

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN George Fox (Applicant)
AND General Distributors Limited (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Stephen Langton, Counsel for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 29 August and 18 October 2005
**FINAL SUBMISSIONS
RECEIVED** 28 October, 1 and 18 November 2005
DATE OF DETERMINATION 10 January 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] From his employer, the respondent General Distributors Ltd (GDL), the applicant Mr George Fox received two formal disciplinary warnings. They were issued in July and August 2004. The second warning was expressed to be "final." In November 2004, Mr Fox resigned from his employment.

[2] When the employment ended Mr Fox was the butchery manager of the Kelston Foodtown. He had worked in Foodtown stores operated by GDL or its predecessors for 36 years.

[3] The Authority has investigated claims brought to it by Mr Fox that neither of the two warnings given to him was justified and that his resignation had not been freely given but was induced or coerced by unfair and unreasonable treatment he was being subjected to by GDL management to his disadvantage, shortly before he resigned.

[4] Before investigation was resorted to, the parties endeavoured to resolve Mr Fox's problem with mediation assistance.

[5] Mr Fox seeks a determination by the Authority that he has sustainable personal grievances in relation to both warnings and also the contended constructive dismissal. He views the termination of his job as amounting to either an unjustified disadvantage in his employment or an unjustified dismissal. Further, Mr Fox seeks a determination that GDL acted in breach of s.4 of the Employment Relations Act 2000, under which the parties to any employment relationship are required to deal with each other in good faith.

[6] As remedies for his grievances Mr Fox seeks reimbursement by GDL of all earnings lost as a consequence of them. He also seeks compensation for hurt feelings and humiliation and for loss of benefits expected from his employment. The remedies sought for the breach of s.4 of the Act are “damages” and/or “a penalty.”

[7] There is little or no dispute about the core facts in relation to the issuing of each warning by GDL or the tendering by Mr Fox of his resignation. A perception Mr Fox has is that the warnings and other behaviour by GDL management, was a course of conduct embarked upon with the intention of forcing him out of his employment. GDL has refuted all allegations made since the time the grievances were raised, that its conduct was unlawful. It claims that at all times its actions were procedurally and substantively justified and were therefore the actions of a fair and reasonable employer.

[8] Where, as in this case, the Authority is investigating a number of actions which are separated in time, it takes a wide view in ascertaining whether individually or collectively the employers conduct was unjustified, and whether the employee suffered any disadvantage in the employment as a result, and also whether any unjustified actions of the employer were the proximate cause of a resignation. As permitted under s.160(3) of the Act, the Authority may “concentrate on resolving the employment relationship problem, however described.” It is not necessary for the Authority to confine its investigation to claims that the employers actions are able to be placed in one or another legal pigeon-hole the courts may have identified, particularly in cases of constructive dismissal.

Case Ready Meats

[9] The restructuring of butchery operations at all Foodtown stores and Mr Fox’s attitude to that change, are matters of significance when considering the warnings given to Mr Fox and his subsequent resignation. Cabinet (or Case) Ready Meats – CRM - was an initiative of GDL intended to achieve greater efficiency in its butchery departments. A consequence of the introduction of CRM was to be the redundancy of butchers employed in-store. The positions of Department Manager, Mr Fox’s own position, and Assistant Manager, were unaffected by the change and were intended to continue. Staff including Mr Fox had been advised earlier in 2004 that CRM was to be introduced in November that year.

[10] Mr Fox was unhappy that he was not going to be made redundant. Retirement was in prospect, as he was in his 60’s and had been working for 36 or more years. If he had been made redundant his length of service would have realised Mr Fox a substantial payment of compensation, enhancing his retirement. He had recently been seriously ill and was also feeling stressed and anxious because of a requirement to use a computer for certain tasks. Mr Fox was averse to using computers and had previously avoided this work by allowing his assistant to do what was necessary. However once it was introduced CRM was going to require more to be done on computers, work that GDL expected Mr Fox him to do himself. The employer had made known to him its expectations in this regard.

[11] By mid – 2004 when he received his first warning, these various circumstances affecting both his employment and his personal life had caused Mr Fox to become weary, distracted and dispirited.

The first warning

[12] This warning was issued following a failure by Mr Fox to ensure that butchery stock was removed from the display cabinet or case, prior to the “best before” date marked on each item. GDL’s policy is for stock to be removed from display two days before that date, and certainly not later than it. A random inspection on 2 July 2004 by senior management revealed about 20 items

of meat and poultry still on display when they should not have been. Several of the items were inside the two day zone and several others had expired their “best before” date, in some cases by about seven days. They included nine packets of venison which were labelled “BEST BEFORE 26 June 04.”

