

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Iosefa Masinalupe (Applicant)
AND Formway Furniture (New Zealand) Limited (Respondent)
REPRESENTATIVES Guido Ballara for the Applicant
Karen Sagaga for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Wellington, 17 November 2006
DATE OF DETERMINATION 23 November 2006

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Iosefa Masinalupe "Joe Masina" has applied for interim reinstatement to his position as a team leader at Formway Furniture (NZ) Limited (Formway) located at Gracefield Lower Hutt. The application is opposed by Formway.

Summary of the background and facts

[2] Mr Masina was employed for approximately 24 years at Formway; his employer from the time he arrived in New Zealand. His employment was covered by the terms of a collective employment agreement with the New Zealand Furniture Workers Union. His salary was \$39,000 per annum. He had an unblemished and excellent work record.

[3] He was appointed to the position of team leader (previously called a supervisor) in the powder coating department in 1986, and the team leader of the traffic department, when its team leader left.

[4] On 24 May 2006 Mr Masina was approached by another worker about a letter that worker had received to attend a meeting in regard to the disposal of scrap. This followed an investigation undertaken by Formway because a customised order had gone missing and couldn't be found.

[5] Together they attended the meeting with Mr Masina acting as the worker's support person. During the meeting Mr Masina says he admitted instructing the worker to dispose of the scrap that included the missing order. Mr Masina says he was told the order had been cancelled. The cash received for the scrap was, he says, then used for the benefit of the team as, he understood it had always been done. As a result of the meeting, and an understanding they had that the Police might become involved, both workers resigned. Mr Masina then approached his Union for help. Monica Tukaki, Union Organiser, took the matter up on Mr Masina's behalf. Formway accepted that the process followed in regard to Mr Masina's involvement, and his resignation, was flawed and reinstated him on "garden leave". It put him back on the payroll to redo the process and conduct another enquiry upon getting professional advice.

[6] For a number of reasons, upon which nothing turns, a disciplinary meeting on the allegation of misappropriation of company property did not take place until 2 August and 26 September 2006. In the meantime Formway and the Union made enquiries and had meetings about the disposal of scrap for cash and custom and practice arrangements. It was confirmed that there was no documented process for the disposal of scrap. What did exist was a verbal instruction that no scrap was to be disposed of without the factory manager's knowledge.

[7] For the 2 August meeting Mr Masina and his Union were advised that the company was also going to consider the matter of its trust and confidence in him by way of alleged for serious misconduct.

[8] On 26 September Mr Masina was represented by Graeme Clarke, Union Official. Richard Dagger an advisor for Formway (not present on 24 May), Chris Barnes, the Operations Manager and Neil Thompson the Factory Manager also attended the meeting. After an adjournment Formway made its findings known, and sought from Mr Masina and the Union, submissions on the penalty. After this was considered Mr Masina was dismissed for serious misconduct because the company had concluded that he had misappropriated company property and its trust and confidence in him had been lost because he had been deceitful. The Union immediately considered the outcome had been predetermined.

[9] Mr Masina's representative filed the application of a statement of problem for interim reinstatement in the Authority on 2 November 2006, after mediation services were provided to the parties by the Department of Labour at the end of October. The application has been supported by

an Undertaking as to Damages from Mr Masina. The costs of the application are being backed by the Union.

The Authority's consideration of the matter

[10] The parties' representatives are agreed on the correct law that applies. My summary of the tests that apply for interim reinstatement are:

- Is there an arguable case?
- Are there any alternative remedies available and who does the balance of convenience favour?
- Balance the justice of the situation between the parties.

[11] I am satisfied that there is an arguable case. Formway will have to justify its decision to dismiss Mr Masina with the knowledge, that since it has relied upon serious misconduct, its proof will have to be of a high standard because of the serious gravity of the allegations.

[12] In particular, I am satisfied that there will be an issue about what it was that Mr Masina was admitting to on 24 May and whether any admission made by him at that time was taken into account subsequently on 2 August and 26 September to allegedly predetermine the matter. If it is found that his admission was taken into account would a fair and reasonable employer have had regard to it considering Formway reinstated him, so as to redo the process? In other words was it an issue for the employer to understand what Mr Masina meant at the time and in the context of its inquiry, given that there is a difference of understanding about whether as Mr Thompson says a customised order was meant to be put to one side, or as Mr Masina says he was told it had been cancelled. Mr Masina says he was honest at all times and accepted that he made a mistake about the order. He says he honestly gave information about the disposal of scrap for cash. What happened to the cash that will have to be assessed with what other employees say, the views of the managers and other witnesses from Formway, the evidence from Messrs Thompson, Mark Wilson, a previous production manager employed at Formway, and Bernie Heistand, a development engineer contractor at Formway.

[13] The next matter is the issue between various witnesses about the custom and practice of disposing of scrap for cash. There was no documentary record of any instruction or policy. What has to be considered is what Mr Masina understood he could do if his explanation is plausible, alongside Mr Thompson's understanding and recollection that he says he told team leaders to

inform him of any disposal of scrap, and any other evidence from the company to rebut Mr Masina's and other employees' evidence that there was a custom and practice arrangement.

[14] Also Mr Thompson says he informed team leaders any cash received had to be returned to the manager. Mr Masina says he understood that custom and practice was that any cash for scrap would be used for the members of the teams for "shouts" including drinks, morning and afternoon teas.

[15] The next matter has to do with what evidence the company had to decide that Mr Masina was deceitful to support the charge that it involved a loss of trust and confidence in him since he was in a team leader role. It seems it is saying it relied upon his responses, replies and answers that it considered were evasive and that he took sick leave because he was worried about the situation. Mr Masina denied the allegations and says he took sick leave because he had the flu.

[16] The final matter has to do with the test of whether in all the circumstances a fair and reasonable employer would have dismissed Mr Masina having regard to his length of service, his role, his unblemished and excellent record at work, any custom and practice and the circumstances of Formway's decision making in the disciplinary process and the availability of other penalties.

[17] I accept that there is an arguable case, but that Formway has a prima facie justification for its action. The introduction of the new allegation of a loss of trust and confidence will need to be scrutinised with the original allegation and Formway will need to show that it was justifiable given it is relying on both allegations in its decision to dismiss Mr Masina, and that the latter allegation was not added, as the Union says, to bolster Formway's case.

[18] The next matter is whether there are any remedies that exist in the alternative to interim reinstatement. There will be alternative remedies for any lost wages and compensation. Reinstatement is the prime remedy and will be considered on 30 and 31 January 2007. Reinstatement is very important to Mr Masina for his reputation and financial situation, and if he is right, he should not be deprived of his right to work, especially considering work at Formway provides him with more income than what he is getting at the moment. Besides I have considered his right to work has been supported by the efforts of the Union to obtain information and help from fellow workers in the workplace. Also, in this regard Mr Masina has made attempts to immediately mitigate his loss and try to get work. He has had 24 years with the same employer. He has for a number of years been a trusted team leader with an excellent and unblemished record. Formway

accepted that he had to be reinstated after a flawed process leading to Mr Masina's resignation in May 2006, and had him on "garden leave" until 26 September 2006. That seems to have been unchallenged by the Union, while the parties conducted their enquiries and Formway the disciplinary procedure. If there is any issue of blameworthy conduct caused by Mr Masina then this will be able to be dealt with at a full investigation of the issues, and if it does not impact on his reinstatement then would likely be off set on any other remedies.

[17] For the above reasons I hold that the balance of convenience favours Mr Masina. I have also taken into account that Formway has advised its employees of what is expected of them disposing scrap. This has been supported by the Union writing to all its members in the workplace. Mr Masina accepts it, says he understands it and is clear about complying with the company's procedure. His position has been filled on a temporary basis by another Formway employee. I note that the company says that there is some division over this matter and Mr Masina's role in the workplace. However, the evidence, other than in general terms, is not enough to convince me that it is likely to lead to any trouble or difficulties that can not be managed and that reinstatement is not impracticable given the size of the organisation, Mr Masina's job still exists and has been temporarily filled by an existing employee and that these sort of matters will give rise to different points of view and any divisions are based on general views and not specific detail.

[18] I now turn to the justice of the matter. I find that this favours Mr Masina also. There is no issue taken about the time taken between his dismissal on 26 September and the statement of problem being filed in the Authority. Ordinarily a delay would have some significance but the parties waited on the Department of Labour to provide mediation services. An investigation meeting on the employment relationship problem has been arranged for 30 and 31 January 2007. The time lapse for the investigation meeting (including a work shut down) is an issue that relates to Mr Masina's right to work on the presumption he will be able to prove his case and where he is having some difficulty in getting full time work, and relying on a benefit, uncertain work arrangements and adjusting after 24 years to the unusual circumstances of having to find alternative work with the allegations hanging over him.

[19] Therefore, it is my decision, that Mr Iosefa Masinalupe be reinstated to his position or placement in a position no less advantageous to him at Formway Furniture (NZ) Limited, forthwith.

[20] Costs as requested are reserved.

P R Stapp
Member of Employment Relations Authority