

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Mark Donald Green (Applicant)
AND Goodman Fielder New Zealand Ltd
(t/a Quality Bakers) (Respondent)
REPRESENTATIVES Greg Lloyd, Counsel for the Applicant
Lewis Turner, Counsel for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING Christchurch 16 June 2006
SUBMISSIONS APPLICANT 30 June 2006
RESPONDENT 17 July 2006
DATE OF DETERMINATION 29 August 2006

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant, Mark Green, was employed by the respondent for about nine years as a qualified baker in Christchurch.

[2] The respondent, Goodman Fielder New Zealand Limited t/a Quality Bakers (“Quality Bakers”), has a number of work sites where employees are involved in the manufacture of bread, small goods, pies, pastry and other food related products.

[3] On 26 April 2005 there was an altercation between Mr Green and another employee T. Following an investigation into that altercation Mr Green was dismissed on 9 May 2005 and T was given a written warning.

[4] Quality Bakers Human Resource Manager, Scott Munday, set out the reasons for Mr Green’s dismissal in a letter dated 27 June 2005 to Mr Green’s union, the National Distribution Union (“the union”).

[5] Two relevant paragraphs of that letter are set out below:

In the early hours of Tuesday the 26th of April 2005, Mr Green and a fellow employee became embroiled in a verbal altercation relating to a mechanical interruption in the plant. During this altercation, it was alleged that Mr Green had struck the employee.

As a result of that allegation, an investigative process was undertaken to determine the corroboration of the accusation. Based on an impartial investigation, which drew on statements provided by both parties & post-event eyewitness accounts, it was determined by a high degree of probability that Mr Green did in fact strike the individual during the altercation.

[6] Mr Green says that his dismissal was unjustified. During the investigation of the disciplinary matter Mr Green denied punching T. After Mr Green was dismissed the union wrote a letter accepting that Mr Green did punch T but that he did so in self defence.

[7] Quality Bakers say that the termination of Mr Green's employment was substantively justified and procedurally fair.

The Issues

[8] The justification of this dismissal is to be determined in accordance with the new test of justification set out in section 103A of the Employment Relations Act 2000. This requires an objective determination of what a fair and reasonable employer would have done in the circumstances.

[9] In *Hudson v Air New Zealand Limited* (unreported, AC 30/06, 30 May 2006 Shaw J held that the *test for justification applies at all stages including the employer's decision to dismiss*.

[10] The following questions require determination:

- (i) Was there a full and fair investigation which disclosed conduct a fair and reasonable employer would regard as serious misconduct?
- (ii) Would a fair and reasonable employer have dismissed Mr Green in all the circumstances?
- (iii) Was there disparity of treatment of Mr Green?
- (iv) If the dismissal was unjustified was there contributory conduct on the part of Mr Green which should reduce any remedies awarded to Mr Green?

Was there a full and fair investigation which disclosed conduct a fair and reasonable employer would regard as serious misconduct?

The Collective Agreement

[11] Mr Green was a member of the union and his work was covered by a collective agreement between Quality Bakers and the union, 1 August 2004 to 31 July 2006.

[12] Quality Bakers has a code of conduct policy. It set out the offences which constitute serious misconduct and which may lead to summary dismissal. Under 1.7 it provides that *physical violence against any person on GFNZ premises, or a workplace where GFNZ employees work (provocation will not be accepted as an excuse)*.

[13] Mr Green acknowledged that he was aware of the code of conduct policy and that physical violence was serious misconduct.

The Investigation

26 and 27 April 2005

[14] On 26 April 2005 at 3.15am T went to see his supervisor Ricky Vaeluaga and complained that Mr Green had hit him in the face. Mr Vaeluaga noted that T's face was red on his left cheek.

[15] A series of interviews took place on 26 April 2005 to ascertain what had occurred. Mr Green had a support person present when he first discussed the matter with Mr Vaeluaga. A statement was taken from Mr Green at the time.

[16] Mr Vaeluaga then went to discuss the matter with the plant manager Keith Wills. Mr Wills met with Mr Green and his support person Reuben McNabb on 26 April 2005 to discuss what had happened. A further statement was taken from Mr Green. Mr Green initially refused to answer whether or not he had punched T but then said that he had not punched T.

[17] Mr Wills then met with T who said that Mr Green had punched him in the face which knocked his earmuffs off and turned his face. T said that he pushed Mr Green away with one hand in the chest, picked up his ear muffs and left. T said that he then told another employee Daryl he had just been punched and asked Daryl to go and run the mixer. He then told Mr Vaeluaga about the incident.

[18] Mr Wills interviewed Daryl on 27 April 2005. Daryl said T told him Mr Green had just hit him and asked if he could take over at the mixer. Daryl said that he was surprised but could tell someone had punched T in the face as T's face/neck area was red and he appeared to have a fat lip.

[19] Mr Green was placed on special leave on normal pay for the duration of the investigation. A formal investigation meeting was scheduled for 2 May 2005 at 10.30am.

2 May 2005

[20] Mr Green attended the meeting on 2 May with Mr McNabb as support person. Tony Andrew, the South Island regional operations manager, attended the meeting on behalf of Quality Bakers with Mr Wills and Brett Pfahlert. All previous statements that had been taken from Mr Green, T, Darryl and Mr Vaeluaga were read out. Mr Green confirmed that his previous statement was correct. Mr Green said in addition to his previous statement that *he started it I didn't* and he denied hitting T. Mr Green said with respect to T's statement that it is very *watered down*. Mr McNabb said that he thought Mr Green was physically assaulted by T. Mr Andrew said that T was being interviewed as well.

[21] The meeting then closed and there were some further investigations before the final disciplinary meeting on 9 May 2005.

3 May 2005

[22] There was a disciplinary meeting with T. T denied any physical contact on his part with Mr Green except to the extent that he pushed him away after the punch and picked up his ear muffs. T confirmed his earlier statement.

4 May 2005

[23] Mr Andrew carried out further investigations about T's appearance after the incident with Daryl and Mr Vaeluaga. Daryl confirmed his earlier statement and gave some more details of T's appearance after the incident. He said that he said he could see an imprint of a fist above T's lip on the left hand side of the face and that when he looked at Mr Green, Mr Green was very pale and angry.

[24] Mr Vaeluaga said that there was a mark on T's upper lip to his cheek which looked like a punch imprint. He said that it hurt T to pull his lip back.

9 May 2005

[25] On 9 May 2005 there was a second disciplinary meeting. Mr Andrew attended with Mr Pfahlert. Mr Green attended with Mr McNabb and an employment advocate Ian Thompson. I am satisfied that the further statements taken from Daryl and Mr Vaeluaga were presented to Mr Green and/or his representative at the meeting. Mr Andrew advised that the investigation had been completed. The conclusion was presented to the meeting. It was that there was strong reason to believe as a result of the investigation carried out by Quality Bakers that Mr Green did in fact strike T following a verbal altercation and that provocation would appear to be a factor. Mr Thompson raised some concerns about the process around the special leave and asked why T had not also been *sent away*. Mr Thompson also queried consistency about the marks on T's face. There was no further information provided to Mr Andrew.

[26] There was then a brief adjournment during which Mr Andrew and Mr Pfahlert consulted with Mr Munday.

[27] Mr Andrew and Mr Pfahlert then reconvened the meeting. In response to the matters raised by Mr Thompson, Mr Andrew said that the special leave was a term used to get away from the negative connotations of suspension and that the leave had been discussed with Mr Green and Mr McNabb before it was taken. Mr Andrew said that T was being dealt with separately and in accordance with company policy and procedures.

[28] Mr Andrew then said that the final conclusion was that the evidence strongly suggested that Mr Green did strike T and that strike constituted an act of serious misconduct under 1.7 of the code of conduct. Mr Green was advised of the decision to terminate his employment. It was recorded that Mr Green was to be paid one weeks pay (40 hours).

The investigation***Special Leave***

[29] Mr Green did not initially take any issue with his placement on special leave on 30 April 2005. The issue of special leave was raised again during the disciplinary meeting on 2 May 2005 by Mr Andrew and there was agreement by Mr McNabb and Mr Green that it continue. Mr McNabb advised that Mr Green appreciated having the time off and Mr Green commented that he wasn't feeling well anyway. I do not find any unfairness with respect to the special leave or with the fact that Mr Green was placed on special leave and T was not. Mr Green was facing an allegation of violence and T was not.

Reason for dismissal

[30] Mr Green was advised of the allegation that he had hit T. Mr Lloyd submits that Mr Green's dismissal was, at least in part, predicated on the basis that he had lied and that should have been put to him. I do not find that Mr Green was dismissed for being dishonest during the investigation. The reason for his dismissal was that Quality Bakers concluded that he had hit T. Quality Bakers had to reach a conclusion in circumstances where T said he was hit by Mr Green and Mr Green said he did not hit T.

[31] This case is distinguishable from the unreported Employment Court judgment of Travis J in *Alofa v Aotea Centre Board of Management* and *Aotea Centre Board of Management v Alofa* AC 50/01 30 July 2001 where lying was the focus of the employer's concerns and Mr Alofa was not directly confronted with the allegations.

Bias

[32] Mr Green said that he did not tell the truth about punching T because he was concerned he would not get a fair hearing. These concerns were based on the friendly relationship between Mr Vaeluaga and T and Mr Green's poor working relationship with Mr Wills. Mr Andrew made the final decision following the disciplinary meetings and Mr Green did not raise any concerns at the time of the disciplinary meetings in terms of an unfair process. Mr Wills was not at the final disciplinary meeting. Mr Andrew could not recall Mr Wills when I asked him at the investigation meeting, *saying anything at all about Mr Green*. The feedback from Mr Pfahlert to Mr Andrew was that Mr Green was very good at his job and reliable. Mr Vaeluaga was only involved initially when T approached him to complain about being hit and then to give a further statement about T's appearance after the incident. He did not have any input into the decision making process. There was other evidence about T's appearance from Daryl.

[33] I am not satisfied looking at the matter that there was a reasonable possibility, suspicion or danger of bias in this case with respect to those carrying out the investigation or on the part of the decision maker.

Mr Green not being asked to make a formal complaint

[34] One of Mr Green's complaints about the process was that he was never asked to make a formal complaint about T with respect to the incident and that he was never asked if T had assaulted him. I have considered the complaint in terms of the adequacy of the investigation although, at least in part, it probably arises as the result of how another incident between T and Mr Green in 1999 was dealt with. I shall set out the background to that incident shortly.

[35] I am satisfied that Mr Green's statement which contained his version of events was considered by Quality Bakers and also put to T. Mr Green in his statement makes reference to T being *in his face, chest shunting him and grabbing him around the shirt*. T denied that he made physical contact with Mr Green apart from pushing him away after the punch. Although Mr Green did not make a formal complaint that T assaulted him I am satisfied that T's actions during the incident were investigated and considered as part of the overall investigation into the allegation against Mr Green. There was an absence of any physical or other third party evidence to support Mr Green's statement that T pushed, shunted and grabbed him.

[36] I am satisfied though from my assessment of the initial questioning by Mr Wills that he did have an open mind. It is apparent from Daryl's statement that he was asked about the state of Mr Green's shirt. Quality Bakers concluded that there was a degree of provocation by T toward Mr

Green but not physical violence. I am of the view that this conclusion was open to Quality Bakers in terms of T's actions.

[37] There was an incident between T and Mr Green in April 1999. Mr Green complained to Mr Wills in 1999 that he had been manhandled across a conveyor by T. T agreed, when talked to by Mr Wills, that he had acted inappropriately and knew that there was a possibility he could be dismissed. Mr Wills asked Mr Green if he wanted to take the matter further but Mr Green did not want to. It is certainly arguable that this was not the right approach to have taken at the time and that the company should have taken action regardless of Mr Green's views. I am not satisfied though that that matter is relevant to the investigation about the incident in 2005.

Should it have been apparent to Quality Bakers that Mr Green was acting in self defence?

[38] It was not until the Authority investigation meeting that Mr Green said T had come toward him with a closed fist and that he defended himself. Mr Green said that he knew that there were no witnesses to the incident and that he adopted a similar approach of denial which his father had adopted in a dispute with a neighbour.

[39] I do not think Mr Green, from my assessment of his statements given at the time, was particularly comfortable denying he punched T. I do not doubt that he is usually an honest person.

[40] The difficulty though is that the information that Mr Green provided to me and the union after his dismissal was not available to Quality Bakers when it conducted its investigation. It was not put to Mr Andrew who was the decision maker.

[41] I do not accept Mr Lloyd's submission that a fair and reasonable employer would have considered self defence in its investigation and on that basis made enquiries. Self defence is different to provocation. It would have required Quality Bakers to consider the incident from a different perspective and reach a conclusion as to the reasonableness of Mr Green's punch. Mr Green denied punching T so Quality Bakers was not, and could not be expected to be, alerted to the need to consider whether the punch was a justified use of reasonable force.

Mr Green's historical difficulties with T

[42] Mr Green and T did not get on well. There had been attempts to accommodate Mr Green's request to change shifts. Quality Bakers say that other employees were not willing to work with Mr Green. Mr Green did not get that impression from his discussions with staff. In any event the only other incident involving violence between T and Mr Green had been in 1999. I am of the view that whilst it was accepted that Mr Green and T did not get on well there was no suggestion that an incident of this nature would be likely. It was not unreasonable of Quality Bakers to expect Mr Green and T to act appropriately notwithstanding that they did not like each other.

Conclusion as to investigation and finding of serious misconduct

[43] Mr Green had a support person present during interviews and at the disciplinary meetings. He provided statements about what took place on 26 April 2005 and was shown statements made by T and other employees. His responses were taken into account in terms of the final decision but Quality Bakers concluded that Mr Green had hit T. I am satisfied that there was a full and fair investigation.

[44] I find that it was reasonable for Mr Andrew to conclude from the evidence, particularly from Daryl and Mr Vaeluga, that Mr Green had punched T. The code of conduct provided that physical violence against another person constitutes serious misconduct and that provocation is not an excuse. There was a degree of provocation in this case because T entered Mr Green's work area and was confrontational and argumentative. Mr Green's punch to T's face in my view was conduct that could not be seen as a reasonable response. It was a hard enough punch to leave visible marks on T's face. It was conduct which I find a fair and reasonable employer would regard, following the investigation, as serious misconduct.

Would a fair and reasonable employer have dismissed Mr Green in all the circumstances?

What were the circumstances at the time of dismissal?

[45] Mr Green had been an employee of Quality Bakers for nine years and was very good at his job. I am satisfied that Mr Andrew considered both of these matters. There had been a history of difficulties between T and Mr Green and they did not like each other. An attempt to shift Mr Green had not for whatever reason eventuated. Two employees who do not like each other is not an uncommon scenario in the work place. A dislike of another employee does not justify violence toward that person.

[46] Mr Green was aware of the code of conduct about physical violence and knew that it may result in summary dismissal. He denied he had punched T. To the extent that he accepted there was an incident he said that T *started it*. There were no witnesses to the actual punch but there was evidence about his appearance from two people who had seen T just after the incident. Mr Andrew concluded that there had been a punch and that he had lost trust and confidence in Mr Green.

Disparity of treatment?

[47] In terms of the incident itself T was given a written warning and Mr Green was dismissed. I am satisfied that there was an adequate explanation for the difference in the disciplinary sanctions. Quality Bakers did not conclude that T had engaged in physical conduct with Mr Green. There was a conclusion that Mr Green had punched T although Mr Green denied that he had punched T. There was no explanation by Mr Green that the punch was in self defence.

[48] I heard evidence from Robert Beldham who was an employee at Quality Bakers for 31 years. He told me about a violent incident at Quality Bakers about 15 years ago which ended when he hit someone with a chair. I also heard about other incidences including someone smashing a plate glass window. There was no knowledge by the company about some of the incidences I heard evidence about. Historically there may well have been a different approach to violence but I am not satisfied that is the situation in more recent times.

[49] The matters that I heard evidence about either occurred a considerable time ago or there are adequate explanations as to why there was a difference in treatment. The earlier incident between T and Mr Green was dealt with differently and perhaps not appropriately. An employer though is not bound for ever by the mistaken treatment of an employee on a particular occasion – *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636. There is also an explanation about that incident that Mr Green did not want to proceed with a complaint.

[50] I do not find that there are issues about disparity of treatment.

Determination

[51] I find that a fair and reasonable employer would have considered that Mr Green's conduct amounted to serious misconduct and would have proceeded to summarily dismiss him in the circumstances.

[52] I do not find that Mr Green has a personal grievance. His dismissal was justified.

Costs

[53] I reserve the issue of costs.

Helen Doyle
Member of Employment Relations Authority