

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paore King (Applicant)
AND Richmond Limited (Respondent)
REPRESENTATIVES Simon Mitchell, Counsel for Applicant
Tony Waddell, Advocate for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 1 June 2005
SUBMISSIONS RECEIVED 7 June 2005
DATE OF DETERMINATION 15 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Paore King says he was unjustifiably dismissed by his former employer, Richmond Limited (“Richmond”). His dismissal followed his admission that he had hit a fellow employee while at work. His sense of grievance flows primarily from his view that his explanation was not properly investigated, let alone accepted, and a proper investigation would have shown he had done no more than respond to a threat from the other employee.

[2] Reinstatement is sought.

The assault

[3] Mr King and the fellow employee, Haji Mahmoud, worked on the chain at Richmond’s meat processing plant at Dargaville. There was some tension between the two. It flared up during the relevant incident on the night shift on 11 November 2004. During that shift Mr Mahmoud was working at a weigh station hanging animals up on the main chain and removing their flexor tendons. Mr King was the next person in the chain.

[4] Mr King’s evidence was that – as part of an ongoing argument about whether Mr King could tell Mr Mahmoud what to do and whether Mr Mahmoud should be more helpful on the chain - Mr Mahmoud started waving his knife at him. When asked to expand on the circumstances in which that happened, Mr King said the two men were standing a few metres away from each other, and Mr Mahmoud was holding his knife in his hand at about waist height, pointing it at Mr King as he spoke.

[5] Both men were swearing at each other. In Mr King's words, he 'slapped' Mr Mahmoud across Mr Mahmoud's earmuffs. It was common ground that the slap knocked Mr Mahmoud's earmuffs off his head to the ground. When asked at the investigation meeting why he did that, Mr King said it was because of Mr Mahmoud's aggressiveness and because he felt threatened by Mr Mahmoud's pointing the knife at him. He 'slapped' Mr Mahmoud in order to make him 'back off'.

[6] Mr Mahmoud reported the matter promptly, saying he had been 'punched' in the ear or head. On being made aware of the report Laurence Davies, the meat processing manager, organised a meeting at which Mr Mahmoud made a formal complaint. Mr Davies observed that Mr Mahmoud appeared distressed and complained of having a sore head.

[7] Mr Mahmoud gave Mr Davies his version of events. According to Mr Davies' note of the meeting Mr Mahmoud said he was in the process of removing flexor tendons when he was hit. He said Mr King did not say anything before hitting him, but afterwards Mr King asked why he was not helping to cut the hocks off another animal. Mr Mahmoud told Mr King that was not his job. Mr Mahmoud also told Mr Davies that after he was hit he fell to one knee. Mr King continued to abuse him.

[8] Mr Mahmoud advised Mr Davies there were no other witnesses. That was the case.

The company's investigation

[9] After formally taking the complaint, Mr Davies arranged to meet with Mr King. The meeting went ahead the same day, 11 November. An attempt was made to contact his union's shed president, Warren Clarke, but when that proved not be possible Mr King agreed to proceed without Mr Clarke. Mr King himself was a union delegate.

[10] During the 11 November meeting Mr King denied 'hitting' Mr Mahmoud, but it was common ground that he told Mr Davies he slapped Mr Mahmoud in the earmuffs. In elaborating on the incident he indicated, in effect, that more tension had arisen when there was a problem in the stun box and Mr King asked Mr Mahmoud why he did not help the other halal slaughtermen with it (only a halal slaughterman could do the work required). Mr Mahmoud said that was not his job, and I was told at the investigation meeting that was correct since only one particular halal slaughterman was authorised to carry out the task required at the time. Mr King said the two men started abusing each other.

[11] Then there was a problem with the hanging of the animals, which Mr King said 'pissed' him off. He went on to refer to his request that Mr Mahmoud cut the hocks off a particular animal, and Mr Mahmoud's reply, again, that it was not his job. Mr King said he reminded Mr Mahmoud of a discussion of the previous night about helping each other, and according to Mr Davies' note he said: "I then slapped him in the ear muffs."

[12] Matt Araroa, the boning room supervisor on the night shift, also attended the meeting and took a note of it. His note also records Mr King as describing the discussion about cutting off the hocks, before saying 'I then slapped him in the earmuffs.'

[13] Mr Davies' note goes on to record Mr King as saying: "Prior to this meeting there was another altercation verbally. Haji was verbally abusing me waving his knife at me while removing the tendons." Mr King expressed the view that Mr Mahmoud had a poor attitude and was ignorant and arrogant. Later in the conversation Mr Davies asked Mr King if he was making an allegation about Mr Mahmoud's knife-waving. Mr King said he was. Mr Davies asked Mr King if he was being threatened and Mr

King said: “while we were arguing.” Mr Davies told Mr King he would investigate the allegation about Mr Mahmoud.

[14] Mr Araroa’s note also records Mr King as saying: “Now before this happened there was another altercation in a verbal sense. Haji was verbally abusing me while waving his knife around in a notable fashion while removing flexor tendons.” The rest of his note on that point is substantially similar to Mr Davies’.

[15] Mr King was suspended on pay pending a resumption of the meeting the next day, in the presence of Mr Clarke.

[16] Meanwhile Mr Davies told Mr Mahmoud of the allegation that he had verbally abused Mr King and was waving his knife around in a threatening manner. Mr Mahmoud said his knife was in its pouch at the time of the assault, and that he had been punched rather than slapped. He said Mr King looked around before punching him, and he believed the punch was pre-planned.

[17] When Mr Clarke reported for work early on the morning of 12 November, Mr Davies asked to see him. Mr Davies told Mr Clarke what had happened the night before, and gave Mr Clark copies of his notes of Mr Mahmoud’s complaint and Mr King’s response. He advised that the meeting with Mr King would resume at 3 pm that day.

[18] Mr Clarke says he did not have time to prepare for the meeting, but his concern was in essence that he did not have an opportunity to interview night shift staff, who did not arrive at the plant until after 2.45 pm. However since it was already common ground that there were no witnesses, such interviews would not have added anything to the available information regarding the alleged assault itself. At the same time Mr Clarke was able to interview an employee who worked with Mr Mahmoud, and according to him that employee complained about Mr Mahmoud being unhelpful and difficult to work with. Mr Clark also spoke to another employee, Colin French, who alleged that Mr Mahmoud had once threatened him with a knife.

[19] As it happened, Mr French had approached Mr Davies earlier in the day with that allegation. Mr Davies asked why the incident was not reported at the time, and did not receive an answer. Mr French did not provide any further details. Given the lack of detail, failure to report the incident when it happened, and the timing of the allegation, Mr Davies did not believe it was genuine. Nor did he believe it was relevant because he did not understand Mr King to be saying he acted in self defence.

[20] Mr Clarke’s enquiries meant there was a delay in starting the meeting. Once it started Mr King was asked again whether he hit Mr Mahmoud. Mr King replied that he had, and would do so again. Mr Clarke asked that the company take into account Mr King’s previous work history when it made its decision. In support of the allegation that Mr Mahmoud had threatened Mr King with a knife he raised an earlier incident, in October 2004, in which he said Mr Mahmoud had cut Mr King deliberately. Mr Davies said the incident in which Mr Mahmoud had allegedly waved a knife at Mr King could not be verified as there were no witnesses.

[21] It seems the October incident was not discussed any further during the 12 November meeting, but Mr Davies observed at the investigation meeting that such a serious matter should have been reported as a deliberate act. It was not. Instead, while Mr Mahmoud had cut Mr King in October, the matter had been dealt with at the time as an accident. A health and safety investigation followed the incident, and the resulting report recorded Mr King as describing his attempt to move an animal at the same time as Mr Mahmoud was working on it. That was when the accident happened. There was no suggestion at the time of any deliberate threat or attack. Such attempts as

were made at the investigation meeting to portray the October incident as a deliberate act were far from convincing.

[22] The 12 November meeting was adjourned while the company made its decision.

[23] In reaching the decision to dismiss, Mr Davies relied on Mr King's admission of having hit Mr Mahmoud, and believed Mr King had shown no remorse during the company's investigation. He did not accept the explanation that Mr King had acted in self defence. He noted that Mr King had not offered that explanation on 11 November, and he did not accept the October incident was anything but an accident. Finally, he was satisfied Mr King's action amounted to serious misconduct.

[24] Mr King and Mr Clarke were advised of the decision to dismiss on 15 November 2004.

Justification for the dismissal

[25] The decision to dismiss was challenged in that:

- (a) there was a failure to fully investigate Mr King's assertion that he hit Mr Mahmoud in self defence;
- (b) there was a failure to take into account Mr Mahmoud's aggressive behaviour towards Mr King; and
- (c) the investigation was rushed and unreasonable, and Mr King was severely prejudiced in his ability to put his case.

1. Failure to investigate the allegation of self defence.

[26] It was clear from both Mr King's account and Mr Mahmoud's that the two had argued about whether or not Mr Mahmoud should carry out particular tasks, and it would have been easy for Mr King to go on and say something like 'while we were arguing he threatened me with his knife so I hit him'. He did not say that. Instead, when asked to give his account, he described the argument then merely said 'I then slapped him in the ear muff.'

[27] It is true he then alleged that Mr Mahmoud had been waving his knife at him. He also said it happened during an earlier argument, but he did not say it was happening at the time he hit Mr Mahmoud. Indeed the account he gave Mr Davies of the exchanges between them is more indicative of Mr Mahmoud waving or gesticulating with his knife as he spoke, rather than using it to threaten Mr King. There was little in the way Mr King expressed his position at the time - or at the investigation meeting - to support his subsequent allegation that he felt threatened, and even less to support the later allegation that he felt so threatened he hit Mr Mahmoud in self defence. Even if he did feel so threatened, at best he hit Mr Mahmoud by way of a pre-emptive attack rather than in true defence of himself.

[28] Instead, the content of the exchanges between himself and Mr Mahmoud - as he recounted them to Mr Davies - indicates Mr King was making a general complaint about Mr Mahmoud's behaviour in order to explain his admitted action, rather than a specific allegation that he hit (or slapped) Mr Mahmoud in self defence. If anything, the tone of his explanations suggests Mr King's 'slap' was intended to express his disapproval of Mr Mahmoud's behaviour and poor work ethic.

[29] Neither Mr Davies nor Mr Araroa understood Mr King to be saying he acted in self defence, and that interpretation was open to them. I do not believe there was enough information before Mr Davies to warrant a full investigation into whether Mr King had acted in self defence.

2. Failure to take into account Mr Mahmoud's aggressive behaviour

[30] Mr Davies understood that, when Mr King spoke of Mr Mahmoud waving his knife, he was talking about some incident other than the one that led to Mr King hitting Mr Mahmoud. Both parties subsequently attempted to identify when that incident occurred, and the net came to be cast quite widely on Mr King's behalf. I believe that, in that process, some red herrings were raised. It seems more likely to me that, on 11 November, Mr King was talking about the other, earlier, arguments he had with Mr Mahmoud that night. Whether or not my view is correct, I do not believe Mr Davies did enough to clarify when and in what circumstances Mr Mahmoud was allegedly waving his knife.

[31] This led him into further error when he put the matter to Mr Mahmoud. Mr Mahmoud may have had his knife in his pouch at the time he was hit, but he may also have been waving it around earlier in the argument as Mr King said. Mr Davies did not investigate the allegations about Mr Mahmoud's waving the knife as carefully as he should have, and hence did not obtain a full picture of the events of 11 November.

[32] Had he obtained such a picture, it might have indicated Mr Mahmoud was either waving his knife or gesticulating with it as he spoke to Mr King. It may or may not have suggested some sort of disciplinary action or reprimand was called for in respect of Mr Mahmoud. However there was still no allegation that Mr Mahmoud was waving the knife when Mr King hit him, while Mr Mahmoud's statement was in effect that he was not doing so. Moreover Mr King's own account suggested strongly that he was the aggressor in the argument overall.

[33] Some reliance was also placed on Mr French's allegation about Mr Mahmoud's behaviour. Mr French did not give evidence. However even if Mr French had played a fuller role in the company's and the Authority's investigation, the fact remains he did not witness the incident of 11 November. His vague, and hitherto unreported, account of some earlier incident involving Mr Mahmoud would not have shed light on the 11 November incident, and would probably not displace the strong impression created by Mr King's own account of that incident.

[34] Overall, although the employer acted on an incomplete picture of the events of 11 November, a fuller picture would be unlikely to have affected the conclusions about Mr King's culpability.

3. A rushed investigation

[35] The principal ground on which it was said the investigation was rushed concerned Mr Clarke's alleged inability to prepare properly for the 12 November meeting, and an associated lack of time or opportunity to explore and present Mr King's explanation.

[36] I accept that the disciplinary investigation has something of a hurried air about it. This is mitigated by the fact that from the outset Mr King admitted 'slapping' Mr Mahmoud, and I find Mr Davies was entitled to conclude there had been more than a slap. It was also clear from the outset that there were no witnesses to the relevant incident. Finally, even now and in the face of his explanation that he acted in self defence, Mr King has never alleged that Mr Mahmoud made any move to attack him. Instead he said Mr Mahmoud waved his knife around in an earlier argument.

[37] Mr Clarke may have wanted an opportunity to seek more evidence bearing on Mr Mahmoud's tendency to wave his knife around or otherwise behave in a threatening way. I have already commented on the relevance of anything Mr French might have said on the matter. As for prior reported incidents involving Mr Mahmoud, the October incident was raised on 12 November and at the investigation meeting. The attempts to use it to explain Mr King's actions on 11

November were unconvincing as it was clear it was an accident. No other incidents were referred to in evidence.

[38] I do not believe Mr Clarke's ability to present Mr King's explanation was prejudiced by any hurry in the company's investigation. There was little Mr Clarke could do about the weakness of the explanation.

[39] For all of these reasons I conclude the dismissal was justified. Mr King does not have a personal grievance.

Costs

[40] Costs are reserved. The parties may agree on the matter themselves. If they seek a determination from the Authority they should file and serve memoranda on the matter.

R A Monaghan
Member, Employment Relations Authority