

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mumtaz Ali (Applicant)
AND General Distributors Limited (Respondent)
REPRESENTATIVES Zaheda Ali, Counsel for Applicant
Stephen Langton, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 5 September 2005
19 September 2005
SUBMISSIONS RECEIVED 3 and 5 October 2005
DATE OF DETERMINATION 5 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mumtaz Ali was employed by General Distributors Limited (“GDL”) at its Papakura Countdown supermarket from November 2002 until his dismissal for serious misconduct on 27 June 2005. Mr Ali worked in the supermarket’s produce department. At the time of his dismissal he held the position of produce manager.

[2] The allegations of serious misconduct Mr Ali faced and for which he was ultimately dismissed concern representations he made during a review hearing of a claim for compensation for injuries allegedly suffered in the work place and representations made on his GDL employment application form dated 3 November 2002.

[3] Mr Ali says his dismissal was unjustified because the investigation was unfair and the conclusions reached by GDL were unreasonable. He seeks reinstatement to the position from which he was dismissed, compensation for hurt and humiliation caused as a consequence of his dismissal and reimbursement of lost wages.

[4] GDL says its decision to dismiss Mr Ali was reasonable in all the circumstances because having fully and fairly investigated the allegations it had a reasonable basis upon which to conclude Mr Ali knowingly made false representations to improve his chances of receiving accident compensation and knowingly made false representations on his position application form and that these actions seriously damaged its trust in Mr Ali to such a degree that the employment relationship could not continue.

[5] During the first scheduled investigation of this employment relationship problem it became evident that the Authority required the assistance of an interpreter to facilitate Mr Ali’s participation

in the investigation meeting. That investigation meeting was adjourned and reconvened at a later date. I record that I was assisted during the subsequent investigation meeting by an interpreter of the Hindi language. I also record that the interpreter did not speak as a first language the dialect of Hindi spoken by Mr Ali and his counsel. In this respect, Ms Ali was able to assist with the interpretation.

Issues

(i) Did Mr Ali have a fair opportunity to respond to the allegations?

[6] In a letter dated 11 February 2005 Mark Bell, GDL's national health and food safety manager, wrote to Mr Ali inviting him to attend a meeting on 16 February to discuss two allegations:

- the first allegation concerned Mr Ali's evidence during a Disputes Resolution Service review hearing on 11 January 2004 and the truthfulness of that evidence; and
- the second allegation concerned Mr Ali's alleged failure to disclose prior medical conditions or injuries on his GDL position application form dated 3 November 2002.

[7] In the letter Mr Bell advised Mr Ali that GDL wished to discuss the allegations with him and would consider any explanation he provided. Mr Ali was invited to bring a support person with him to the meeting. The letter also advised that the allegations could amount to serious misconduct and if upheld could put Mr Ali's employment with GDL in jeopardy.

[8] With the assistance of his adult daughter Mr Ali drafted a response to Mr Bell's letter which Andrew Gush, dry goods manager, typed and proof read. This letter is dated 15 February and was presented to Mr Bell during the meeting which was held on 23 February. The letter provides the following responses to the allegations:

- the first time he consulted a doctor about an inguinal hernia - the injury which was the subject of the review hearing - was May 2005;
- he had not suffered from an inguinal hernia prior to his employment with GDL;
- since 1987 in correspondence with ACC and doctors he had declared his job involved heavy lifting;
- he did not give false testimony at the 11 January hearing;
- he had received earnings related compensation from his insurance company and had only made the ACC claim on the advice of his doctor; and
- he found the allegations distressing and was seeking legal advice.

[9] Mr Ali attended this meeting with Mr Gush as his support person. A transcript of that meeting has been provided to me which I accept as accurate.

[10] I am satisfied that the allegations and the information supporting those allegations were fairly put to Mr Ali to enable him to provide a response. Mr Ali's letter of 15 February and the transcript show Mr Ali clearly understood the nature of the allegations and the basis of those allegations. He provided responses to the allegations and did not raise any objection to the process.

[11] There is little point listing the documents put to Mr Ali during the meeting. This information is well known to the parties. It is enough to say that the documents were fully traversed by the parties during the meeting.

[12] On 7 March Mr Bell wrote to Mr Ali asking to meet again to discuss further information received in the course of the investigation from ACC, Mr Ali's former employer Turners and

Growers, Peter Brown from CRM, GDL's injury management provider, and the decision of the Dispute Resolution Service.

[13] On 21 March Mr Bell received a faxed letter from Mr Ali advising that at his position interview he had declared an injury to Peter Stace, dry goods manager. Mr Ali said he told Mr Stace this injury had occurred six years prior to his application and that he did not declare injuries more than six years old because he did not think they were relevant. The application form asks for details of injuries and related time off work in the preceding six years.

[14] On 23 March the parties meet again. The notes of the meeting have been made available to me. I accept these notes are an accurate record of that meeting.

[15] On 6 April Mr Bell wrote to Mr Ali providing information received from the review officer. This information was that it was her usual practise to administer an oath prior to taking evidence, and had been sourced following a request from Mr Ali at the meeting of 23 March. The letter also invited Mr Ali to attend a further meeting on 7 April to consider the information provided by the review officer and for Mr Bell to advise Mr Ali of his conclusions regarding the serious misconduct allegations.

[16] Mr Ali responded to Mr Bell's letter on the same day requesting copies of all meeting notes and all information under consideration. The final paragraphs of this letter provide:

"As far as I am concerned I feel that I have fully and frankly answered all your questions and would like this matter resolved sooner rather than later.

