

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 61
5334745

BETWEEN TANGIANAU HERE
 Applicant

AND MCALPINE HUSSMAN
 LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Gregory Bennett, Counsel for Applicant
 Jo Phipps, Advocate for Respondent

Investigation Meeting: 15 November 2011

Submissions received: 21 November 2011 from Applicant
 25 November 2011 from Respondent

Determination: 20 February 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Tangianau Here, says he has been unjustifiably dismissed and unjustifiably disadvantaged by the respondent, McAlpine Hussman Limited (“McAlpine” or “the company”).

[2] The unjustifiable disadvantage is twofold: that Mr Here was not told he was entitled to a support person at the disciplinary meeting and that he was called to a disciplinary meeting.

[3] Mr Here seeks compensation, lost wages and reinstatement.

[4] Mr Here has been a longstanding employee of the respondent’s for more than twenty years.

The Incident 6 December 2010

[5] On 6 December Mr Dave McAuley, Mr Here's Team Leader, issued a work instruction to Mr Here. When he went to check five minutes later Mr Here was chatting with another worker. Mr Here says he discussed the instruction with a colleague. Mr McAuley says Mr Here had no need to discuss it with anyone and he told him he knew what he had to do. Mr McAuley said Mr Here made a comment about the workplace not being a prison. Mr McAuley said it was not a holiday camp and Mr Here was expected to work.

[6] Mr McAuley said he walked away. Mr Here then came over to where Mr McAuley was, stopped a couple of meters away from him and yelled that Mr McAuley had better not make another complaint about him. Mr McAuley replied "*Or what?*" Mr Here said "*I know where you live.*"

[7] Mr Here went to the office of Mr Kevin Atkins, the Factory Manager, and complained about Mr McAuley. Mr Atkins said to leave it to him.

[8] Mr Atkins made notes. These state that Mr Here said Mr McAuley was always following him around and checking up on him and that he had an issue with him which was a longstanding one.

[9] Mr Here maintained that had been having an ongoing dispute with Mr McAuley which had not been rectified, despite his telling management about it.

[10] Mr McAuley said that since he had been promoted Mr Here had been resisting taking instructions from him and had not been working well.

[11] On 21 July 2010 Mr Here had received an employment warning for swearing at Mr McAuley. This incident related to Mr McAuley checking whether Mr Here had completed some work that had been assigned to him. Mr Here's response was to tell Mr McAuley to fuck off and so some work. Mr Here did not contest the validity of that employment warning.

[12] Mr Joseph Henry, the Knock Down supervisor, who had witnessed the argument, also went to see Mr Atkins.

[13] Mr McAuley, Mr Here and Mr Henry were called into Mr Atkins' office. Mr Atkins asked Mr Henry what had happened and then asked Mr McAuley what had happened.

[14] Mr Atkins raised the previous warning with Mr Here regarding a similar incident. Mr Here said he had an issue with Mr McAuley. Mr Atkins asked if Mr McAuley had treated him unfairly or been aggressive. Mr Here replied he had not but he still had a problem with him

[15] Mr Atkins asked Mr Henry about the poor relationship. Mr Henry said the problem lay with Mr Here and that he himself was dissatisfied with Mr Here's performance.

[16] Mr Atkins said given that Mr Here had threatened Mr McAuley he had no option but to convene a disciplinary enquiry and suspend Mr Here on full pay until the date of the enquiry.

[17] Mr McAuley said he did not like the fact that Mr Here had said he knew where Mr McAuley lived.

[18] Mr Here said that at that point Mr Atkins threw his hands up and said "*you just lost your case, we can't help you and this has to go further.*" He then told Mr Here to go home, think about what he wanted to happen and to come back the next day.

[19] Mr Atkins did not give evidence but Messrs McAuley and Henry say Mr Atkins told Mr Here to go home and cool off. Mr Here said he did not think he had done anything wrong.

7 December 2010

[20] Mr Here was met by Mr Henry who told him to wait until Mr Atkins came to get him. Mr Here handed him a letter of apology for Mr McAuley. The letter read:

I would like to take this opportunity to apologize for my outburst yesterday. I am sorry if what I said, in the heat of the moment, was taken seriously. I meant no harm or malice.

[21] Mr Here was given a letter advising him of a disciplinary meeting to be held on 10 December. The purpose of the meeting was to discuss what the company believed to be unacceptable behaviour, being verbal threats to a team leader. He had the right to representation and was suspended on pay until the date of the meeting. The possible outcomes were set out.

10 December Meeting

[22] Present at the meeting were Mr Norm Campbell, a union delegate, Mr Atkins, Ms Marie van Es, the Human Resources Manager, and Mr Here. Ms van Es took notes.

[23] Mr Here apologised and said it would not happen again and reiterated that he had an ongoing problem with Mr McAuley. Mr Atkins acknowledged Mr Here's frustration regarding Mr McAuley. Mr Campbell said he didn't believe others had taken the comment as a threat. Mr Atkins said Mr McAuley had taken it seriously and had contacted the Police and his security company.

[24] Mr Atkins said the earlier issues should have been addressed at the time but they did not justify the current situation.

[25] Mr Atkins asked what guarantee he had that it wouldn't happen again. Mr Here said he would do as he was told and that he wanted to come back to work. Mr Atkins asked how he would fix it. Mr Here said they would have to be friends. An adjournment was then taken. Mr Atkins was given the letter of apology. Mr Here was summarily dismissed.

[26] Ms van Es said Mr Atkins gave a lengthy explanation regarding the dismissal. A threat had been made and Mr McAuley had taken it as a threat as had people who had heard it. Mr Atkins had to look after the health and safety of all staff. He said he had considered alternatives to dismissal but did not see that there were any. He could not have Mr Here working with Mr McAuley again and there was nowhere else to move him. He had considered Mr Here's length of service and that it would be difficult to get new permanent work but felt there was no other option.

[27] Ms van Es deposed that she and Mr Atkins had phoned Ms Lyn Wallace, the Director Human Resources Australia New Zealand, who has overall responsibility for employment related matters. They spoke with her regarding what had been said at the meeting and what the decision would be.

[28] Mr Here said he was escorted from the premises and felt ashamed as he did not believe he had done anything wrong.

[29] Mr Here said he was not given proper notice of the first meeting. The first meeting was called at Mr Here's instigation.

[30] Four people signed a document, dated 14 March 2011, which reads:

*We the undersigned do hereby say that we were witnesses to the argument and so called threat to Dave McAuley on 6th December 2011 [sic] at our place of work "McAlpine Hussmann Ltd"
Joe Henry was not a witness to this.
He was at his work desk app 20 meters away,
We never took this seriously and everyone laughed about it.*

[31] Only two of the signatories were summonsed to give evidence: Mr Norm Campbell and Mr Junior John. During the hearing, it became evident that Mr Campbell had not witnessed the argument; he had been outside having a cigarette. Mr John asked Mr Campbell to sign the document, which was written by Mrs Here, despite Mr Campbell not being a witness.

Disciplinary Procedures

[32] The company's disciplinary procedures provide that the employee will have prior notice of the allegations, adequate notice of the meeting and the type of action that could result.

[33] I do not accept that Mr Here did not know what the disciplinary meeting was about. He knew full well. He had earlier acknowledged that he had made the comment in question.

[34] There was nothing disadvantageous about calling Mr Here to a disciplinary meeting.

Complaints

[35] The applicant's submissions asserted that the company had not responded in a proactive manner to Mr Here's complaints about Mr McAuley. Mr McAuley deposed that he was aware that Mr Here had complained to the previous factory manager that he was being "*picked on*" by Mr McAuley and Mr Henry. Mr McAuley and Mr Henry said the previous factory manager had informally looked into the matter and concluded that Mr McAuley's close supervision of Mr Here was appropriate.

[36] Whether or not the company attempted to resolve that issue, given the nature of the two incidents (the warning incident and the dismissal incident) Mr Here's actions were not justified.

The Suspension

[37] The Statement of Problem did not claim that the suspension constituted a disadvantage. Para 2.8 does refer to the respondent's not asking the applicant whether there was any reason he should not be suspended.

[38] The applicant says no grounds for suspending him have been provided.

[39] The respondent says Mr Here was not suspended until he was given the letter of 7 December. Mr Atkins' notes state he suspended Mr Here on the day of the incident. Whichever day the suspension took place, it is clear that no discussion was had with Mr Here about it. It was sensible to send Mr Here home on 6 December. That was justified by the fact that feelings were clearly still running high. Mr Here did take the opportunity to consider what had happened and wrote a letter of apology.

[40] The suspension on 7 December did not have the same rationale; there was no longer the same immediacy and Mr Atkins had the letter of apology. That suspension was unjustified. However, Mr Here did not give any evidence about how he had been disadvantaged, therefore I cannot award any remedies.

Authority to Dismiss

[41] The applicant submitted that Ms van Es had given evidence that she and Mr Atkins did not have the authority to dismiss and were required to refer the matter to Ms Wallace. Ms van Es did not mislead the Authority.

[42] The actual evidence was that they did have the authority to dismiss. All that was required was a discussion of the process and decision with Ms Wallace. I accept that evidence.

Investigation

[43] Mr Bennett submitted that Ms van Es had misled the Authority when she deposed that Mr Atkins was responsible for the investigation and she was aware that with the exception of Mr Henry those who had witnessed the argument refused to give statements.

[44] There was some question as to whether Mr Henry had witnessed the argument or simply overheard it. Mr Bennett submitted that this meant the respondent was not fully informed about the events.

[45] Given that Mr Here accepted that he had said "*I know where you live*" to Mr McAuley and that Mr McAuley, to whom the remark was addressed, said he had been very concerned and felt threatened, it is difficult to see the relevance of other people's perceptions, if they differed. Mr Here's remark followed an earlier abusive comment to Mr McAuley.

[46] The investigation was fair.

Justification

[47] In *Air New Zealand Limited v V* [2009] ERNZ 185 the Court stated that one of the issues was whether a reasonable employer would have made a finding of misconduct in the circumstances. Mr McAuley perceived Mr Here's words as a threat. It is difficult to see how else they could have been intended.

[48] The other issue is whether the decision to dismiss was one which a fair and reasonable employer would have made. The respondent did, and was entitled to, take the previous warning into account.

[49] Mr McAuley was not shown Mr Here's letter of apology. At the hearing he said it would not have made any difference. Mr McAuley was obviously very concerned about what had happened.

[50] Had it not been for the previous warning, Mr Here's apology and statement at the dismissal meeting that he would have to get on with Mr McAuley, would have made it likely that the dismissal was unjustified.

[51] In all the circumstances, the respondent was justified in dismissing Mr Here.

[52] Had I found that the dismissal was unjustified, I would not have ordered reinstatement. There was no application for interim reinstatement or urgency when the Statement of Problem was filed. Mr McAuley is still employed by the respondent. There is no other area in which to place Mr Here.

Costs

[53] The parties are urged to resolve the issue of costs. If they are unable to do so, the applicant is to file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority