

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 26
5364854

BETWEEN PHILLIP GEORGE
FRASER
Applicant

A N D WHAKATANE MILL
LIMITED
Respondent

Member of Authority: K J Anderson

Representatives: S Austin, Advocate for Applicant
D France, Counsel for Respondent

Investigation Meeting: 11 September 2013 at Whakatane

Submissions Received: 3 October 2013 from Applicant
3 October 2013 from Respondent

Date of Determination: 24 January 2014

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Mr Phillip Fraser, claims that he was unjustifiably dismissed on 30 May 2011. Mr Fraser asks the Authority to find that he has a personal grievance and award him various remedies.

[2] The respondent, Whakatane Mill Limited (WML), denies the claims of Mr Fraser and says that his dismissal was justifiable on the grounds of serious misconduct, namely: refusing to comply with a lawful and reasonable instruction.

[3] The Authority received evidence from Mr Fraser; and for WML there is evidence from Ms Valerie Burley, Mr Sean Kerslake, Mr Mark Hammond and Ms Lynsey Archipow. The parties have also provided a number of relevant

documents. All of the available material has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background

[4] Mr Fraser started working at the Whakatane Board Mill in 1972. At the time of his dismissal he was employed as the Head Storeman, a position he held since October 1993. The terms and conditions of Mr Fraser's employment were provided by the *Whakatane Mill Limited Collective Agreement*.

[5] In his role as Head Storeman, Mr Fraser was responsible for supervising two senior storemen. He reported to the Stores Co-ordinator: Ms Burley.

Matters leading to Mr Fraser's dismissal

[6] The evidence of Ms Burley is that she was appointed to the position of Stores Co-ordinator in 2007; following the resignation of the incumbent in the position. Relative to matters leading to the dismissal of Mr Fraser is that a part of Ms Burley's role is to purchase inventory for the store at the mill. Ms Burley attests that the creation of purchase orders was not a significant element of her role in that she would spend, on average, 1½ hours each day creating the purchase orders.

[7] The evidence of Ms Burley is that between 2007 and 2009, when she went on leave, the purchasing element of her role was partially covered by an administrator in the finance group: Ms Harris. But this was an unsatisfactory arrangement as Ms Harris had no experience of the stores function and had no day-to-day exposure to the stores environment. Hence, Ms Harris was unfamiliar with the inventory that the purchasing orders related to and she was also less likely to identify any errors in the purchasing orders when she carried out the purchasing in the absence of Ms Burley. Also, Ms Harris had a commitment to end of month financial reporting. There was a problem with having only Ms Harris to provide cover when Ms Burley went on leave, because when she came back to work, she would find that some of the purchase orders had not been processed or they had been incorrectly completed. Ms Burley attests that this had the potential to place the business at risk, particularly if purchase orders for critical spares required for the operation of the plant had not been actioned, or were incomplete. Ms Burley says she was restricted to taking annual leave for one or two days at a time, in order to ensure that the purchasing requirements did not fall behind.

[8] Because of the problems arising in regard to covering her leave, Ms Burley spoke to her manager, Mr Kerslake. It was decided that it would be appropriate for Mr Fraser to take over the purchasing responsibilities in the absence of Ms Burley.

Raising the relieving issue with Mr Fraser

[9] The evidence of Ms Burley is that in October 2009, she spoke to Mr Fraser about him carrying out the purchasing responsibilities whenever she was absent. Ms Burley says that Mr Fraser informed her that he did not want to do this. Ms Burley says that she was surprised about Mr Fraser's attitude, given his knowledge of the stores functions and his experience with such.

[10] A meeting took place between Mr Fraser and Mr Kerslake on 27 November 2009. Mr Kerslake recorded the context of the meeting in: "*Personnel Meeting Notes*". The request made by Ms Burley for Mr Fraser to act as her backup and his refusal to do so was discussed. Mr Fraser confirmed meeting with Ms Burley and refusing her request. When asked to explain his reasons the refusal, Mr Fraser informed that he had applied for the role of Stores Co-ordinator in the past and had been unsuccessful. And he queried why his employer believed he could do the job now. Mr Kerslake explained that Mr Fraser would only be required to carry out a small part of Ms Burley's normal role in her absence and he would be provided with any training and support that he required to enable him to carry out the tasks. This would include one-to-one training or development.

[11] The further evidence of Mr Kerslake is that, for various reasons, a further meeting with Mr Fraser to discuss assuming Ms Burley's duties did not take place until 26 May 2010. Mr Kerslake attests that upon being asked why he would not carry out the duties of Ms Burley when required, Mr Fraser responded that he was concerned about providing sufficient cover for the stores operations. The matter of applying and not being accepted for the Stores Co-ordinator role in the past was also again raised by Mr Fraser. Mr Kerslake says he explained to Mr Fraser that the company would ensure there was sufficient cover for the stores operations when he was carrying out Ms Burley's role.

[12] The evidence of Mr Kerslake (corroborated by the notes of the meeting) is that Mr Fraser informed that he had previously trained other store co-ordinators and he had set up catalogues in SAP at a mill in Kawerau. Mr Kerslake attests that he

conveyed to Mr Fraser that this indeed was the reason why he was being considered to be the best person to cover Ms Burley's role in her absence.

[13] Mr Fraser then informed that the reason he did not want to cover Ms Burley's role was that he might make a mistake and over-order stock. Mr Kerslake explained that within the SAP system there are approval levels set; hence it would not be possible for Mr Fraser to over-order stock. The evidence of Mr Kerslake is that he informed Mr Fraser that the company was making a reasonable request; that this did not expose Mr Fraser to any harm, and he was suitably experienced to act in the Stores Co-ordinator role. Mr Kerslake again informed that appropriate training would be offered.

Further discussions between Mr Fraser and WML

[14] It appears that due to Mr Kerslake having other commitments with the Carter Holt Harvey Group, he was unable to engage again with Mr Fraser about the Stores Co-ordinator coverage until 27 September 2010. However, it appears that at some point in 2010, Mr Fraser was provided with a task list relevant to the essential purchasing components of the Stores Co-ordinator role. The evidence of Mr Kerslake is that as an outcome of discussions with Mr Fraser's union representative, the task list was reduced to the extent that Mr Fraser would only be required to action purchase orders when Ms Burley was absent.

Meeting 27 September 2010

[15] At this meeting, Mr Kerslake reiterated the requirement for Mr Fraser to provide cover for Ms Burley in her absence. Mr Fraser was referred to clause 29 of the collective employment agreement (CEA). Clause 29.1 of the CEA provides that:

At the discretion of the employer, employees may be required to perform any duties and utilise any skills they possess subject only to limitations of skill, competence (unless adequately supervised) or statute, regulation and safety.

[16] And then at clause 29.4 of the CEA, it is provided as follows:

Range of Duties: The annualised income set out in this agreement recognises that employees are required by the employer to carry out a wide range of duties or functions to ensure the efficient continuity of the process or activity, subject only to limitations of skills/competence (unless adequately supervised), statute, regulation

and safety. Deployment is agreed not to be a variation of an employee's agreement of employment.

[17] And at clause 29.6 of the CEA, there is provision for higher duties allowances where an employee is directed to, and takes full responsibility, in the absence of a shift co-ordinator or a salaried supervisor.

[18] The evidence is that at the meeting on 27 September 2010, Mr Fraser asked if others could carry out the role of Stores Co-ordinator and two people were suggested by him. However, for respective reasons, these two people were not considered to be suitable. Mr Kerslake attests that Mr Fraser continued to adopt the position that he would refuse an instruction to carry out Ms Burley's role: "... simply because he did not want to do the role".

[19] On 8 November 2010, the Human Resources Manager for WML, Ms Archipow, sent the following email to Mr Fraser and his union representative:

This email is to advise all involved of the outcome and position going forward with regards to cover for the Stores Co-ordinator role.

Following our meetings and after considering the explanations and reasons for Phil's [Mr Fraser] reluctance to act up and cover the Stores Co-ordinator role, the company's position remains the same that they require Phil to train and cover the defined portion of the Stores Co-ordinator role (as given to Rua at the beginning of this process), to allow for and provide business continuity.

A training plan has been hand delivered to Phil by Sean [Mr Kerslake]. Training will commence tomorrow Tuesday 9th November 2010 at 10.30am in Val Burley's office.

Provision of training for Mr Fraser

[20] The evidence is that Ms Burley provided training for Mr Fraser on the purchasing component of her role on 23, 24, 25 and 30 November 2010. Mr Fraser says that he only completed four hours of the training requirement. He says that this was because Ms Burley alleged that he threatened and bullied her. But the oral evidence of Ms Burley, which the Authority accepts, is that there was a total of six hours training provided, being 1.5 hours each day between the hours of 10:30a.m. and 12:00p.m.

[21] The evidence of Ms Burley is that Mr Fraser was "not particularly cooperative" during the training process and that he made it "very clear" that he did

not want to be there. Ms Burley attests that Mr Fraser never indicated that he did not know how to do the work required of him, nor did he say that it was too complicated.

[22] While there is some conflict in the evidence about the nature and extent of the training provided to Mr Fraser, the Authority concludes that it is more probable than not that Mr Fraser was provided with appropriate training by Ms Burley. And the Authority accepts that she was satisfied that he could perform the purchasing aspects of her role.

[23] The evidence of Ms Archipow is that along with Ms Burley, she met with Mr Fraser and his union representative on 30 November 2010. The purpose of the meeting was to discuss Mr Fraser's training to date and to discuss any concerns or matters that needed to be revisited. The Authority has been provided with the notes that Ms Burley prepared pertaining to the tenor of the meeting and what was discussed. Ms Archipow attests that the only issue that Mr Fraser raised was that he had a problem with reading the "highlighted" content of the training book and it was agreed that this would be amended to ensure that it was easier to read the relevant material. The Authority observes that the notes of the meeting record Mr Fraser saying "Why would I be asking questions when I'm not interested in doing it [the training]?"

The refusal by Mr Fraser to carry out Ms Burley's role

[24] The evidence of Ms Burley is that on 30 November 2010, she requested that Mr Fraser cover her purchasing order responsibilities for the next day. Ms Burley informed Mr Fraser that she would be available to provide support to him, when she could. Ms Burley attests that Mr Fraser refused to comply with her request, as evidenced by his failure to present himself at her office on 1 December 2010.

[25] Ms Burley had arranged to be on leave for 10 days: from 6 December to 17 December 2010. However, because Mr Fraser refused to carry out the purchase orders in her absence, Ms Burley only took one day of leave. Mr Fraser was subsequently invited to attend a disciplinary meeting.

[26] However, Mr Fraser went off work on sick leave because he was "feeling stressed". Mr Fraser's evidence is inconsistent in regard to how long he was on sick leave for as in two consecutive paragraphs of his brief of evidence, he first says it was for two weeks. Then he says it was for one week. Nonetheless, the evidence is

consistent in that, as an apparent result of Mr Fraser informing that he was under stress, it was subsequently agreed that he would attend consultation with a psychologist on 20 December 2010.

The psychologist's report

[27] The psychologist's report of 20 December 2010 records, among other things, that her assessment of Mr Fraser:

... did not document any significant depression or overt symptoms of anxiety or stress. Rather, Phil presented as emotionally stable and described a matter of fact, resolute approach to his communications at work.

[28] The report also records that:

Phil stated that his reluctance to complete the additional role is not¹ related to any incompetency issue. He denied having any difficulties with reading, writing, or computer illiteracy. He reported feeling confident in his ability to be able to perform the additional role. The only hesitation Phil mentioned was feeling mildly nervous about the large sums of money involved in the transactions.

[29] On 19 January 2011, a meeting took place to discuss the psychologist's report.

Events leading up to the dismissal of Mr Fraser

[30] Following a meeting with Mr Fraser on 8 March 2011, Ms Archipow wrote to him on 9 March 2011. She records the background to the problem that has arisen and the explanations given by Mr Fraser and the company's response. The letter records that:

At our meeting on Tuesday 8 March 2011 you raised no new concerns or reasons why you should not carry out the purchasing component of the role.

Our instruction to you that you be trained in the purchasing component remains unchanged. We hereby formally request you to participate in training and cover the purchasing component of the stores co-ordinator position when required.

As agreed, in all instances dates for training and cover for the purchasing will be advised to you in writing.

Phil, our instruction that you are to participate in the training and cover the purchasing component of the stores co-ordinator position is a reasonable and lawful request. Should you fail to participate in training and cover the purchasing component of the Stores Co-ordinator position, disciplinary action may be taken and your ongoing employment at Whakatane Mill will be at risk.

¹ The underlining is by the author of the report.

[31] On 11 March 2011, Ms Burley confirmed to Mr Fraser (via an email) the new training dates: 14 and 16 March 2011. Mr Fraser's response was that he would not be attending the training. On 14 March 2011, Mr Fraser's union representative informed Ms Archipow that Mr Fraser would not be attending the training for health and safety reasons. A meeting was called to discuss this new development. Ms Archipow attests that at the meeting, Mr Fraser stated that he did not want to do the training and when asked several times whether there were any further concerns that he wished to raise, Mr Fraser's response was that there was nothing else that he wanted to raise and he reiterated that he did not want to participate in any further training.

[32] During March and April 2011, further representations were made by Mr Fraser's union with various suggestions being proposed and subsequently considered by WML; without any resolution of the issues.

Disciplinary action

[33] Via a letter dated 26 April 2011, Mr Fraser was requested to attend a disciplinary meeting. The letter informed that:

The purpose of the meeting is to discuss and investigate concerns we have in relation to a breach of company policy, namely failure to follow a reasonable instruction by not carrying out the purchasing on Monday, 11 April 2011. The dates that you were required to carry out the purchasing was communicated to you on Tuesday, 5 April 2011. We will conduct an investigation and provide you with the opportunity to give us your explanation of the events that occurred. Please note that we consider this to be a very serious matter which could result in disciplinary action up to and including termination of your employment.

[34] Due to the apparent unavailability of Mr Fraser's union representative, a disciplinary meeting was unable to occur until 9 May 2011. Further meetings with Mr Fraser took place on 12 May and 26 May 2011. The outcome of the 26 May meeting was that Mr Kerslake informed Mr Fraser that his refusal to comply with the lawful instruction to carry out the purchasing duties, as required by the company, was not reasonable and was considered to be serious misconduct. Mr Kerslake informed that he would be making a recommendation to the Acting General Manager, Mr Hammond, that Mr Fraser should be dismissed. However, Mr Fraser would have an opportunity to meet with Mr Hammond to present his account of events and any

other information that he felt Mr Hammond should consider before a final decision was made.

[35] A meeting with Mr Hammond duly took place on the afternoon of 26 May 2011.

The dismissal of Mr Fraser

[36] At a meeting on 30 May 2011, Mr Hammond advised Mr Fraser that the company had decided to dismiss him. The decision is recorded in a comprehensive letter of the same date. The germane content is recorded as follows:

Decision

Your refusal to comply with the lawful and reasonable instruction to carry out the purchasing duties as directed on 11 April 2011 was not justified or reasonable. Your statements to us that you will continue to refuse to comply with any such instructions are also not justified. You have been given the appropriate training and are competent and capable of performing purchasing duties. You also have the necessary support available should any issues arise while performing these duties. Your position that you now require further training is not acceptable and is an attempt to avoid performing duties and responsibilities which we can require you to do and which are essential to meeting the operational demands of the business. We note that in the past, when we offered refresher training courses for you around purchasing duties you have failed or refused to attend those courses in any event.

We have therefore concluded that your refusal to carry out a lawful and reasonable instruction by your supervisor was deliberate and wilful and that there were no reasonable explanations for your behaviour. Your behaviour constitutes serious misconduct. We have no confidence that you will cooperate with the company moving forward and in fact, you have stated that you will continue to disobey such instructions.

In determining whether dismissal is warranted, we have considered your length of service. We would expect someone with your employment history to understand the importance of having a constructive relationship with the company. We have taken into consideration that you have an active warning on file. We considered whether there are other means of addressing your behaviour. We have referred above to the considerable steps we have taken to endeavour to maintain the employment relationship in spite of your behaviour. We have considered whether the issue can be satisfactorily addressed by no longer requesting these responsibilities from you and have concluded that no one else could perform these duties as efficiently as you and in a manner which does not disrupt the business. In this circumstance, we no longer have the trust and confidence in you necessary for us to continue a satisfactory employment relationship.

Regrettably we have reached the conclusion that your employment is to be terminated on grounds of serious misconduct.

[37] Mr Fraser was informed of his right to appeal the decision and that should he wish to do so he should present a submission to the Whakatane Mill human resources department (Ms Archipow) in writing within seven days of receiving the dismissal letter. Mr Fraser was informed that the Mill Manager would consider any submission that he wished to make and would respond within seven days of the receipt of any submissions from Mr Fraser.

[38] In regard to the opportunity to appeal the dismissal, Mr Fraser says that he did this and he has produced a handwritten document that he asserts is evidence that he made an appeal against his dismissal. The document is undated. Nonetheless, it appears to address the meeting that took place on 30 May 2011, and the letter confirming Mr Fraser's dismissal of the same date. However, Ms Archipow attests that the company never received any appeal from Mr Fraser and the first indication of his dissatisfaction regarding the dismissal, was the raising of a personal grievance by his union on 17 August 2011. There is no mention in the grievance letter of Mr Fraser having made an appeal. Given the careful approach taken by WML in regard to all other aspects of the dispute with Mr Fraser, over an extensive period of time, I conclude that it is unlikely that Mr Fraser actually presented the written appeal that he has now produced to the Authority: the evidence of Ms Archipow about this issue is accepted.

Analysis and conclusions

[39] When a dismissal is challenged as being unjustifiable, the Authority must apply the test provided by s.103A(2) of the Employment Relations Act 2000 (the Act). This is:

Whether the employer's actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time that the dismissal occurred.

[40] And, when applying the above test, the Authority must consider the criteria set out within s.103A(3) of the Act. Notwithstanding the submissions for Mr Fraser to the contrary, I find that WML has established that all of the criteria set out in s.103A(3) have been met.

Was the dismissal of Mr Fraser something that a fair and reasonable employer could have done in all the circumstances?

[41] Given the long service of Mr Fraser and the regrettable termination of his employment, the Authority has subjected all of the evidence pertaining to his dismissal to particularly close scrutiny. And despite the comprehensive submissions advanced on behalf of Mr Fraser to the contrary, I conclude that the dismissal was something that a fair and reasonable employer could do in all the circumstances.

[42] The consistent and unreasonable position adopted by Mr Fraser, by refusing to undertake the duties requested of him, led WML to reasonably conclude that the refusal to carry out a lawful and reasonable instruction constituted serious misconduct. And despite Mr Fraser being cautioned on several occasions that he was placing his employment in jeopardy, he resolutely made it clear that he would not carry out the lawful and reasonable instruction given to him.

[43] While various arguments have been advanced as to his reasons for refusing to carry out a legitimate request by his employer, the inescapable fact is that, quite simply, for reasons that Mr Fraser has still not been able to logically explain, he was prepared to place his employment in jeopardy rather than cooperate with his employer, despite the numerous attempts by WML to assist him to do so.

[44] I accept that WML was entitled to request Mr Fraser to carry out the duties in question pursuant to clause 29 of the collective employment agreement. It is also accepted that the company was entitled to conclude that Mr Fraser had the necessary skills and competence to carry out the duties required of him pertaining to covering the role of Stores Co-ordinator, when reasonably required. Indeed, Mr Fraser acknowledged that he was competent to carry out the duties involved but he remained resolute in his refusal to do so. Perhaps the words used by the psychologist, in her report of 20 December 2011, best summarise the situation whereby she concluded that Mr Fraser:

... presented as a highly determined, inflexible gentleman who is unwilling to compromise on this matter.

[45] It is most regrettable that the longstanding service of Mr Fraser should have ended in the manner it did. To some, the dismissal may be seen as harsh, but dismissal was an action that the employer, acting fairly and reasonably, could take as the

appropriate response to Mr Fraser's conduct.² I find that his dismissal was justifiable as he left his employer with no alternative but to implement this sanction after having exhausted all other possible options.

Costs

[46] Costs are reserved. The parties are invited to resolve this matter. In the event that a resolution is not possible, the respondent has 28 days from the date of this determination to file submissions. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority

² *W&H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448 at 459