

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 19/10
5291685

BETWEEN KARLENE BAKER
 Applicant

AND TALLEY'S GROUP LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Jon Everist, Counsel for the Applicant
 Graeme Malone, Counsel for the Respondent

Investigation Meeting: 29 January 2010 at Christchurch

Determination: 1 February 2010

DETERMINATION OF THE AUTHORITY

[1] Karlene Baker worked for Talley's Group Limited at its Ashburton vegetable plant from November 2005 until she was dismissed in early December 2009. Ms Baker says that she was unjustifiably dismissed and seeks interim reinstatement pending resolution of her personal grievance. Grant Nicholson is Talley's plant manager. He says that he justifiably dismissed Ms Baker for serious misconduct so the company opposes interim reinstatement.

[2] Ms Baker's statement of problem was lodged without any affidavits in support but with an undertaking as to damages. Affidavits were eventually lodged and served followed by the company's reply and affidavits in opposition. Based on that material, this determination resolves the claim for interim reinstatement. The findings expressed here are solely for that purpose – final findings will have to wait for the opportunity to test the evidence.

[3] I will explain more fully the events up to and including Ms Baker's dismissal before applying the law concerning interim reinstatement.

Some background

[4] At the relevant time, Ms Baker was employed on night shift as a machine operator. She worked on one line while her partner (Nicholas Goodwin) did similar work on the other line. Ms Baker says that she was responsible for the operation of various machines so that the correct weight of the right product is placed in plastic bags, the bags correctly labelled and correctly placed in cartons. Mr Nicholson says that included as a primary responsibility ensuring that the bags are correctly packed free of extraneous matter and without tears or rips. Ms Baker's evidence does not directly address that but nor is it inconsistent with the responsibility as described by Mr Nicholson. Accordingly I accept Mr Nicholson's evidence on the point.

[5] Ms Baker says that she has a written warning for an unrelated matter. She and Mr Goodwin were both sick due to food poisoning so they reported sick and did not attend work. Ms Baker says that company policy is to give written warnings to a staff member for taking a night off work following a rostered night off. When the supervisor gave her the warning on Tuesday 24 November 2009, he told her that she would be fired if he had his way. Ms Baker replied with some abuse. The written record of the warning suggests more to the story, and I have also been given the leave application form and the supervisor's notes. It appears that Ms Baker made a leave request that was declined so she later reported in sick for that day (as did Mr Goodwin). When she was warned about this on Tuesday 24 November she became angry, saying to the supervisor *get your finger out of your arse*. Later during the shift she could be heard swearing and was seen by a supervisor *pulling faces*. During the shift a supervisor was hit in the face with some frozen peas in circumstances suggesting that they were thrown at her by Ms Baker.

[6] On Wednesday 25 November 2009 Ms Baker and Mr Goodwin met with the pack-out manager and the night shift manager. The managers said that one or both of them may be sabotaging the company. No details were given and Ms Baker denied any knowledge of sabotage. There was then complaint about Ms Baker's swearing.

The dismissal

[7] Ms Baker says that she was confronted by the pack-out manager and the operations manager at about 10.30pm on Monday 31 November concerning a

complaint that she would not remove an eyebrow piercing. She was then told to go upstairs where Mr Nicholson, the two managers just mentioned and the quality assurance officer talked to her. Ms Baker says that she was told that she had not done a check-sheet properly. She was then told that she had a bad attitude and that there were complaints about her. Mr Nicholson then complained about the quality of the product she was packaging regarding sealing and date stamps. Mr Nicholson referred to bags from Ms Baker's line on the previous Tuesday that had been cut. One was produced and Mr Nicholson said that it was sabotage. Ms Baker denied responsibility for the damage. However, Mr Nicholson told her to pack up her stuff and leave within 15 minutes and to return the next morning at 9.00am.

[8] Next morning, Mr Nicholson went through some of the issues discussed the previous night but concentrated on the cut bags. He confirmed that he thought Ms Baker had cut them. He said that it was a criminal matter and that she was dismissed for lack of faith.

