

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 136  
5390184

BETWEEN

MOSESE FATUKALA  
Applicant

A N D

GOODMAN FIELDER NEW  
ZEALAND LIMITED  
Respondent

Member of Authority: James Crichton

Representatives: Piliki Talanoa, Advocate for Applicant  
Elizabeth Coats and Susannah Maxfield, Counsel for  
Respondent

Investigation Meeting: 20 November 2013 and 21 February 2014 at Auckland

Date of Determination: 8 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] I note at the commencement of this determination that I have decided that I should order that the name of the complainant in this matter ought not to be published and to that end, I have referred to her throughout this determination as Witness A. I make that order in terms of the power given to the Authority in Schedule 2 clause 10 of the Employment Relations Act 2000.

[2] The applicant (Mr Fatukala) filed a Statement of Problem in the Authority on 27 July 2012 alleging that he had been unjustifiably dismissed from his employment by the respondent (Goodman Fielder). The Statement in Reply filed by Goodman Fielder proceeded on the footing that a personal grievance had not been raised in time by Mr Fatukala.

[3] By determination [2012] NZERA Auckland 370, I decided that there were exceptional circumstances and concluded that it was just to allow Mr Fatukala's grievance to proceed. That decision issued on 16 October 2012 and mediation was attempted unsuccessfully thereafter.

[4] By the middle of 2013, it was apparent that Mr Fatukala wished to continue with his personal grievance claim and at about the same time, Bell Gully were instructed by Goodman Fielder. An amended Statement in Reply was filed on 8 July 2013 and an investigation meeting set for 23 August 2013.

[5] That hearing date was subsequently vacated because of the difficulty in getting a clear brief of evidence from Mr Fatukala about just exactly it was that he was alleging. I made various attempts to get clear and unequivocal evidence from Mr Fatukala about his contentions but was ultimately unsuccessful. Throughout this process, Goodman Fielder's counsel understandably protested the inadequacy of the evidence provided by Mr Fatukala.

[6] In the result, by email dated 3 October 2013, I suggested two options to the parties for dealing with the matter. The option chosen was that I interview Mr Fatukala, take his evidence, provide a summary of that evidence by Minute to Goodman Fielder and if I was satisfied that there was a case to answer, I would then ask Goodman Fielder to put up its witnesses and enable me to examine them.

[7] That process was followed with Mr Fatukala giving his evidence on 20 November 2013 and Goodman Fielder giving its on 21 February 2014, Mr Fatukala having satisfied me that there were matters about the way in which Goodman Fielder had dealt with the issue that I needed to conduct further inquiries.

[8] Mr Fatukala was employed by Goodman Fielder from 20 May 2007 as an Assistant Baker. He was dismissed for serious misconduct on 21 February 2012.

[9] That dismissal was a consequence of a complaint received from Ms A earlier that same month in which Ms A complained about the actions of Mr Fatukala and certain other employees which allegedly happened at the workplace.

[10] Goodman Fielder investigated Ms A's complaint, by speaking to a large number of witnesses, including but not limited to the individuals complained about, and after considering Mr Fatukala's responses to the allegations directed at him,

determined that he was guilty of serious misconduct and that dismissal was the only appropriate course of action.

[11] A personal grievance was eventually raised, but as I have already indicated, there was a significant delay which necessitated a determination by the Authority allowing the matter to proceed further.

### **Issues**

[12] I am satisfied that the best way of considering the evidence before me in this matter is to assemble the material around the various considerations that I derived from my examination of the relevant witnesses.

[13] Using that approach then, I propose to address the following questions:

- (a) Was Mr Fatukala's English limited;
- (b) Did Goodman Fielder correctly evaluate the evidence of the complainant;
- (c) Was Goodman Fielder guilty of disparate treatment;
- (d) Was there an unjustified dismissal?

### **Did Mr Fatukala have sufficient English?**

[14] When I took Mr Fatukala's evidence, I formed the view that he had limited ability with English. As a matter of fact, English is Mr Fatukala's second language and the impression that he created in giving his evidence to me was that he could not read English, spoke it with difficulty, and to quote my Minute of 3 December 2013, "*had very little understanding of questions directed at him in English*".

[15] Whether it was a deliberate strategy to convince me that Mr Fatukala's English was not strong or whether it was simply an unintended consequence of the way the matter unfolded is neither here nor there. I was left with the impression that Mr Fatukala struggled with English and therefore, I was concerned at the apparent absence of evidence on the paper file before the Authority that Goodman Fielder had taken appropriate notice of that potential deficit in its disciplinary inquiry and engagement with Mr Fatukala.

[16] However, when I spoke with Goodman Fielder's witnesses, they were adamant that Mr Fatukala's English is perfectly adequate, while accepting that he speaks English as a second language. Both Ms Susan Walls, a National Human Resources Manager for Goodman Fielder, and Mr Dallas Vince, a senior Operational Manager with Goodman Fielder, gave evidence to that effect.

[17] Both of them were involved in the investigation and subsequent disciplinary process engaged in by Goodman Fielder and both of them, at the Authority's request, specifically addressed that issue in the evidence they gave me.

[18] Ms Walls said that in the disciplinary meetings that she was involved with, Mr Fatukala had no difficulty understanding questions posed to him and no difficulty responding in English. Moreover, she made the pertinent observation that Mr Fatukala was represented throughout the disciplinary process and that at no stage did his representative suggest that Mr Fatukala was unable to understand matters and therefore needed a translation or an interpreter present.

[19] Perhaps even more relevantly, Mr Vince gave evidence about his operational engagement with Mr Fatukala prior to the disciplinary matters. The essence of that evidence was that Mr Vince dealt with Mr Fatukala regularly and would speak to him on a weekly basis if not more often. Mr Vince told me that he would frequently give Mr Fatukala instructions in English and there was never any question of Mr Fatukala not understanding what he was supposed to do or indeed asking for further clarification because he did not understand something. Moreover, Mr Fatukala would respond to questions from Mr Vince or provide him with verbal reports about operational matters, always in English and always intelligibly.

[20] I accept that evidence from Goodman Fielder at face value. It cannot be the position that Mr Fatukala understood English sufficiently to operate appropriately in the workplace but did not understand it sufficiently to be able to participate appropriately in the disciplinary process. Furthermore, Ms Walls' evidence was that in the early part of the disciplinary process, Mr Fatukala spoke readily and engaged with the employer and it was not until Mr Talanoa took over representing him that Mr Fatukala tended to defer to Mr Talanoa. Her explanation broadly was that Mr Fatukala simply deferred to Mr Talanoa and that was the explanation for his apparent failure to understand the questions that I was putting to him during my examination of him.

[21] In any event, whatever the explanation, I am satisfied that Mr Fatukala's English is perfectly adequate for the purposes both of being an operational employee and engaging with his employer in respect of a disciplinary inquiry. Moreover, any concern that may have existed about whether Mr Fatukala's English aptitude fell off as a consequence of being in a stressful situation, such as a disciplinary inquiry, seems to be addressed completely by the fact that throughout the disciplinary process, Mr Fatukala was always represented, either by a union official or by Mr Talanoa. At no stage did any of those officiating representatives raise any issue with Goodman Fielder about Mr Fatukala's understanding of the proceedings.

[22] It follows that I am satisfied that Goodman Fielder could have proceeded with its disciplinary inquiry in respect of Mr Fatukala notwithstanding that English is his second language because it could properly have concluded that Mr Fatukala had sufficient English to understand and engage in the disciplinary process and/or that Mr Fatukala was sufficiently ably represented in order for any concerns about his English aptitude to be raised by one or other of his representatives and such a concern was never raised.

**Did Goodman Fielder properly evaluate the evidence of the complainant?**

[23] Mr Fatukala told me when I took his evidence that Ms A was fond of what might be called "*horseplay*" in the workplace, that she regularly engaged in that sort of behaviour with male staff, and that that behaviour is out of step with her complaint about Mr Fatukala which is effectively in the nature of sexual harassment.

[24] My attention was drawn to Ms A's *Facebook* site which, inter alia, shows a photograph of Ms A herself displaying a good deal of bare skin. I emphasise at once that the photograph is not indecent but according to Mr Fatukala, and again to quote my earlier Minute of 3 December 2013, "*a woman who is happy enough to display herself in that way on her Facebook site, may well be acting inconsistently with the nature of her complaint*".

[25] In addition to that allegation, there was the suggestion that Mr Fatukala made that Ms A had not volunteered her complaint and that the complaint emanated from an investigation conducted by Goodman Fielder which was seeking to understand why Ms A and one other employee had poor attendance records on a particular shift. Mr Fatukala contended that Ms A sought to explain herself by making this complaint.

It follows that Mr Fatukala is contending that the complaint was a shield rather than a sword.

[26] Goodman Fielder's evidence in response proceeded on the straightforward footing that whatever the basis of Ms A's complaint and whatever she chose to put on her *Facebook* page, and whatever she chose to do in the workplace by way of horseplay, in the end she was still entitled to a safe workplace. Ms Walls in particular made the observation that when Goodman Fielder was interviewing Ms A, she was honest but also tearful and upset about the matter. The file note made by Goodman Fielder at the time tends to support those conclusions.

[27] The short point is that Goodman Fielder formed the view that Ms A was a reliable witness and that her complaint broadly was made out. In addition to speaking to Ms A, Goodman Fielder also spoke to a significant number of other staff and those other staff both confirmed the essential elements of Ms A's complaint while also confirming aspects of Mr Fatukala's claim that Ms A was inclined to horseplay in the workplace.

[28] But as Goodman Fielder rightly says, it has an obligation to provide a safe workplace for all staff, whatever the particular attributes or behaviour patterns of those staff actually are. Particularly in relation to complaints with a sexual overtone, it will be especially important for an employer to ensure that staff in the most vulnerable position are provided with some reasonable guarantee of safety and when there are incidents, those incidents are dealt with appropriately and fairly.

[29] I am satisfied then that Goodman Fielder could have concluded that Ms A was a reliable witness, notwithstanding the other evidence about her behaviour in the workplace and that, as a reliable witness, her complaint could be evaluated as a truthful complaint and needed therefore to be investigated.

### **Was Goodman Fielder guilty of disparate treatment?**

[30] This allegation by Mr Fatukala has two legs. The first is a complaint that while he was, by all accounts, the least involved of three men in the behaviour complained of, his penalty (dismissal) was the same as the penalty given to the most seriously involved staff member. To draw this point out, Mr Fatukala complains that he ought not to have been dismissed and should have suffered some lesser penalty given that the principal offender was dismissed.

[31] Goodman Fielder's witnesses told me that they did not accept Mr Fatukala's logic. In their view, both Mr Fatukala and the other man referred to were found to have been guilty of serious misconduct for the particular behaviour that each of them was found to have been involved in and that it was available to a good and fair employer to dismiss both employees in those circumstances, notwithstanding that one was more responsible than the other.

[32] Put another way, Goodman Fielder says that Mr Fatukala's behaviour justified dismissal on its own, whatever happened to the other man referred to.

[33] But Mr Fatukala also complains that the third man involved was also treated differently and his point here is that that other individual apparently suffered no disciplinary sanction at all. But that is not the whole story. This third individual was not actually employed by Goodman Fielder at all but was employed by a labour hire company called Adecco and it was that employer (Adecco) that made the decision that this man did not have a case to answer.

[34] Goodman Fielder says that it was unaware of what approach Adecco was taking and indeed at the time it dealt with Mr Fatukala, it simply did not know what if anything Adecco was proposing to do in relation to the third man.

[35] Moreover, both Mr Vince and Ms Walls made the point that it was Goodman Fielder's standards as employer which they had to adhere to and it was on those standards that Mr Fatukala was judged and not the different standards that might be applied by another employer.

[36] Again, I conclude that a good and fair employer could decide that, looked at in isolation, Mr Fatukala's behaviour was found to be so unsatisfactory as to justify a finding of serious misconduct and subsequently a conclusion that the only response to that by way of a disposition was summary dismissal. Furthermore, I accept what Goodman Fielder says that the standards in issue and the yardstick by which it must judge is what pertains to its employment relationship and its standards and not the standards that might be applied by another employer.

### **Was there an unjustified dismissal?**

[37] I am satisfied on the evidence I heard that Mr Fatukala was not unjustifiably dismissed and therefore that he has no personal grievance. The first reason that I

reach this conclusion is simply that there is no sustained attack on the disciplinary process undertaken by Goodman Fielder. Even if there were, I am satisfied that the process the employer adopted was the process that a good and fair employer could adopt in the particular circumstances of this case.

[38] It was an absolutely standard process involving the receipt of a complaint, an investigation involving the taking of statements from all of the staff members who had some knowledge of the matters in question and then an engagement with Mr Fatukala to get his input into the matters complained of.

[39] Throughout the process, Mr Fatukala was given the clearest possible indication of the nature of the allegations made against him, was encouraged to get support for the disciplinary meetings and did in fact do so. He was represented throughout either by a union or by Mr Talanoa and he participated throughout the process via those representatives.

[40] It is absolutely clear that Mr Fatukala raised a number of points with the employer about the substance of the complaints against him and I am satisfied that the complaints that Mr Fatukala raised at the time were considered by Goodman Fielder in its final disposition of the matter.

[41] The outcome of Goodman Fielder's disciplinary process was a finding that Mr Fatukala had committed serious misconduct and ultimately, after asking Mr Fatukala to make submissions on penalty, Goodman Fielder decided that dismissal was the only outcome.

[42] The findings of fault made by Goodman Fielder are rational and sustainable by evidence on the balance of probabilities. In particular, I am satisfied that Goodman Fielder did not rely exclusively on the complainant's evidence but also gave appropriate weight to corroborating evidence from other staff.

[43] On the finding that Mr Fatukala's behaviour constituted serious misconduct, given the factual findings I have just referred to, it is difficult to see how any other conclusion could be arrived at. On the face of it, what Mr Fatukala was found to have done was in breach of Goodman Fielder's policies and procedures as well as being in breach of express terms of Mr Fatukala's employment agreement. Perhaps most graphically, serious misconduct is defined in Goodman Fielder's Code of Conduct policy as including sexual harassment of other employees. Again I make the point

that, given the findings of fact arrived at properly in my view by Goodman Fielder, it is difficult not to see the conduct complained of as a form of sexual harassment. Even if it is not, there are various other provisions in the same policy which includes violence against any person within the business premises or acting in a manner which threatens the personal safety or health of another employee. These alternative grounds could have founded a basis for a serious misconduct finding if it were to be determined that the matter in question did not constitute sexual harassment.

[44] Having concluded that this was an example of serious misconduct, I am satisfied that a good and fair employer could then have concluded that the only suitable disposition of the matter was to summarily dismiss Mr Fatukala from the employment.

### **Determination**

[45] For reasons which I have advanced in this determination, I am not satisfied that Mr Fatukala has proved his personal grievance and accordingly he is not entitled to any remedies.

### **Costs**

[46] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority