

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry Nelson (Applicant)
AND Meadow Mushrooms Limited (Respondent)
REPRESENTATIVES Kay Stringleman, advocate for the applicant
Anne Toohey, counsel for the respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING Christchurch 19 December 2006
Site Visit 20 December 2006
DATE OF DETERMINATION 15 February 2007

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicant, Kerry Nelson, was employed by the respondent for 19 years until her summary dismissal on 18 January 2006. At the time of her dismissal Ms Nelson was working in a team leader position at the respondent's harvesting shed at Wilmers Road.

[2] Meadow Mushrooms Limited (Meadow Mushrooms) is a duly incorporated company and carries on the business of producing fresh mushrooms and mushroom products.

[3] Meadow Mushrooms confirmed the dismissal in a letter to Ms Nelson dated 20 January 2006. The letter provided that Ms Nelson was summarily dismissed following Meadow Mushrooms' investigation into allegations that Ms Nelson threw a knife in the harvesting shed at Wilmers Road. It provided amongst other matters the reason for the dismissal as below:

We believe it was a reckless and dangerous act to throw a knife in a fit of anger, in a shed containing other people and it is an act we cannot condone. This is a definite serious breach of our Health and Safety rules and also is an act of behaviour that we consider is Serious Misconduct. We must as a company, have a very strict stance on situations involving knives for the protection of all our staff. We must also be able to trust that our Team Leaders act in a manner in accordance with our Health and Safety and Work Rules. Accordingly, we have summarily dismissed you for Serious Misconduct. Termination is effective immediately, but we will pay you one week's wages in lieu of notice.

[4] Ms Nelson says that her dismissal was unjustified. She says that what she did was not serious misconduct in her employment, that there was unfairness with respect to part of the procedure adopted by the company to investigate her conduct, and that the decision to summarily dismiss was not one which a fair and reasonable employer would have made and was unjustified.

[5] Ms Nelson seeks a finding that her dismissal was unjustified, an order that she be reinstated to her previous position, reimbursement of lost wages together with compensation in the sum of \$5,000 and costs.

[6] Meadow Mushrooms say that the dismissal was justified both procedurally and substantively and no remedies should be awarded to Ms Nelson.

Issues

[7] The test of justification is set out in section 103A of the Employment Relations Act 2000. It requires that the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. The Employment Court in *Air New Zealand v Hudson* (2006) 3 NZER said with respect to s.103A at para.132 that:

The section does not differentiate between aspects of the dismissal process but, because it refers in general to the employer's actions, the test for justification applies at all stages including the employer's decision that misconduct has occurred and the employer's decision to dismiss.

[8] The issues to be determined are:

- Was the investigation into Ms Nelson's actions fair and reasonable?
- Was Meadow Mushrooms justified as a result of that investigation in concluding that Ms Nelson's actions with the knife on 8 January 2006 amounted to serious misconduct?
- Was there disparity of treatment?
- Was dismissal an appropriate penalty?
- If the dismissal was unjustified then what remedies should be awarded and is there any issue of contribution?

The applicable collective employment agreement

[9] Ms Nelson was a member of the Amalgamated Workers' Union New Zealand ("The Union"). The Union was party to a collective agreement with Meadow Mushrooms which was effective from 4 April 2005 and remained in force until 2 April 2006. The collective agreement covered the work which Ms Nelson performed. There were no disciplinary investigation procedures in the collective agreement. Schedule 5 of the collective agreement dealt with company policies and procedures. Clause 5 of that schedule is headed Company Rules and Discipline. It contains a list of offences which constitute serious misconduct and will result in instant dismissal, together with sample offences which constitute misconduct and may make an employee liable to dismissal but are typically covered by the warning procedure. The warning procedure is as follows:

Warning procedure

First offence – verbal warning (recorded in writing)

Second offence – written warning

Third offence - dismissal

[10] One of the offences which constitutes serious misconduct is any deliberate breach of safety procedures, and another is, any other offence which the company may regard as a

serious breach of company rules. One of the sample offences which constitutes misconduct is failure to observe safety procedures.

