake approached him to ask about why he had slammed the door. Again Mr Viliamu was present. The conversation again became heated and it was common ground that Mr Ioelu stabbed his knife into a pallet. Mr Aisake alleged that he feared for his safety during the argument, although there was no allegation he was threatened directly either with the knife or in any other form. There followed an exchange between the two in which Mr Ioelu told Mr Aisake he was not entitled to tell Mr Ioelu what to do, but after further discussion the incident ended in a handshake. Mr Aisake said that he decided thereafter he would not tell people what to do because he was not a charge hand and had no right to give instructions.

However he did not raise this with his employer at any time until he responded to Mr Knowles as he did on 11 December. There was no evidence that, in the interim, he had attempted to refrain from either issuing instructions or appearing to do so.

On 12 December a similar incident occurred. Early in the afternoon Mr Knowles noticed a load of hides was ready for collection. As he could not see Mr Viliamu he told Mr Aisake the load was ready and asked Mr Aisake to collect it. It was common ground that Mr Aisake did not reply, but he agreed in evidence that he heard Mr Knowles and knew the request was directed at him. He did nothing about collecting the hides, and nor did he advise anyone else they were ready. Mr Viliamu was working on the bottom that day, and Mr Aisake could not see why Mr Viliamu was not asked to get the hides. Mr Aisake said he did not reply to Mr Knowles because he did not want another argument, but I do not find that credible in the light of his general willingness to speak out on matters he considered important.

The hides were left where they were until Mr Bell noticed them while doing his rounds in the early afternoon, at about 1.30 pm. The afternoon shift was to commence at 2 pm, and the hides needed to be collected and loaded by then. Later he saw an afternoon shift employee doing the loading.

A little after 2 pm Messrs Knowles, Bell and Mather were in the office when Mr Bell mentioned that the hides had not been loaded earlier, and that an employee from the afternoon shift at Sutherland was doing the loading. Mr Knowles advised he had asked Mr Aisake to do the loading.

Mr Mather went to speak to Mr Aisake, who was preparing to leave the premises at the end of his shift. He caught up with Mr Aisake in the car park. He asked Mr Aisake if Mr Knowles had asked him to collect the hides. Mr Aisake replied 'yes'. When Mr Mather asked if Mr Aisake had collected the hides, Mr Aisake replied 'no'. There was a conflict in the evidence about whether, and in what terms, Mr Mather advised there would be a meeting the following day, but Mr Aisake must have had some advance notice because the meeting came as no surprise to him and he identified the main issue on which Mr Ritchie needed to be briefed. The same afternoon Mr Mather contacted Mr Ritchie to advise that there had been a serious incident and Mr Aisake would need representation.

Accordingly on 13 December 2002 there was a meeting at the employer's premises between Messrs Ritchie, Aisake, Knowles, and Mather. Mr Ritchie reported to the office when he arrived on-site, as required by the company's health and safety policy. Mr Knowles went to advise Mr Aisake of Mr Ritchie's presence, and before the meeting started Mr Aisake explained to Mr Ritchie the division of responsibilities between the top and bottom drum hands. Mr Ritchie commented at the investigation meeting that he was aware of the issue as it was a 'hardy annual'.

The meeting commenced with Mr Mather asking Mr Aisake why he had not responded to the instruction of 12 December, and advising that dismissal may result. Mr Aisake's response was that

it was not his job to collect hides while he was working on top. It was Mr Viliamu's job. When it was put to him that he had time to collect the hides, Mr Aisake said he was too busy.

A note of the meeting - whose contents were not the subject of any real dispute - showed Mr Aisake was asked why he did not advise Mr Knowles that he was too busy, but did not record the answer. The note recorded further that it was put to Mr Aisake that he made no effort to communicate with Mr Knowles, and there had been no problems like that in the last 20 years. Mr Aisake was also advised of the concerns of management in that it had the right to expect Mr Aisake to follow instructions and to communicate, and this was important in the interests of health and safety.

In addition to the items recorded in the note, it was common ground that Mr Knowles asked Mr Aisake why he had not told Mr Viliamu a load of hides was ready. Mr Aisake replied that he was not a charge hand, it was not his job, and he was too busy.

Mr Knowles found Mr Aisake's attitude during the meeting to be aggressive and angry, although a better description would be that Mr Aisake was tense. Mr Knowles commented that Mr Aisake talked over him when he asked a question, to the extent that he could not complete the question - which explains why the note of the meeting does not record some of Mr Aisake's answers to the questions put to him. Mr Aisake's voice was raised, and he refuted the points Mr Knowles attempted to make by saying he did not have to do as Mr Knowles said. Indeed Mr Aisake said in an affidavit filed in support of the present application:

"I will always do what John wants me to do, but only if his request is reasonable and it is my job according to the Employer's rules."

There was a break in the meeting, during which Mr Ritchie spoke to Mr Aisake, suggesting that he pull his head in or he would be down the road.

When the meeting resumed, Mr Aisake was asked why he was intent on making trouble, and was refusing to co-operate and follow the instructions of his supervisor. No answer was recorded, but it was common ground that Mr Mather asked Mr Aisake if in future he would change his attitude. Mr Aisake replied there was nothing wrong with his attitude. Mr Mather considered the tone to be defiant, and used the same word to describe Mr Aisake's general demeanour during the meeting. The evidence persuades me this was a reasonable assessment. On receipt of Mr Aisake's answer Mr Mather concluded:

"It was clear to me that Vai had refused to carry out a reasonable instruction given by John, and his explanation that he was too busy or that it wasn't his job was unsatisfactory. Vai had not given a reasonable excuse for his failure or refusal to carry out the task. It was also clear to me that Vai would not agree to act reasonably in the future. I advised Vai that he was dismissed."

The dismissal was summary. A letter of dismissal dated 17 December 2002 stated the reason for the dismissal as follows:

"The reason for your dismissal was your failure to follow the instructions of your supervisor on 12 December 2002. You also failed to advise your supervisor you had not performed the task, which compromised the running of the tannery. As discussed, this was not the first time you had failed to follow a lawful and reasonable instruction."

Determination

The principles applicable to the present employment relationship problem are conveniently set out in the judgment of the Court of Appeal in **Sky Network Television Ltd v Duncan** [1998] 3 ERNZ 917 as follows:

“Disobedience of an order which an employer has the lawful authority to give to the employee is a form of misconduct but it does not necessarily follow, at common law, that such an act of disobedience justifies dismissal. The disobedience must be wilful, a word which, in this context, “connote[s] some deliberate design or purpose to derogate from duty. ... It has an overtone of the knowingly improper. There has to be something which amounts to a deliberate flouting of the terms of employment contract ...” (p 922 ll 25 – 33)

While such considerations are relevant in a problem like this, in the context of an alleged unjustified dismissal amounting to a personal grievance:

“... ultimately the test is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but rather whether the conduct of the worker justified dismissal.” (p 923 ll 29 – 31).

In turn the well-known general test for justification concerns what was open to a fair and reasonable employer in the circumstances (**BP Oil Limited v Northern Distribution Workers IUOW** [1989] 3 NZLR 580).

There was some discussion at the investigation meeting about whether, after the dismissal, Colyer Mair sought to justify the dismissal with reference to incidents not relied on at the time the decision was made. Much was made of this in submissions, and I was referred to a decision of the Employment Court in **Ashton v Shoreline Hotel** [1994] 1 ERNZ 421. I am familiar with that decision and do not believe it applies to the present facts. I have already mentioned that I did not understand Colyer Mair to be relying on earlier incidents - particularly cleaning the pH probes and effluent baskets, and the 11 December incident - as justification for the dismissal. Instead the incidents form part of the general background against which the decision to dismiss was made, and illustrate what the company meant when it put to Mr Aisake on 13 December its question about why he was intent on making trouble, not co-operating and not following his supervisor’s instructions. The incidents also form part of the general background to the reason why Mr Mather asked Mr Aisake if he was prepared to change his attitude.

The incident which led directly to the decision to dismiss was the incident of 12 December. Mr Aisake has not disputed that he ignored Mr Knowles’ instruction to collect the hides, or that he did not attempt to inform anyone else the hides were ready, so the question is whether the company was justified in not accepting his explanation. The primary explanation given during the 13 December meeting was that it was not Mr Aisake’s job as the person on ‘the top’ to collect the hides, rather it was Mr Viliamu’s job as the person on ‘the bottom.’ A secondary, and in any event weak and unsupported, explanation was that Mr Aisake was too busy.

Since there was no disagreement about the general distinction between the top and bottom roles taken by the drumhands, the acceptability of Mr Aisake’s explanation turns on the degree of rigidity with which the distinction was observed. The approach Mr Aisake took in his actions on 11 and 12 December was in effect that the roles were completely separate, so while working on ‘the top’ the person in that role did not carry out the duties of the person on the bottom. Thus he said of the instruction to collect the hides, ‘it’s not my job’. However Mr Aisake was aware of clause 19 of the cec, and the general expectation that employees help each other out when they could. It is likely that is why he raised the secondary argument that he was too busy to collect the hides.

I find unreasonable and opportunistic Mr Aisake’s stance that it was not his job to collect the hides. Aside from the particular problem in May 1999 there was no evidence of any problem of the kind raised by the incidents of 11 and 12 December 2002, and I do not accept Mr Aisake was entitled to ignore cl 19 of the cec. Accordingly I conclude Mr Mather was justified in not accepting the explanation. As for whether Mr Aisake was too busy, both Mr Mather and Mr Knowles were in a position to appreciate that the quantity of work to be done on 12 December was low, and production records support that.

Mr Aisake's failure to collect the hides himself was not the only aspect of his behaviour that was taken seriously. Mr Aisake also failed to respond to Mr Knowles at all, or to advise anyone else that the hides were ready. I consider his inaction in that respect to amount to sheer bloody-mindedness. I have already rejected as not credible Mr Aisake's supplementary explanation that he wished to avoid another argument with Mr Knowles. He was silent because he wanted to make a point, not because he wanted to avoid an argument.

I regard Mr Aisake's allegation that he did not want to tell anyone else what to do because he was not a chargehand as falling in the same category. Any alleged concern about giving instructions might have had some substance if Mr Ioelu had been working with Mr Aisake on the bottom that day, but that was not the case. There was no evidence of any good reason why Mr Aisake would feel he could not simply advise Mr Viliamu that the hides were ready. On his own evidence, Mr Viliamu would expect to be responsible for collecting the hides on receipt of that information. Mr Aisake was again trying to make a point. Mr Mather was entitled to take this into account.

The attitude of defiance Mr Aisake exhibited at the 13 December meeting itself can also be taken into account in determining justification for the decision to dismiss. In arguing with and talking over Mr Knowles he illustrated more of the behaviour which was of concern to the employer in the first place, namely his unwillingness to follow instructions and to communicate. In asserting there was nothing wrong with his attitude, even in the face of a pointed warning from his representative, he gave the employer reasonable grounds to believe he was unlikely to improve.

Finally he made his stance clear to Colyer Mair and to the Authority when he said he would act on Mr Knowles' instructions, but only if they were reasonable. While employees are entitled to refuse to obey an instruction if it is not lawful or reasonable, when exercising this entitlement they run the risk that their own assessment of what is lawful and reasonable is not itself reasonable. Moreover, unlike the **Sky Network Television** case (supra), there was no real dispute about the correct interpretation of the parties' employment agreement. Mr Aisake's stance was not reasonable, and he must accept the consequences.

In further support of his position in this employment relationship problem Mr Aisake said he believed the company wanted a reason to get rid of him because he stuck up for the employees over the smelly face pieces and because he had recently been asked to represent the drum hands as their union delegate. There was no reasonable foundation for the belief, and I do not accept it as a statement of the real reason for the dismissal. Rather the reason was as stated in the extracts I have set out.

For these reasons I conclude the dismissal was justified. Mr Aisake does not have a personal grievance.

Costs

Costs are reserved. The parties are invited to reach agreement on the matter. If they are unable to do so they shall have 14 days from the date of this determination in which to file and serve memoranda on the matter. If either wishes to reply to anything in the memorandum of the other, there shall be a further three working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

R A Monaghan
Member, Employment Relations Authority