[9] I will summarise Mr Nicholson's evidence about the circumstances that resulted in the dismissal. Two cartons packed on 24 November on Ms Baker's line were found to contain a number of bags of frozen peas with cuts in the bags. The bags and boxes are all time stamped. One box was marked 02.14 and contained 11 uncut bags with that time stamp and four cut bags marked 01.57, 02.03, 02.09 and 02.14. The second box was marked 22.46 with 11 uncut bags similarly marked and four cut bags marked 22.36, 22.38, 22.39 and 22.46. Given the time stamps and the logistics of the processing operation, someone must have emptied the reject bin, cut the bags and reintroduced them further down the line. Staff are issued with plastic knives and the cuts appeared to be consistent with the use of such a knife. Records showed that Ms Baker, Mr Goodwin, a supervisor and a box stacker were working in the room. The last two mentioned persons were not likely to be responsible. The cut bags were processed on Ms Baker's line. Either she reintroduced the cut bags into the line or someone else did and she allowed that to happen in breach of her responsibilities. Ms Baker also bore a grudge against the supervisor.

Arguable case?

[10] Counsel for Talley's accepted that Ms Baker has an arguable case for unjustified dismissal in light of the burden of proof where an employer dismisses an employee.

[11] Ms Baker says that she did not cut the bags and was not involved. She and Mr Goodwin say that cuts can be caused by the machinery or defects in the plastic. For present purposes I accept that cuts or tears in plastic bags can be caused by the machinery or defects. However, the machinery processes 40 bags per minute so each box is stacked with its full complement of bags in much less than one minute. All the bags in a box must have time stamps within a minute of one another. The time stamps on the cut bags in each box are not within one minute so the cuts bags must have been reintroduced to the packing line out of sequence and after the various processes that would have identified a bag with a cut. That means that Ms Baker was responsible either because of a deliberate act or negligence. If Ms Baker does establish a personal grievance because Talley's did not act how a fair and reasonable employer would have acted at the time, she would likely face a considerable or perhaps complete reduction in remedies because of contribution and/or her conduct might make it impracticable to reinstate her. On the evidence before the Authority at this point, there is little prospect of reinstatement for Ms Baker after a full investigation.

Balance of convenience

[12] Ms Baker's case for interim reinstatement is advanced principally on the basis of the financial problems caused by her loss of income. Ms Baker has two young children and she and Mr Goodwin have a mortgage commitment on their house. Without Ms Baker's wage and with a reduction in Mr Goodwin's income they have not been able to meet this commitment so they have arranged to freeze their repayments in the meantime. I have no information about whether they can meet their other day to day expenses so I must assume they can. The evidence does not establish a significant risk of irreparable harm so as to support interim reinstatement.

[13] It is said that Ms Baker is distressed as a result of the dismissal and has been prescribed antidepressants while Mr Goodwin says he is under pressure at work because of the incident. The emotional effects on Ms Baker are not such that they cannot be adequately remedied in due course by compensation if a grievance is established while the pressure on Mr Goodwin is immaterial for present purposes.

[14] Talley's would be able to meet an award for lost remuneration or other compensation if such orders resulted from a determination of the substantive grievance.

[15] If Ms Baker is reinstated in the meantime Talley's will suffer the cost and inconvenience of engaging a further operator to work alongside Ms Baker since it could not take the market risk of supplying undetected damaged product to customers.

[16] I conclude that the balance of convenience supports Talley's opposition to interim reinstatement.

Overall justice

[17] Ms Baker has a weak case for permanent reinstatement.

[18] It took three weeks to lodge a statement of problem and the affidavits were not lodged until 12 January 2010. There has been no explanation for this delay.

[19] These factors do not support interim reinstatement.

Conclusion

[20] Ms Baker's claim for interim reinstatement is declined.

[21] Costs are reserved.

[22] Counsel should confer with one another about mediation. If there is agreement to participate in mediation, they should advise the Authority. Tentative arrangements can be made for an investigation meeting.

Philip Cheyne
Member of the Employment Relations Authority