[13] When these circumstances were investigated with Mr Fox a few days later on 6 and 7 July, he offered no excuse and accepted that he was at fault for what had happened. In his evidence to the Authority he reiterated that being taken to task for this situation had been “a fair cop.” His conduct earned him a First Written Warning, which he signed on 8 July 2004. Its life was expressly limited to 12 months.

[14] This matter was dealt with by GDL in accordance with best procedural practice, and I also find that grounds for issuing a disciplinary warning existed. One of the “Key Accountabilities” of Mr Fox’s position as Meat Manager was expressed to be;

Ensures that presentation within the butchery department is consistently of the highest standard and complies with all company policies. Ensures that the full range of product is available and to the quality required by company standard.

From the enquiries it made of Mr Fox his employer was reasonably able to conclude that he had breached his duty as framed in the above key accountability. The issue of a first formal warning as the particular response to the breach cannot in my view be challenged as unreasonable. It was neither harsh nor excessive in the circumstances. I am satisfied that when deciding upon the appropriate disciplinary action to be taken Mr d’Artagnan Kennedy, Fresh Foods Manager of Kelston at the time, took into account all relevant factors. They included matters of aggravation such as the number of items, the diversity of them, the length of time they had remained on display and the fact that Mr Fox was in a leadership position as manager. There was also the fact that when interviewed Mr Fox admitted to Mr Kennedy he had seen that some of the items had expired. Even then he had done nothing to remove them or have them removed by his staff.

[15] The warning stated that Mr Fox had been found guilty of “misconduct”. In my view nothing turns on whether his actions should more accurately have been described as a matter of “performance” neglect or failure, because the important thing was for Mr Fox to be made fully aware of the nature and quality of the wrong alleged against him. As a term, “misconduct” may to some have harsher connotations than “non-performance,” but there could be no misunderstanding by Mr Fox about why he was being warned or the consequences, present and future, to his employment relationship. I find that the written warning was abundantly clear in these respects.

[16] Looked at in isolation the July 2004 warning was, I find, justified as being within the range of responses from a fair and reasonable employer to a clear breach of duty by a senior employee. Undoubtedly the issue of the warning diminished the security of Mr Fox’s employment with GDL and was therefore a disadvantage in that employment, but since there was no lack of justification he has no grounds for a personal grievance.

[17] Further on in this determination I consider whether the July warning, which I have found was justified when it was given, at any later time was exploited in some way by GDL as providing a way of putting or increasing pressure on Mr Fox to leave his job.

[18] Certainly the treatment of Mr Fox a short time later in July 2004, when there was a further occurrence of outdated meat being displayed, does not indicate that GDL was intent on trying to force him out of his job. His explanation for that second occurrence was accepted by GDL and no action was taken against him, indicating that he was dealt with objectively and without

predisposition on the part of GDL.

The second and “final” warning

[19] This followed a situation revealed on 9 August 2004 where the display cabinet in the butchery department, from which customers select what they want, was found at 10 am. to have a poor coverage of meat. Company policy is for the cabinets to be fully covered in both quantity and range by 9 am, and with all key product displayed. Mr Fox had been reminded in writing of this requirement earlier in the year during his six monthly appraisal. It had been an objective that was expressly set for him to achieve before his next appraisal.

[20] Again, a thorough and fair investigation was I find carried out by GDL management before the final warning was issued. Mr Fox blamed short staffing in his department. He also suggested low morale among the staff had contributed, as on the day in question at 10 am. his staff had attended a meeting to learn more about the CRM restructuring and the redundancy this would create for some. GDL rejected his explanation, taking into account the fact that several staff including Mr Fox had been on duty since 6 am. on 9 August and together they would have provided sufficient manpower to meet the display requirements. Whatever bad news the staff heard at the meeting and whatever loss of motivation that may have caused them, should not have had any impact on meat display coverage which should have been fully provided by 9 am. or 9.30 at the very latest, before the meeting was scheduled even to begin. As Mr Fox noted, it was not until about 2 pm. that the proper coverage was achieved.

[21] GDL concluded that Mr Fox had failed to perform the known requirements of his job as a manager. That conclusion was reasonable, I find. Through his long experience Mr Fox must have known the importance of displaying wares to potential customers. His obligation was expressed as a key accountability of his job in the formal position description for it, and there was no suggestion that company standards and policies were unknown to him. The particular standards to be achieved had been made clear to him a few months earlier, during his appraisal. GDL was entitled to view this failure by Mr Fox as serious, and even more so given the management position he held. The earlier warning was not irrelevant in the circumstances and GDL was, I find, entitled to have regard to it when deciding upon the disciplinary action to be taken.

[22] In his evidence to the Authority, Mr Fox considered that those who should have been made accountable for what had happened were at a level of management above him, Mr Kennedy and Mr Richard Croucher the Kelston store manager. GDL, reasonably in my view, did not accept that the blame could be passed on in that way, since Mr Fox had been in charge of the butchery department and had the means and ability to comply with the company standards and policies. I consider that a warning of some kind was justified in the circumstances and that in view of the recent earlier failure of duty by Mr Fox, for which he had been formally warned, it was open to GDL to issue the ultimate disciplinary warning. This was given to Mr Fox in writing on 25 August 2004. It too had a life limited to 12 months.

[23] The final warning referred to “misconduct” as the reason for it being given. Again, I consider that it was the substance of Mr Fox’s actions that is important, rather than the generic term used to describe what he did. His conduct was reasonably regarded as a matter of blame for which he was properly held accountable, as he was advised.

[24] A question has been clearly raised in this case as to whether the warning was elevated to “final” status only because of another matter that had surfaced earlier, and had grown in importance and was then under review between the parties. This was the problem Mr Fox had identified about the use of computers. Associated with that was a request he had made to be stood down from his

position and allowed to perform a less demanding role in the butchery department.

The computer phobia

[25] In May 2004 Mr Fox told the Store Manager, Mr Croucher, he was not going to use the computer as required because it gave him headaches and sore eyes. This was of some concern to Mr Croucher because the introduction of CRM intended later in the year would increase the need for the butchery manager to use a computer to produce data such as gross profit percentages relating to his particular department. Mr Fox was asked by Mr Croucher to provide a certificate from his doctor about this problem. He agreed to do so but did not produce the certificate until requested again by Mr Croucher in July. By the time the medical certificate was given to GDL, on 8 July 2004 Mr Fox had been issued with the first written warning.

[26] In June 2004, Mr Fox had asked whether he could step down as butchery manager to a lesser role in the same department. Later in June he was told there were no suitable roles that could be offered.

[27] The medical certificate confirmed that Mr Fox suffered an “anxiety complex” relating to computers and that any attempt to use computers caused physical symptoms which hindered him in performing that kind of work. Once he had received it, Mr Croucher promptly sent the medical certificate to GDL’s health and safety officer, Mr Mark Bell, who called Mr Fox to a meeting on 30 July. At the end of the meeting Mr Fox repeated the suggestion made earlier that he retire or be allowed to step down from his management position.

[28] After the meeting Mr Bell wrote to Mr Fox advising;

As was discussed at our meeting it is important that we establish whether your Doctor’s advice will enable us to work towards resolving your medical condition that is creating health issues whenever you use a computer.

Please understand that we will follow guidance from your Doctor as he is the best judge of your medical welfare. It is important that your health is not put at risk.

The purpose of this letter is to arrange a meeting with you, your representative, myself and Richard Croucher in order to discuss the advice provided by your Doctor.

[29] That further meeting took place. Following it, GDL decided to leave treatment in the hands of Mr Fox’s doctor and for the time being do nothing further about the computer problem, one way or another. The day after this meeting another one was held to investigate the poor display of meat found on 9 August. The final warning of 25 August 2004 was issued at the end of that investigation.

[30] The giving to Mr Fox of the second warning drew, a few days later on 30 August, personal grievances he raised in respect of it and also the earlier warning. He claimed both warnings had been unjustified and had disadvantaged him in his employment. The raising of these grievances, it may reasonably be expected, would have reminded GDL of the need to be careful of Mr Fox’s rights as an employee, in its on-going attempts to resolve the computer problem and his redeployment request.

[31] A letter written to Mr Fox by GDL the day after the grievances were raised indicated that the employer indeed intended to proceed carefully, reasonably and sympathetically in its dealings with him. GDL said in the letter, once again, that it would defer to whatever medical advice Mr Fox

received from his doctor and that it sought to identify with them the options available to address the computer problem. To this end a meeting was held with Mr Fox and his lawyer, Mr Ryan, on 10 September 2004 during which there was further discussion about Mr Fox's suggestion made earlier that he step down as butchery manager.

[32] A further meeting was held on 28 September 2004 at which Mr Fox announced he had changed his mind about stepping down. He said he thought that GDL was trying to get rid of him on medical grounds. GDL acknowledged to him that medical termination was an option if he was unable to perform his duties because of his condition.

The resignation

[33] The next meeting was on 22 October 2004. Mr Fox attended with Mr Ryan his representative. In the course of the meeting Mr Fox drafted a resignation letter, which he signed and gave to Mr Bell. The letter stated;

I George Fox advise that with much reluctance I have found myself in a position where I can no longer continue in my employment with Foodtown.

Over the past six months I have noticed a steady decline in my general health and well being. This decline in my health has become more noticeable in the last three months where the demands placed on me by my employer to become computer literate have caused me increasing concern and anxiety.

On 11 October 2004 I consulted with my Doctor,who advised me that I could not continue to expose myself to these levels of stress and suggest that I leave my job.

Therefore I tender my resignation from Foodtown effective, Monday 1 November 2004.

As Mr Fox was on sick leave when he resigned, he did not return to work after giving this notice.

[34] Upon receiving the resignation Mr Bell wrote to Mr Fox on 26 October expressing his disagreement that any "demands" by GDL had caused the termination of the employment. Mr Bell reiterated the steps that the company had been in the middle of taking in consultation with him and his doctor to properly explore and address the computer problem, when Mr Fox resigned.

[35] Resignation must be regarded as a considered rather than a rashly taken step by Mr Fox, as he had been receiving both legal and medical advice at the time he resigned. Even so, Mr Bell invited Mr Fox to reconsider his resignation and resume the process of trying to overcome the employment difficulties. That invitation was not subsequently taken up by Mr Fox.

Unjustified disadvantage – unjustified dismissal

[36] Looking at GDL's handling of the computer problem in isolation from the two warnings it gave Mr Fox, I am unable to find anything about the employer's actions that was unfair or unreasonable. GDL had not made any final decisions about what actions if any it would take to address the computer problem. It was in the middle of assessing the cause and extent of the problem, in consultation with Mr Fox and his doctor, when he suddenly resigned. It had treated the problem as a serious and genuine one and had not regarded it as a performance or competence issue. Once the medical diagnosis had been revealed by Mr Fox, he was relieved of any requirement to have to use the computer while the problem remained under investigation.

[37] I am satisfied that in respect of the computer problem GDL did nothing that was in breach of the Health and Safety in Employment Act 1992. There is no basis for any claim that GDL had failed to provide a safe and healthy workplace. There was nothing that was reasonably foreseeable about the problem, and GDL responded properly as soon as it found out from Mr Fox that the problem had medical causes.

[38] GDL asked Mr Fox if more training on the computer might help overcome the problem. He replied that his doctor had advised against undergoing training. GDL waited while Mr Fox tried a course of medication, to see if that helped. GDL was looking at the possibility of psychiatric intervention as suggested by the doctor, when Mr Fox resigned. He had seemed unenthusiastic about receiving that kind of help.

Delegation of computer work to assistant manager

[39] As recently as May 2004 Mr Fox had been expressly advised by Mr Croucher not to delegate particular computer functions, which the latter said in his memorandum of 18 May 2004 were a “management function.” Mr Fox considers there is some injustice in the fact that previous store management had allowed him to delegate the computer work to his assistant manager, yet Mr Croucher was insistent that Mr Fox had to do that work himself. Even if there has been past tolerance of a delegation of duty by an employee, an employer is entitled to end that arrangement by giving reasonable notice that in future it expects the defined duties of a position to be performed personally by the employee who is being paid to do them.

[40] Although GDL had not been able to make any final decisions by the time Mr Fox resigned, it had told him that doing nothing and maintaining the status quo was not an option for addressing the computer problem in the longer term. It may be that hearing this was discouraging for Mr Fox but this expression of its attitude by the employer does not provide the basis for a claim of unjustified disadvantage or a claim of constructive dismissal. As the courts have held, an employment relationship is not a fragile thing to be cocooned in cotton wool and protected from the robust communication of views, or from discouraging words being uttered now and again between the parties.

[41] I find it was reasonable for GDL to expect a manager to perform all of the functions and duties of his position himself. Mr Fox’s assistant confirmed to the Authority that it was reasonable for GDL to have viewed the continuation of the delegation as unacceptable in the longer term. His assistant, who had been doing the computer work for Mr Fox, said in evidence that because of the extra load he was doing he viewed himself as being almost the same as the manager and that he had been basically doing Mr Fox’s job. It is significant that he also felt he should have been remunerated for these higher duties. If the delegation was allowed to continue it may only have been a matter of time before GDL would have had on its hands a grievance or pay claim from Mr Fox’s assistant.

[42] It was submitted that the requirement for Mr Fox to change the way he was carrying out his duties with regard to the computer work, was “the straw that broke the camels back.” It did not need to be, as Mr Fox could have lightened the load he felt had been placed on him, by resorting to the disputes procedure contained in his employment agreement. The importance of that procedure in circumstances such as these was discussed by the Employment Court in *NZ Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 362. The Court’s observations include the following;

Where there is a genuine dispute between the parties as to their rights, especially if it is based on reasonable grounds, neither party can use the other party’s stance in the dispute as a ground for either dismissal or resignation intended to be treated as a

dismissal.The parties owe each other a duty to refer the dispute to mediation, and failing resolution, to the Employment Relations Authority for determination. There is neither a need nor a justification for any more drastic action.

[43] Mr Fox could have framed a formal dispute around the question of whether he should be allowed to continue with the delegation arrangements, and if so for how long or in what circumstances. His failure to invoke and engage in the disputes procedure before resigning makes that action he took seem drastic, unnecessary and unjustified.

Course of conduct causing disadvantage or inducing resignation

[44] Looking now at the combination of the two warnings and the handling of the computer problem, I am unable to see this as a course of conduct, or to find some agenda hidden within, set by GDL to force the retirement of Mr Fox. The claims in this regard have been constructed with hindsight.

[45] Just as with the “fair cop” of July 2004, the August circumstances of poor coverage could not have been contrived by GDL to provide a basis for issuing a series of warnings and other conduct. These things had happened while Mr Fox was in charge and in a position to have prevented them from happening. GDL would have had to be prescient to issue the first warning as the beginning of a course of conduct intended to make Mr Fox leave his job. At the time of the first warning GDL could not have known that the circumstances leading to the second warning would arise, and it did not know then that the computer problem was more deep seated than a training issue but had medical origins.

Determination

[46] I conclude that the claims of personal grievance in respect of the two warnings and the termination of the employment, cannot be upheld. The facts, as I have found them to be, do not support any of those claims. Resignation was a choice freely made by Mr Fox who, if he had wished, could have used other ways of testing his rights if he felt GDL was infringing any of them or acting unreasonably in any way.

[47] Both warnings I find were issued with justification and neither therefore gives rise to a successful claims of personal grievance. I find that GDL’s handling of the computer problem did not lack justification in any respect and therefore that conduct too does not provide any basis for a successful claim of grievance. Neither does it support a claim of constructive dismissal. It should be clear from the leading cases on constructive dismissal that this particular legal remedy is not available as a response to any unreasonable or unfair conduct by an employer no matter how minor or unintentional, but is reserved for cases of more serious, blatant and calculated wrongdoing on the employer’s part. The circumstances of this case, as I find them to be, are not such at all.

[48] I find that GDL was not in breach of the Health and Safety in Employment Act 1992. Neither did it breach its statutory duty to act in good faith towards Mr Fox. I note that the remedy of a penalty sought for this alleged breach was not available until 1 December 2004 when it was reserved for actions committed after that date; see s.73 of the Employment Relations Amendment Act (No 2) 2004. Even then the breach of good faith must be “deliberate, serious and sustained”; see s.4A of the Employment Relations Act 2000. Section 73 of the Amendment Act, as pointed out by Mr Langton, also means that the test of justification applicable in this case for a personal grievance, remained the *Oram* test and was not the one provided at s.103A of the Employment Relations Act as amended.

[49] GDL was not required to grant every wish of Mr Fox. To have treated him as redundant when he was not would have invited grievance claims from others such as his assistant, who had also wanted to be made redundant. The employer was correct not to confuse the purpose of compensation paid to redundant employees with benefits paid to superannuated or retiring employees.

[50] The employment relationship problem or problems raised by Mr Fox are not matters for which GDL has legal responsibility for. Accordingly, no orders to remedy the problems are made by the Authority against GDL.

Costs

[51] Applying the principles recently approved of by the Employment Court in *PBO Ltd v Da Cruz* AC 2/05, unreported, 9 December 2005, I consider that GDL is entitled to an order for costs. It seeks a reasonable contribution of about \$4,500 for the day and a half long investigation meeting held in respect of a complex claim requiring more time than might be considered usual or normal. Before fixing an amount of costs to be paid I will give Mr Fox or his representative Mr Ryan until 7 February 2006 to provide any response to the matters relevant to costs that are set out in paragraph 7 of Mr Langton's submissions.

A Dumbleton
Member of Employment Relations Authority