This has been dragging since February of this year and it has taken a toll on my well being, my health and has affected my concentration towards my occupation and mostly my family." "

[17] Mr Bell wrote to Mr Ali on 7 April enclosing copies of all notes and information obtained to date in the investigation. The covering letter acknowledges Mr Ali's request for further information, the distress he advised he was experiencing and suggests a meeting in the following week to receive further comment from Mr Ali and for GDL to reach a conclusion. Mr Ali was invited to bring a support person and consulted regarding the time of date and time of the meeting. The letter also provides a summary of the allegations and lists the information obtained during the course of Mr Bell's investigation.

[18] I am satisfied on the information received that the allegations, and the basis of the allegations, were fairly put to Mr Ali and that he had a fair opportunity to respond to those allegations. Mr Ali was supported throughout the process, at first by his adult daughter in preparing the first response, then by Mr Gush, during the disciplinary meetings and finally by Ms Ali, who Mr Ali had instructed by May 2005.

(ii) Was it fair and reasonable for GDL to conclude Mr Ali's actions amounted to serious misconduct?

[19] On 4 May Mr Ali attended a further meeting with Mr Bell accompanied by his lawyer, Ms Ali. Mr Ali was invited to provide any further information or explanation in response to the allegations. Ms Ali advised Mr Bell, on Mr Ali's behalf, that he had nothing further to add. Mr Bell then advised GDL's preliminary view was that Mr Ali had given false evidence at the review hearing that he had not lodged a hernia claim prior to September 2004, that when the documents showed an ACC claim for a hernia injury had been lodged by Mr Ali in May 2004 and that this evidence had been given under oath. In relation to the second allegation Mr Bell advised GDL's preliminary view was the information given on Mr Ali's 3 November 2002 application form was

false regarding previous injuries and time off work in relation to those injuries.

[20] Mr Bell wrote to Ms Ali on 18 May to confirm these preliminary conclusions and provide copies of all supporting information. This letter concludes with an invitation to Mr Ali to provide any further information before conclusions are reached and requests that Ms Ali contact Mr Bell by 24 May to progress the matter.

[21] On 7 June Ms Ali wrote to Mr Bell raising concerns that the conclusions reached were based on a predetermined and biased interpretation of the relevant documents, that there was no basis for loss of trust and confidence in Mr Ali as he continued to perform his duties with commitment and two managers had provided personal references in support of Mr Ali's continued employment.

[22] The documents show Mr Ali lodged a claim with ACC for a work related hernia injury in May 2004. The date by which Mr Ali's signature appears is 7 May 2002. Mr Ali accepts he mistakenly dated the form. The employer named on that claim form is Turners and Growers. Mr Ali said he had not completed the related ACC claim form himself and unwittingly signed it. It is accepted that Mr Ali's employer at the time was GDL but it is unclear why that employer is listed, or why the location of the accident is listed as Pukekohe when Mr Ali does not deny that he told the review officer during the review hearing in January 2005 that he had not made such a claim prior to September 2004. Mr Ali says he said this because he had not been diagnosed with a hernia in May 2004 - that his doctor had said to him that it could be a hernia. This is not borne out in his May ACC claim form.

[23] The documents show that Mr Ali was familiar with the accident compensation claims process and that he had received information from ACC declining the May hernia claim. This was put to Mr Ali to comment on during Mr Bell's investigation. It was open to GDL to conclude that Mr Ali knew he had made an ACC claim for a hernia injury four months before the September claim was lodged, that he denied he had made such a claim to improve his chances of success at the review hearing and that this amounted to serious misconduct.

[24] The documents also show that Mr Ali failed to fully disclose on his position application form or to Mr Stace during the interview process the extent of his work place injuries and time off work due to those injuries during the six years preceding his application to join GDL. The information provided to the Authority shows Mr Ali suffered a work place injury in October 2002 for which he required two weeks off work on accident related compensation. Mr Ali failed to disclose this information to Mr Stace or on his application form dated 3 November 2002. It was open to GDL to conclude that Mr Ali had deliberately failed to disclose his recent injuries and that such action amounted to serious misconduct.

(iii) Was dismissal an option open to GDL?

[25] A meeting was convened with the parties on 24 June to hear Mr Ali's submissions as to penalty and to advise him of GDL's conclusions. GDL advised Mr Ali that one of the factors it was considering in weighing the appropriate penalty was an earlier incident in Mr Ali's employment with GDL where a false declaration on his application form had been revealed. On that occasion Mr Ali accepted he had failed to make a truthful disclosure on his application form and provided a written apology and explanation to his store manager, which was accepted.

[26] Mr Ali's letter of apology dated 4 December 2002 demonstrates he clearly understood that making false statements was unacceptable and could affect his employment with GDL. When further apparent false statements were uncovered as a consequence of his application for accident compensation and following a full investigation GDL concluded Mr Ali had knowingly made those

false statements, it was fair that the earlier incident and Mr Ali's apology should be taken into account. In these circumstances it was open to GDL to conclude Mr Ali's conduct had damaged its confidence in him to such a serious degree that dismissal was an appropriate penalty.

Conclusion

[27] There is no doubt that Mr Ali was a conscientious employee. However, the evidence provided to the Authority establishes that GDL fully and fairly investigated the allegations against Mr Ali, reached conclusions which were open to it in the circumstances and fairly considered the issue of an appropriate remedy. For these reasons I find Mr Ali's dismissal was justified.

Costs

[28] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so application may be made to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority