

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

5010595
AA 345/07

BETWEEN

KAIRENGA METUA
Applicant

AND

**INDEPENDENT LIQUOR
(NZ) LIMITED**
Respondent

Member of Authority: Alastair Dumbleton

Representatives: John Minto, Advocate for Applicant
Glenn Finnigan, Counsel for Respondent

Investigation Meeting: 17 October 2007

Determination: 31 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant Mr Kairenga Metua was employed by the respondent Independent Liquor (NZ) Limited (ILL) between May 2006 and 19 September 2007 when he was summarily dismissed for serious misconduct.

Application for interim reinstatement

[2] On 21 September 2007 he applied to the Authority for an order of interim reinstatement into his job.

[3] That application was not required to be determined, as on 17 October 2007 the Authority proceeded with a full investigation of Mr Metua's claim of unjustified dismissal. Before doing so, the parties attended mediation to try and resolve the grievance themselves.

[4] Mr Metua asks for orders from the Authority requiring ILL to reinstate him immediately to his full time position in the company's warehouse, and to compensate him and also reimburse him for wages lost in the period after his dismissal.

[5] There is little or no dispute about the material facts in this case. How it is to be determined comes down to the way statute and case law should be applied in the circumstances of the dismissal, which were as follows.

[6] On Friday 14 September 2007, Mr Metua was doing his usual work in the warehouse of ILL during the night shift. About 140 workers are employed there. At around 3am while he was using a forklift for stacking pallets, he was verbally abused and then physically assaulted by another worker, Mark Tufaga. He was older than Mr Metua, who was aged 20, and was also bigger. The attack was unprovoked, although Mr Metua believes that Mr Tufaga had been drinking.

[7] Mr Metua received from Mr Tufaga more of a smack to the side of the face with the back the hand than a punch to the head with a closed fist. Nevertheless this was an unlawful assault and it naturally upset and angered Mr Metua.

[8] He immediately reported it to his team leader and then was allowed to go home.

[9] In leaving the premises Mr Metua went to his car, which was parked in a secure yard monitored by closed circuit TV.

[10] In the video footage shown to the Authority, Mr Metua is seen walking up to his car and placing something inside, although not getting in. Next Mr Metua is shown walking away from his car, until he is out of the picture. There is no dispute that he walked over to a car belonging to Mr Tufaga which was also parked in the yard and proceeded to damage it by kicking in a body panel. Mr Metua then returned to his car and got in. He can be seen on video driving along towards the car he had just damaged, before turning around and driving out of the gate of the yard.

[11] Mr Metua told the Authority that the reason for driving back past the car he had just damaged was to take its number. He said this was so that if his wife saw a car with that number outside at their house, she would know who it belonged to.

[12] ILL promptly investigated Mr Metua's complaint of assault. Upon returning to work he was asked what had happened. In giving his account he said nothing about damaging Mr Tufaga's car. Although by then ILL had received a complaint about the damage, Mr Metua was not asked if he knew anything about that. Mr Metua was commended for not retaliating against Mr Tufaga, but he still did not volunteer information about what he had done.

[13] For his misconduct four days earlier, as could be expected Mr Tufaga was dismissed by ILL on 18 September 2007. Witnesses were able to confirm to the employer that Mr Metua had not provoked the assault on him by Mr Tufaga.

[14] ILL then commenced an investigation into an allegation of serious misconduct against Mr Metua, arising from the damage caused to Mr Tufaga's car.

[15] When asked, straight away Mr Metua admitted responsibility for the damage. He said he had just "lost it" after being assaulted by Mr Tufaga. Also he said he had since spoken to Mr Tufaga and made arrangements with him to have the car repaired at Mr Metua's own expense of about \$350.

[16] At the end of the disciplinary meeting with Mr Metua and his support person, managers of ILL announced the employer's decision to dismiss Mr Metua with immediate effect. ILL wrote to him the same day confirming the dismissal and explaining their decision as follows:

After hearing your explanations, I/L believes that your actions in deliberately setting out to inflict damage to another employee's property constitute serious misconduct, even allowing for the incident that had occurred earlier. As we explained to you, the company was impressed as to the way you had handled yourself by removing yourself from the immediate area. You let yourself down by taking the course of action that you did, rather than just leaving the site and leaving any further investigation and action to the company. The company views any form of assault on company employees or their property is regarded as serious misconduct and, on the balance of the evidence we believe that you were guilty of serious misconduct.

[17] Mr Metua received one weeks pay in lieu of notice and was paid all other wages due to him.

Justification

[18] As with any personal grievance, this claim of unjustified dismissal is to be determined according to whether or not the employer acted with justification.

[19] The relevant legislative provisions are at s 103A of the Employment Relations Act 2000, and the applicable case law is the decision of the Employment Court in *Air New Zealand Limited v. Hudson* [2006] 3 NZELR 155.

[20] In *Hudson* the Employment Court summarised the principles to be applied in giving effect to s 103A, and a more recent summary of them is in the Court's judgment in *X v. Auckland District Health Board*, unreported, 25 February 2000, AC 10/07. Included among them is the principle that the Authority must consider separately what the employer did and how the employer did it, to determine what a fair and reasonable employer would have done and how the employer would have done it, in the circumstances. Justification is to be determined on an objective basis, being the point of view of a neutral observer. All the circumstances of the case must be taken into account in determining whether what the employer did and how the employer did it were what a fair and reasonable employer would have done. Questions of justification for dismissal must be judged at the time the dismissal occurred.

Dismissal justified

[21] Applying those principles, I am satisfied that the dismissal of Mr Metua in all the circumstances was a justified dismissal by ILL. The serious misconduct he was dismissed for was the damage he deliberately caused to the car belonging to another employee, when that property was supposed to be protected while left on the employer's premises by the owner. That conduct was capable of amounting to serious misconduct.

[22] ILL had provided a secure car place so that cars belonging to employees and other vehicles could be kept safe while parked at the workplace.

[23] ILL was in my view reasonably able to conclude that there was no matter of reasonable excuse for Mr Metua to avail himself of.

[24] After Mr Metua had reported being assaulted ILL investigated almost immediately, and the employer had taken prompt and appropriate action in dismissing Mr Tufuga.

[25] Mr Metua said that Mr Tufuga had been reported previously to the employer for being drunk at work, but no action had been taken by the employer. However Mr Metua was no longer in harms way because of a co-worker affected by drink, by the time he took his retaliatory action. He had stopped working and was on his way to leave the premises and go home. If the employer had insisted that Mr Metua had remained working in potentially unsafe conditions, grounds for a grievance may have arisen. But at the time he kicked in his assailant's car there was no threat to his safety, as he had finished working for that day. He also had no reason to suppose that the employer had not taken his assault complaint seriously, or would not investigate it properly.

[26] I consider the employer was justified in being concerned that employees who take retaliatory action may cause the original misconduct to be repeated and to escalate, instead of leaving it for the employer to handle. Where the misconduct is violence, there is a danger that supporters of the protagonists may be encouraged to join in and mete out their own form of justice as well.

[27] It is also clear that any provocation originally given to Mr Metua was not an operative factor at the time he retaliated by damaging his assailant's car. He had acted rationally after that by in complaining and then by leaving the premises. He was obviously in a reasonably fit state to drive and not mentally unhinged by the attack upon him, and he was able to foresee the possibility of some form of revenge from Mr Tufuga for what he had done to his car. Mr Metua exercised his judgment but badly, in deciding to get his own back on his assailant in the way he did.

[28] I consider that the employer's action in dismissing Mr Metua was justified on the basis that ILL was entitled, and had a responsibility, to keep its premises safe and secure from damage caused from within to property. ILL also had an interest necessarily in discouraging its reasonably large work force from committing acts of revenge or retaliation in the workplace.

[29] Perhaps if Mr Metua had told ILL what he had done before he was asked, the employer might have retained trust and confidence in him. That did not happen and

now it can only be a matter of speculation as to whether it would have made any difference to the outcome.

Determination

[30] I therefore determine that the employer did act fairly and reasonably in establishing and in weighing up all the relevant circumstances before deciding to dismiss Mr Metua. From the point of view of a neutral observer, ILL was justified in dismissing Mr Metua, I find.

[31] Accordingly, no orders are required to be made against ILL.

Costs

[32] Costs are reserved for the parties to discuss and endeavour to settle. If any question remains, application may be made to the Authority in writing.

A Dumbleton
Member of the Employment Relations Authority