

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Ben McClelland (Applicant)
AND The Supply Chain Limited (Respondent)
REPRESENTATIVES Tony Wilton for Applicant
Stephen Langton for Respondent
MEMBER OF AUTHORITY Robin Arthur
INVESTIGATION MEETING 3 August 2006
DATE OF DETERMINATION 12 September 2006

DETERMINATION OF THE AUTHORITY

[1] The applicant pursues a personal grievance for his dismissal as an operator at the respondent's South Island distribution centre in Christchurch.

[2] He was dismissed after the respondent investigated his complaint that a co-worker threatened him and kicked his car as he drove out of his workplace. The respondent found that the applicant's own conduct earlier on the day of the event complained about breached company work rules and warranted dismissal.

[3] The respondent's reasons for dismissing the applicant were summarised in a letter to his union representative:

After a thorough investigation, the Company concluded that Mr McClelland's actions created a situation where there was a perception that a fight or confrontation was inevitable between himself and another staff member. This is considered to be unacceptable personal behaviour and a breach of the Company's work rules.

In reaching the decision to terminate Mr McClelland's employment, the Company also took into consideration that on 21 July 2005 he had been issued with a first written warning, and on 24 August 2005 a final written warning was issued.

[4] Mediation did not resolve the claim which proceeded to an Authority investigation. The applicant, his manager Joe Leitch, distribution centre manager Bernie Blackman and the respondent's Regional Loss Prevention Manager Reece Polglase each provided written statements and answered questions at the investigation meeting. The parties' representatives gave oral submissions on the facts and legal issues.

The issues

[5] An investigation of this type of claim looks at the quality of the respondent's inquiry and its reasons for reaching the decision to dismiss. It is:

"an inquiry into the question of whether the employer's representatives actually believed, and did so on reasonable grounds following a fair inquiry, that the

*employee was guilty of misconduct so serious it warranted dismissal”.*¹

[6] It seeks to answer the question put in s103A of the Employment Relations Act 2000 (“the Act”): considered objectively, was the dismissal justified because the employer’s actions were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal?

[8] As noted in the analysis of the application of s103A given by the Employment Court in *Air New Zealand v Hudson* (unreported, AC 30/06, 30 May 2006, Judge Shaw) at [142]-[143]:

All the circumstances of the case includes not just the employer’s reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employer and the employee. ...

Therefore, a particular employer, having followed proper investigative processes is justified in dismissing for misconduct it reasonably believes has occurred if the Authority or the Court finds that a fair and reasonable employer would have dismissed in all the circumstances.

[7] In this case the employer’s actions to be considered are:

- (i) its finding of misconduct, and specifically that the applicant had created a situation where there was a perception that a confrontation was inevitable; and
- (ii) the account taken in its dismissal decision of earlier warnings to the applicant about poor performance.

The respondent’s finding of misconduct

[8] The employer’s inquiry began on 16 December when Mr Blackman received a written complaint from the applicant about events on the previous day involving a co-worker, Mike Beynon.

[9] The applicant accepts that the respondent followed proper investigative processes in dealing with his written complaint of 16 December and the subsequent disciplinary meetings which resulted in both his dismissal and that of Mr Beynon.

[10] Mr Polglase, assisted by Mr Blackman, conducted a thorough inquiry. Statements were taken from the applicant, Mr Beynon, co-worker Ricky Hansen and two other workers. The applicant was represented in each meeting with the company’s representatives by his own union representatives. Suggestions that additional witnesses needed to be interviewed were followed up. All statements taken were provided to the applicant for comment. Mr Polglase’s conclusions were put to the applicant and his representative for comment before a final decision was made.

[11] The events of the afternoon of 15 December were not in dispute. Shortly after 4pm that day, the applicant drove out of the centre carpark onto the public road. Mr Beynon was sitting across the road with two other workers – including Mr Hansen. Mr Beynon had finished work at 2pm but was back outside his workplace at around 4pm. As the applicant drove past Mr Beynon ran across the road and kicked the applicant’s car. The applicant turned his car and drove back to Mr Beynon. Some words were exchanged between the two young men. Mr Beynon left when the applicant used his cellphone to try to telephone the Police. The applicant then drove back to the security guardhouse at the carpark gate. The security guard on duty there had not seen the incident with Mr Beynon but allowed the applicant to use the guard house phone to ring the Police. The applicant arranged to go to the Police station to make a complaint.

[12] What is at issue is the basis of the employer’s findings about events earlier on 15 December. The respondent decided certain words used by the applicant breached a work rule

¹ *Chief Executive of the Ministry of Maori Development v Travers-Jones* [2003] 1 ERNZ 174 at 184.

set out in its code of conduct under the heading: *Personal Behaviour*. The rule stated:

All team members are expected to conduct themselves in a socially acceptable manner. Specifically threats, abuse or physical violence are not permitted. Provocation will not be accepted as an excuse.

[13] The applicant's complaint and subsequent interviews of Mr Beynon and Mr Hansen revealed that what was described as "a verbal altercation" had occurred between the applicant and Mr Beynon when they were working in the warehouse.

[14] The applicant's cellphone had rung. Either Mr Beynon or Mr Hansen – who were both working in an adjacent aisle – called out to the applicant that he should turn his phone off. The work rules forebade the use of cellphones in the warehouse. The applicant says that he replied: "*Yeah I know that, if they want to sack me, they can try to sack me.*" He also said that he made the comment to Mr Beynon that "*he's a good one to talk because he always has his cellphone out and uses it in the warehouse*". Mr Hansen later told his employer that the applicant also said: "*shut up or else*".

[15] Both the applicant's and Mr Hansen's statements confirmed that Mr Beynon then pushed aside cartons on the rack between the aisles. Mr Beynon suggested the applicant was "*pussy*" and should hit him. He said: "*Come on then do it*". The applicant refused to hit Mr Beynon and said: "*I wouldn't waste my energy*".

[16] Mr Beynon then said that he would come back to work after 4pm to fight the applicant. The applicant admitted that he then said: "*Yeah, I'll see you then, looking forward to it*".

[17] On the basis of this evidence the respondent made a finding that the applicant had accepted a challenge to a fight. It also relied on a statement from Mr Hansen to come to a finding that the applicant further provoked Mr Beynon indirectly.

[18] Mr Hansen's written statement to his manager said that later on 15 December the applicant "*came up to me and I told him to be careful and he said don't worry I have been trained to break a leg or kill him with his bare hands if he has to*".

[19] Notes taken during the disciplinary meetings with the applicant show that he denied threatening Mr Beynon. He said that he did not approach Mr Hansen, rather "*he came up to me. I may have made the comment ... I have been trained to break someones leg, which is true, I have been. As for the killing part, I don't know how to do that and find it unlikely I made such a comment*".

[20] From this evidence the respondent made a finding that the applicant spoke with Mr Hansen with the intention that his comments would be relayed to Mr Beynon. The company representatives concluded the applicant wanted to give the impression that he would fight Mr Beynon and would be there after work for that purpose. Mr Polglase's meeting notes put that conclusion this way:

Your actions have created a situation where a fight or confrontation was inevitable due to you projecting the perception you were going to turn up at 4pm for a confrontation/fight with Mike Beynon, irrespective of whether you actually intended to do so or not.

[21] This does not specifically amount to a threat, abuse or physical violence in terms of the respondent's work rule on 'personal behaviour'. Rather the respondent relies on the requirement of 'socially acceptable' conduct.

[22] I find its conclusion was not one that a fair and reasonable employer could not safely reach in the circumstances of this case. The respondent appears to have relied on certain causative steps that cannot be assumed and were not properly established. It did not – and could not – establish that the applicant deliberately spoke to Mr Hansen intending provocative

comments to be relayed to Mr Beynon. Even if he had such an intention, there was nothing to suggest he could guarantee such comments would be passed on to Mr Beynon.

[23] Rather, as Mr Polglase quite fairly conceded during the investigation meeting, the respondent did not know whether Mr Hansen in fact passed on to Mr Beynon any comments made by the applicant *before* the events shortly after 4pm. Mr Polglase did not ask Mr Hansen. Neither did he ask Mr Beynon what Mr Hansen may have told him. Mr Beynon certainly knew about those comments by the time he was interviewed on 19 December but this was four days after he had attacked the applicant's car and after he and a number of other workers had been interviewed to provide statements. In his statement taken on 16 December he made no reference to any possibly provocative comments that he may have heard through Mr Hansen.

[24] I am satisfied that the respondent treated the statements of Mr Hansen and other workers interviewed about events on 15 December with an appropriate level of caution. There was a risk that some would seek to minimise their own contribution to the situation or justify the actions of whichever co-worker they were most friendly with. Properly Mr Polglase and Mr Blackman told the applicant's union representative that they had placed to one side what they described as the applicant's alleged "shut up or else" and "kill him" comments in making their findings. However I am not satisfied that the weight they then placed on the applicant's admitted "looking forward to it" comment is what a fair and reasonable employer would have done in all the circumstances.

[25] Rather I accept the submission of the applicant's counsel that a fair and reasonable employer would consider the applicant's explanation was plausible and give it more weight as part of the circumstances of the case, including assessing the circumstances of the employee. In his account – as put to Mr Polglase on 19 December – the applicant "*wasn't really after a fight*" and saying he was "*looking forward to it*" was "*just talk*". As explained at the investigation meeting, the tone of his words used on 15 December was ironic and intended to convey the sense that he was not interested in a fight at all. His discussion with Mr Hansen – to the extent any of its content could be reliably determined – was also plausibly intended to be defensive and discourage the notion that there would be a fight. I also accept that, objectively assessed, this account is consistent with the applicant's subsequent actions on the afternoon of 15 December.

[26] Implicit in the evidence of all parties was an acceptance in this workplace of a level of what was described as "workplace banter" between "hot blooded young males". There was a negotiated work rule about personal behaviour for the agreed purpose and important operational requirement of promoting harmony between employees. However the evidence on which the employer could reasonably rely in the circumstances of this case was not sufficient to support its findings that the applicant's actions were outside a tolerated range of 'workplace banter'. To that extent I find the respondent's actions in making the finding of misconduct that it did were not justified.

The decision to dismiss

[27] However if this conclusion were wrong and the employer had reasonably found misconduct occurred, the applicant submits that his final written warning for poor performance should not have been taken into account in deciding whether to dismiss him for misconduct.

[28] As Mr Polglase acknowledged during the investigation meeting, the respondent would not have taken the decision to dismiss the applicant for the level of misconduct it found to have occurred but for the applicant's existing warnings.

[29] The applicant did not dispute the respondent's evidence about the warnings and counselling sessions he had received about his work performance. On 24 August 2005 he was issued with a final written warning for failing to meet "acceptable work standards". On 5 December he attended a further meeting with managers and union representatives regarding his unsatisfactory work performance. The applicant accepted that he was not good at the job.

His performance issues were largely to do with whether he could do the required work fast enough. Work data showed that his work rate was significantly slower than other operators. That meeting concluded with a decision by the managers to give the applicant "one more chance". Notes taken at the time say that all parties agreed that if the applicant's performance did not improve, his employment would be terminated. The managers agreed that a training plan would be "formalised" and that improvement was required in the coming month.

[30] The respondent says that the unchallenged final written warning – as provided for in the applicable collective employment agreement – stated that any further breach of the rules and procedures may result in termination of employment. On this basis it says its finding of misconduct by the applicant on 15 December entitled it to dismiss him.

[31] The applicant relies on *Morris v Christchurch International Airport Limited* [2004] 1 ERNZ 336 (EC, Goddard CJ) at [18] for the proposition that a dismissal for misconduct cannot be justified where the worker is on a final warning for performance issues and still within an agreed time frame for improvement unless the subsequent misconduct on its own would justify dismissal. In that respect the regimes for managing performance and disciplining misconduct are separate. A similar approach was taken in *Kernoohan v Asure New Zealand Ltd* [2004] 2 ERNZ 472 (EC, Goddard CJ). However the latter case involved an 'open-ended' performance management programme, with management reserving to itself the right to act further during the performance review period. The present matter is more similar to the performance management arrangement in *Morris* where the employer took further action on misconduct during a stated minimum period of time for performance review – in the applicant's case, one month.

[32] In this case I accept that the principle described in *Morris* applies. Although the respondent was able to point to work records showing little or no improvement in the applicant's work performance in the ten days between 5 and 15 December, it was not able to point to any real attempts to provide an agreed, formal training plan. What had been done was to provide a daily check of the applicant's work but there was no real evidence that anything concrete had been done to assist him to do his work better or faster.

[33] In light of the employer's candid concession that but for the final written warning on performance issues, it would not have dismissed for the misconduct identified, I find that the decision to dismiss was not – in all the circumstances of this case – one that a fair and reasonable employer would have made.

Determination

[34] For the reasons given I find that the applicant has a personal grievance for unjustified dismissal.

Remedies

[35] There are three issues in relation to remedies to resolve the applicant's grievance – firstly, the extent of loss of wages suffered, if any; secondly, whether he is entitled to compensation for hurt and humiliation, and, thirdly, whether any remedies awarded should be reduced for contribution by the applicant to the situation giving rise to his grievance.

Loss of wages

[36] The applicant was paid one week's wages in lieu of notice and three weeks holiday pay following his dismissal. He says he had only five days casual work during January, worked 30 to 40 hours a week in a casual job in February and early March and has had a full-time job since March. The pay at his new permanent job is around \$3.70 an hour less than his pay rate with the respondent.

[37] In assessing the loss of wages I must make some allowance for the prospect that the

applicant would have been dismissed for poor performance in January 2006 in any event following the expiry of the one-month "last chance" agreed on 5 December. It is not a prospect amenable to precise evaluation. I am not prepared to go as far as accepting it was a certainty, which was the import of the respondent's submissions on the point. That would require a view that further training properly and thoroughly conducted by the respondent would certainly have failed. I doubt its staff who provide training would inevitably be ineffective. However it is fair also to take account of the applicant's own assessment of his skills and prospects – he had described himself candidly at one point as "*crap at his job*" and that he did not think he would ever be a "*star*". Balancing those prospects I consider it unlikely that the applicant would have remained in the job in any event beyond the end of February at best. Accordingly I assess the period of lost wages at being ten weeks. From this must be deducted the one week's notice paid and the earnings for casual work in January and February. Proof of earnings were not provided but I estimate those, from the details given in sworn evidence and allowing for the lower hourly rate for the casual work undertaken, to amount to around four weeks wages in total.

[38] I do not accept respondent counsel's submission that a further period equivalent to the length of the applicant's holiday pay entitlements should be deducted from the period of lost wages. The applicant was entitled to receive a lump sum payment for his accrued holiday entitlements.

[39] I find that under section 123(1)(b) of the Act the applicant is entitled to reimbursement of the sum equal to five weeks wages lost as a result of his grievance.

Compensation for hurt and humiliation

[40] The applicant gave limited evidence regarding distress arising from his dismissal. He told me that it was humiliating being "sacked". Because this was shortly before Christmas it made it difficult to get work for some time. He had difficulty meeting payments on his car but managed to get enough money to make minimum repayments after receiving a notice about missed some instalments due. The car was not repossessed.

[41] I find that under section 123(1)(c)(i) of the Act the applicant is entitled to payment of the sum of \$3000 as compensation for humiliation, loss of dignity and injury to feelings arising from his dismissal.

Contribution

[42] Section 124 of the Act requires consideration of reducing remedies where the applicant's actions contributed to the situation giving rise to the grievance.

[43] Although the applicant was not responsible for the extent of the aggressive response from Mr Beynon, both in the morning or afternoon of December 15, he freely participated in the "workplace banter" which occasioned it. The small incident of forgetting to turn his cellphone off and letting it ring on the warehouse floor sparked an unfortunate exchange of words. The employer had raised but not really pressed cellphone use as a matter of misconduct as strongly as it might have done. Rather it accepted an explanation from the applicant that he turned his ringing phone off without answering it. However the applicant must take responsibility for initiating the banter with his immature and incorrect comment to Mr Beynon and Mr Hansen about whether he could be sacked for cellphone use. The evidence was that there was a work rule and clear signage in the warehouse forbidding cellphone use. That was blameworthy behaviour contributing to the situation.

[44] The applicant's warnings for poor performance are also a factor to be considered here. He did not challenge that his final written warning was warranted and was on a further "last chance" at the time.

[45] In *Morris*, the case relied on by Applicant's counsel earlier, the Court reduced remedies by 100 per cent after considering the record of poor performance by the worker in that case.

Total reduction of remedies was also applied in the *Kernohan* case.

[46] In that context, a reduction of remedies of at least 75 per cent sought in the respondent's submissions, is fair and appropriate in this case. Accordingly I order that the extent of remedies awarded to the applicant be reduced by 80 per cent because of his blameworthy actions that contributed to the situation giving rise to the grievance. I had considered a 100 per cent reduction of remedies with only an award of costs to recognise the applicant's grievance (see *Morris* and *Kernohan*) but consider the level of remedies awarded are appropriate to recognise that the applicant was not entirely the author of his own misfortune and to mark the inadequacies in the respondent's reasons for dismissal.

Costs

[47] Counsel for both parties, in order to minimise further costs for their respective clients, made submissions on costs at the close of the investigation meeting. Each accepts that costs follow the event and are comfortable that costs be awarded within the range of notional daily rates commonly applied in the Authority.

[48] The applicant has succeeded in establishing a grievance. He is entitled to a reasonable contribution to his costs. A one-day investigation meeting, starting at 9.30am and ending at 3.30am saw each witness questioned, including additional questioning by counsel, and heard oral submissions on the facts and law from the representatives. Costs at the lower end of the usual daily tariff are warranted. I set costs at \$1500 along with reimbursement of the filing fee.

Orders

[49] After applying the reduction of the remedies for contributing behaviour by the applicant, I order **the respondent to pay to the applicant the following amounts within 28 days of this determination:**

- (i) under section 123(1)(b) of the Act, a sum equivalent to his ordinary weekly wage for one week (at the rate of pay applying as at 5 December 2005); and**
- (ii) under section 123(1)(c)(i) of the Act, the sum of \$600 as compensation for humiliation and loss of dignity; and**
- (iii) the sum of \$1500 as a reasonable contribution to the costs of bringing his claim in the Authority and a further \$70 in reimbursement of the filing fee.**

Robin Arthur
Member of Employment Relations Authority