[11] Clause 17 of the collective agreement is headed Safety. Clause 17.1 provides:

The Company and you are committed to safe working practices. Avoidance of personal injury is a primary objective. You agree to observe all safety procedures and promptly report all potential hazards to your Team Leader/Manager.

Clause 17.10 provides:

No throwing of any object, eg: mushrooms, stalks etc.

Clause 17.11 provides:

Use all equipment in a safe and proper manner.

[12] The company says that any type of misuse of knives in the harvesting shed is strictly forbidden and that it has a zero tolerance to violence in the workplace. It says that all staff know about this although there are no written rules about knives and the use thereof.

The investigation into Ms Nelson's actions

[13] Ms Nelson worked for Meadow Mushrooms on the weekends as a team leader and as a harvester on week days. She was employed at the time of her dismissal for both of the weekend days and three days during the week. On the weekends Ms Nelson was second in charge to Ysobelle Kimber who was the weekend harvesting co-ordinator. Ms Nelson would go to Ms Kimber in the first instance if there were problems in the workplace that she could not deal with.

[14] An investigation into Ms Nelson's actions on Sunday, 8 January 2006 was carried out by the harvesting and distribution manager for Meadow Mushrooms Ltd, Kerrie Vee, and Sylvia MacLellan the harvesting development manager. The allegation that was investigated by Ms Vee and Ms MacLellan was that Ms Nelson had thrown a knife on 8 January 2006 in a mushroom shed.

[15] The background to the allegation was that an employee, Thomas, told Ms Kimber on 8 January 2006 that Ms Nelson threw a knife at him. A fair and reasonable employer would have commenced an investigation into this serious allegation.

[16] Ms Kimber advised Ms MacLellan on Monday, 9 January 2006 of the incident. Ms MacLellan interviewed Thomas about the incident on that day.

[17] Ms Nelson and Ms Kimber were then interviewed as part of the investigation process, together with a number of other employees. The interviews were taped and the Authority and Ms Nelson subsequently provided with transcripts for all of the interviews.

[18] Ms Nelson was advised, prior to and during the investigation, of the seriousness of the allegation and that there was a possibility her employment could be in jeopardy if the allegation was proven. Ms Nelson attended three meetings in total. Ms Vee and Ms MacLellan attended all three meetings for Meadow Mushrooms. The first meeting took place on 11 January 2006 and Ms Nelson was accompanied to that meeting by her husband Brandon. There was a second meeting on 17 January 2006 and Ms Nelson was represented at that meeting by a Union delegate Greg Ong. At the third meeting when Ms Nelson was advised of the decision to dismiss she was represented by a Union organiser Bernie O'Brien.

11 January 2006 meeting

[19] Ms Nelson provided some background with respect to her conduct with the knife at this meeting.

[20] On Sunday, 8 January 2006 Ms Nelson had cause to talk to Thomas, a harvester about his grading of the mushrooms. Thomas was unhappy about this and when interviewed was recorded as saying he felt singled out by Ms Nelson. There was a heated discussion and Thomas argued with Ms Nelson. Ms Nelson said that Thomas swore at her and became abusive. Thomas then returned to his work bay and Ms Nelson heard him refer to her as a *fucking cow*. There was no dispute that Thomas did swear at Ms Nelson and called her an abusive name in the shed.

[21] Ms Nelson went to talk to Ms Kimber about her concerns with respect to the exchange with Thomas. Ms Kimber then went and saw Thomas in his mushroom picking bay and spoke to him about his grading and swearing.

[22] Ms Nelson said that she saw Ms Kimber come out of Thomas's bay with Thomas and they were looking at mushroom boxes together. Ms Nelson said that she was given a knife at that point belonging to another employee Rosa, which was wrapped in a paper towel. Ms Nelson said that while she was holding the knife in her hand she was required to go to the other end of the shed. She said that Ms Kimber then came up to her and said words to the effect, *Thomas is going to try to do this and that*. Ms Nelson said that she asked what was going to happen about the swearing and name calling and Ms Kimber replied *Well that's alright, he's young ... don't worry about it ... and I said, God it's not fair ...*

[23] Ms Nelson said that she told Ms Kimber that she [Ms Kimber] never supported her. She said that she was so upset *you know ... just got the knife and threw my hands down ... I didn't intentionally throw the knife ... I was just really angry and I walked out of the shed, ...*

[24] When asked if anyone could verify her explanation Ms Nelson said that Ms Kimber was behind her. Ms Vee put to Ms Nelson that, *If you've got a knife in your hand ... what are you doing throwing it anywhere? ...* Ms Nelson responded, *.. you have to understand I didn't throw it at him and I didn't intentionally try to hurt anybody ... It was wrapped up in a paper towel, the blade was covered, and I mean, if I had my diary in my hand, if I had a pen in my hand, I would have done exactly the same thing ... it was not intentionally thrown. It was more like ... (frustrated sound) and I just let go ...*

[25] Ms Nelson also read from a diary entry that she had made after the events and in relation to the knife action she had written – *I got angry because I still have no apology from David ... I walked out and threw a knife down that I had in my hand ...*

Further investigation after Ms Nelson's interview on 11 January 2006

[26] Ms Kimber was interviewed following Ms Nelson's interview on 11 January 2006. Ms Kimber agreed that Ms Nelson had complained to her about Thomas's actions and said that she had gone to see him and had talked to him about picking mushrooms and talked to him about swearing at Ms Nelson. Ms Kimber said that she then came out of Thomas's bay and walked down to the end of the shed and called out generally to the workers to make sure they were picking large [mushrooms].

[27] Ms Vee asked Ms Kimber if she had actually seen Ms Nelson throw a knife. Ms Kimber said *...No I didn't see her but you see I came out of his bay and I walked to the end of the shed and I just called out generally "make sure you're picking large" .. sort of thing ... because we've dealt with Thomas .. and that, and when I turned around I came back up past his [Thomas's bay] ... he said, no look what she's done ... threw a knife at me ... and I said who? .. you know, and he said Kerry ... she's thrown a knife at me .. and I just picked it up and I went out of the door and she'd already gone out and that's when... .*

[28] Thomas said he saw something coming toward him from outside [the bay]. He said that he looked down and there was a knife just a few centimetres from him. Thomas said that he saw Ms Nelson walk by quickly and then he called Ms Kimber down. He said that Ms Kimber was on the other side of the shed.

[29] Ms Kimber said she recognised the knife in the middle of Thomas's bay as Rosa's knife and she picked up both the knife and a piece of paper that was close to the knife, wrapped them together and put them into her pocket. She said that she walked out of the shed and found Ms Nelson in the alley outside the shed in tears. Ms Kimber said it was at that point that Ms Nelson yelled at her and told her that she did not think that Ms Kimber had supported her enough in terms of Thomas. Ms Kimber said that she did not say anything to Ms Nelson about the knife because she wanted to talk to her senior Ms MacLellan about the situation. That was inconsistent with what Ms Nelson had said in her interview. Ms Nelson had said that Ms Kimber advised her that it was inappropriate to throw knives. Ms Kimber thought the knife matter was very serious and later that day wrote down an account of what had happened.

[30] Ms Kimber said that after Ms Nelson yelled at her in the alley outside the shed she asked Thomas to come with her to the office to talk about his conduct. Another team leader Noel was initially present as well.

[31] The transcript of Noel's interview reflects that Noel told Ms Kimber that Thomas should not apologise to Ms Nelson because of the *serious accusation here of throwing knives*. Noel agreed in his interview that Ms Kimber told him she was going to put the issue about the knife *in the book and then report it to a senior*. Ms Kimber did not agree with Noel that Thomas should not apologise.

[32] Ms Kimber then called Ms Nelson into the office for Thomas to apologise to her for his earlier inappropriate behaviour. Ms Kimber advised Ms Nelson that Noel would be responsible for Thomas from that point on.

[33] Thomas apologised for swearing at Ms Nelson. Ms Nelson also apologised at the meeting, but there is conflict about the words Ms Nelson used to apologise and to whom she addressed her apology. Thomas, who was interviewed on 9 February and 11 February 2006, said that Ms Nelson apologised for throwing the knife. Thomas could not recall what words she used and said that he did not take much notice because of the way she said it. It did not sound sincere. He said that Ms Kimber was present and she would have heard what was said. Thomas was asked whether there was a possibility Ms Nelson was apologising for something other than the knife, but he discounted that possibility.

[34] Ms Nelson said in her interview that she apologised for *throwing a knife down*. Ms Kimber said that she advised Ms Nelson that Thomas was to apologise to her which he did. Ms Kimber said that she [Ms Nelson] turned around and said – *and I'm sorry I threw the knife at you ...* . Ms Vee asked if Ms Kimber definitely heard "*at you*" and Ms Kimber responded in her interview – *Yes, yes*.

[35] On 14 January Ms Vee and Ms MacLellan interviewed the other harvesters in the shed and Noel. No one saw anything except for an employee who said he saw Ms Nelson throw something into Thomas's bay and indicated a throwing action with his arm. He said he thought it was a mushroom being thrown by Ms Nelson and turned away again. Ms Vee and Ms MacLellan concluded from their perspective that none of the interviews with the harvesting staff were particularly helpful in resolving the issue because no one had seen the incident although an employee had seen Ms Nelson throw something into Thomas's bay.

17 January 2006

[36] On 17 January 2006, after the other interviews had taken place, a further interview took place with Ms Nelson. It was made clear to Ms Nelson that there had not been a decision at that point of time. Ms Vee reiterated to Ms Nelson that the matter was serious and that her employment was in jeopardy.

[37] The inconsistencies between Ms Nelson's recollection of events and Ms Kimber's and Thomas's were put to Ms Nelson, in my view comprehensively at the meeting on 17 January 2006. Ms Vee asked Ms Nelson whether it was possible that she had thrown the knife down into Thomas's bay. Ms Nelson said she honestly didn't know where she had thrown it.

[38] Ms Vee put the inconsistency about the word used to apologise to Ms Nelson. She expressed her failure to understand why Ms Nelson would have apologised to Thomas at all. This is in circumstances where Ms Nelson had said that the knife incident had nothing to do with Thomas. Ms Nelson also said that she did not know where the knife had landed and there did not appear to be anything in Ms Nelson's earlier interview to the effect that Ms Kimber told her where she had picked the knife up from. Ms Nelson in response to that question said that it was a general apology that she was sorry for throwing the knife down.

[39] Ms MacLellan advised Ms Nelson that she went in the middle of the shed and did what Ms Nelson said she did by dropping her hand and throwing the knife down. She could not get the knife to go into the bay further than a foot and most of the time the knife bounced off the end of the stacks.

[40] Mr Ong put forward that no one had seen Ms Nelson throw the knife at Thomas and he said it would be different if someone actually saw Ms Nelson throw a knife at him. At one point Ms Nelson suggested that Thomas could have moved the knife to make it look worse.

[41] Mr Ong during the interview said there was a reason for dropping a knife hard and put it down to the spur of the moment mistake and emotion.

[42] Ms MacLellan responded – *But it was something done in anger though ... A knife was .. seriously flung out of her hand in anger.* Ms Vee said – *You can't have people flinging knives around in anger .. regardless of whether they actually harm someone or not .. By that .. I mean if it did harm somebody then I mean, obviously that escalates the seriousness of it .. But it's still extremely serious to have knives, anger, staff in throwing action .. That you know .. you've got to still .. you've got to still remember that*

[43] Ms Nelson said - *.. I'd just like to also resay, it's not like I knew .. I was thinking I've got a knife in my hand .. and it was wrapped in a paper towel .. you know .. it wasn't that I was trying to harm anyone .. it was just an accident and I shouldn't have let it happen*

[44] The meeting ended on the basis that Ms Vee and Ms MacLellan were going to make a decision.

18 January 2006

[45] Ms Vee explained at the outset of the meeting on 18 January 2006 that it was being taped. Mr O'Brien had been on leave and he explained that it was his first day back. He explained that he had spoken to Mr Ong and Ms Nelson and had a sort of briefing. He said he understood Ms Vee and Ms MacLellan were at the point of being ready to make a decision, and Ms Vee confirmed that the decision had been made. Mr O'Brien then said – *From a point of view of where I'm coming from, I'll be interested to hear your decision .. and then ah .. may offer a comment whatever way the decisions go .. okay?*

[46] Ms Vee then delivered the decision and dismissed Ms Nelson for serious misconduct for throwing a knife in anger which breached the health and safety rules and work rules.

Discussion

[47] I look firstly at Ms Nelson's conduct. The conclusion arrived at by Ms Vee and Ms MacLellan was that Ms Nelson had thrown a knife in anger in the shed and that it was serious misconduct. Ms Vee and Ms MacLellan did not consider that Ms Nelson actually disputed throwing a knife. They further concluded that she did not know where the knife was going to land as Ms Nelson said she was looking forward. She did not stop and pick the knife up. They could not be sure though that the knife was intentionally thrown at Thomas, but concluded the knife did land in the middle of the bay in which he was working. I need to consider whether there was a fair and reasonable basis for the conclusions arrived at and for that I turn to the investigation process.

[48] The Employment Court in *King v PPCS Richmond Ltd (unrep)* AC 61/05, October 2005 said at para 78 of the judgment with respect to the test of investigative fullness and fairness:

While there were imperfections in the employer's investigative process, long-established case law confirms that the test of investigative fullness and fairness is not minute and pedantic scrutiny of the individual elements of that process but, rather, a broad assessment of its fairness in light of the seriousness of the allegation and its potential consequences.

[49] In *Hudson* at para. 144 the Court said:

The question is how would a fair and reasonable employer have acted in all the circumstances of this case. An employer does not have to prove that the incident which did characterise the serious misconduct happened. It must, however, show that it carried out a full and fair investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. The employer is not required to conduct a trial or even a judicial process. But there are some fundamental requirements of natural justice which are appropriate and which, in this case, are reinforced by the company's policy. As part of a full and fair investigation, natural justice requires that an employee is given a proper opportunity to comment on the allegations made against her.

[50] Misusing a knife has been found to be conduct that is capable of amounting to serious misconduct in employment relationships. Ms Stringleman has referred to the Court of Appeal judgment in *Honda NZ Ltd v NZ Boilermakers etc IUOW* [1991] 1 NZLR 392 with respect to the standard to which Meadow Mushrooms must be satisfied when it is alleged an employee has engaged in serious misconduct.

[51] A fair and reasonable employer would have given Ms Nelson a real opportunity to provide an explanation in terms of her conduct and an appropriate investigation would have been carried out consistent with the seriousness of the allegation and potential consequence of a dismissal. At the end of that investigation process a fair and reasonable employer then would have considered all the matters arising from the investigation and then would have made a fair and reasonable decision.

[52] Ms Stringleman submits that Ms Nelson consistently maintained throughout the employer's investigation that she did not deliberately throw the knife down in the sense of forming intention and then doing so, but lost control of the knife accidentally when she made a gesture of frustration. Ms Stringleman submits that prior to Ms Nelson's dismissal she was never advised of the result of Meadow Mushroom's investigation and did not have an opportunity to understand why her explanation that she had not intentionally thrown a knife was not believed. Further, she did not have an opportunity, it is said in Ms Stringleman's submissions, to comment on the outcome of the investigation and as a result of these matters the procedure was unfair.

[53] Ms Toohey submits that it is implicit in an admission of "throwing" that the act is intentional and that Ms Nelson at no stage in the investigation process said that she dropped the knife, or that the knife flew out of her hand. Ms Toohey submits that all the factual matters that were troubling the employer had been put to Ms Nelson on 17 January 2006 and Ms Nelson was given an opportunity to comment on them. She submits that natural justice did not require the taking of the further step of identifying to Ms Nelson what the employer's conclusions were and getting Ms Nelson's comments on those conclusions.

[54] The submissions made by Ms Stringleman and Ms Toohey in relation to procedural fairness are a reminder that there is no sharp distinction between procedural and substantive matters.

[55] There were factual inconsistencies between Ms Kimber's account, Thomas's and Ms Nelson's in relation as to when discussions took place with Ms Kimber and the nature of the apology. I am satisfied though that on 17 January 2006 any inconsistent statements or new

information following the interview with other employees were put to Ms Nelson for explanation. Importantly in my view it was made quite clear to Ms Nelson on 17 January 2006 that there was concern about a team leader throwing a knife anywhere. There was discussion about how that could be dangerous. There were questions about the possibility of the knife travelling a distance and Ms Nelson accepted that a knife could travel depending on the angle it landed on the ground.

[56] Ms Nelson accepted that she did not know where the knife landed and did not stop and pick it up after it was thrown. Ms Nelson did not dispute that she offered an unsolicited apology for throwing a knife down in the presence of Thomas and Ms Kimber. She said it was a general apology not specifically given to Thomas. There was a statement from another picker who said that he had seen Ms Nelson throw an object into Thomas's bay. The employee said he thought it was a mushroom. When this was put to Ms Nelson on 17 January 2006 she denied ever throwing mushrooms.

[57] As well as Ms Nelson's reference to her action of throwing, Ms Vee and Ms MacLellan put their understanding of what Ms Nelson had said to her. At the top of page 22 of the transcript of the interview of 17 January Ms Vee asked Ms Nelson .. *In that case then, I need to ask you, why, if you threw the knife down in anger at Ysobelle and you're not sure where it went ... why did you apologise to Thomas?*

[58] If Ms Nelson did not want Ms Vee and Ms MacLellan to understand she threw down the knife because she was angry and rather that the knife slipped out of her hand accidentally or inadvertently, then in my view she had a proper opportunity during that meeting to do so and on more than one occasion.

[59] Provocation was put forward by Ms Nelson and Mr Ong to explain Ms Nelson's conduct with the knife. Ms Nelson said she was not angry at Thomas, but was angry because Ms Kimber had not dealt adequately with Thomas's behaviour.

[60] I am satisfied that the investigation was appropriate in light of the seriousness of the allegations. All those who could have possibly assisted were interviewed. I find that Ms Nelson was given a proper and full opportunity to comment on the allegation that she threw a knife during the investigation process and the accounts of other employees where they differed from her own. Ms Nelson's version of events was essentially relied upon and accepted where there was a conflict as to whether or not she intended to throw the knife at Thomas. In those circumstances I do not find that a failure to provide conclusions and a further opportunity to comment on 18 January 2006 rendered the process unfair.

[61] As a result of that investigation I find that Ms Vee and Ms MacLellan were entitled to conclude that Ms Nelson had thrown a knife in anger and that such action was deliberate rather than accidental. Ms Nelson said that she threw the knife during the investigation although maintained the action was not toward Thomas or anyone in particular. The possibility of it being thrown not at Thomas but into his bay was put to Ms Nelson. I find that in the absence of any evidence to the contrary Ms Vee and Ms MacLellan were entitled to conclude that the knife landed in Thomas's bay. Ms Nelson confirmed that she did not know where she threw the knife as she was looking forward. Even in Ms Nelson's own diary entry made shortly after the incident she says she threw the knife down and that she was angry. Ms Nelson did not put into her diary that she threw her arms down and the knife accidentally dropped/slipped out of her hand. Ms Vee and Ms MacLellan put their understanding about the throwing action to Ms Nelson and her state of mind as angry and she did not contradict it.

[62] Ms Nelson explained that there was provocation leading to the action because she was angry, hurt and frustrated with Ms Kimber in her failure to deal with Thomas. If it had been a situation where the knife had slipped and therefore inadvertently rather than knowingly being released from her hands, then her explanation and diary entry in my view would have been different.

[63] In reaching that conclusion I am satisfied that the matters raised by Ms Nelson and her representative Mr Ong were considered in an unbiased and fair and reasonable manner.

[64] I have considered whether throwing a knife in anger in a mushroom shed is conduct capable of being serious misconduct. There is training when employees are inducted at Meadow Mushrooms about the handling of knives including care in passing knives, and which side of the knife is the sharp side for cutting mushrooms. I am satisfied that Ms Nelson knew about the rules around handling of knives. There are rules about the storage of knives which again I am satisfied Ms Nelson as a team leader was aware of. It was Ms Nelson's role as team leader at the end of the day to collect, wash and store knives. Indeed this was why an employee had handed her Rosa's knife. These rules are not in writing but it is clear from the collective agreement that there is to be no throwing of any object. Ms Nelson knew that throwing of mushrooms was not allowed. The examples of mushrooms and stalks in clause 17.10 of the collective agreement as objects not to be thrown are not in my view intended to be exhaustive and would extend to knives.

[65] I agree with Ms Toohey that from the interviews during the disciplinary investigation misuse of knives, including throwing was clearly something everyone appreciated was very serious including Ms Nelson. Ms Kimber wanted to raise the knife matter with her senior because she felt it was too serious a matter for her to deal with herself.

[66] Ms Stringleman submitted that there needed to be a deliberate breach of safety procedures under clause 5 to amount to serious misconduct. This, she submits, would require wilful intent rather than accident, compulsion or ignorance. I have found that a fair and reasonable employer was entitled to conclude in this case that Ms Nelson's actions with the knife were not accidental. Ms Nelson was aware of the knife in her hand and its release. She was angry and did not know where she threw it. It was released with sufficient force for it to travel off the walkway which is down the middle of the shed and into Thomas' bay which is fully enclosed on three sides. Ms Nelson did not stop to ascertain where it had landed or whether it had caused harm to anyone. Instead she walked out of the shed.

[67] It is open in my view to a fair and reasonable employer to conclude after a full and fair investigation that there was conduct by Ms Nelson in the throwing of the knife which could be regarded as serious misconduct in terms of the collective agreement as a deliberate breach of safety procedures.

[68] There is an allegation that there was disparity of treatment of Thomas and Ms Nelson. It is understandable that Ms Nelson was upset by Thomas's abusive language and attitude. An employer does have an obligation to treat employees in a similar manner where there are similar offences and circumstances. There are difficulties with the allegation of disparity in this case. The swearing and throwing of a knife are not in my view sufficiently similar offences or circumstances to create a *prima facie* case of disparity for further inquiry to be necessary. If I am incorrect about that matter, then there is adequate explanation for the treatment in the terms of differences between the positions of the employees and the conduct itself. Thomas was rude and abusive in his language towards Ms Nelson. Ms Nelson's actions breached safety procedures and were dangerous and reckless. In those circumstances the disparity in treatment becomes irrelevant.

[69] There is another issue before I turn to whether the dismissal was justified and that is whether there was fairness about the delivery of the decision to dismiss. It had been explained to Ms Nelson and Mr Ong on 17 January 2006 that Ms Vee and Ms MacLellan would consider what had been said. It was understood that they would then be arriving at a decision and would call Ms Nelson as soon as they had, or if there was anything else to check up on. There was no further investigation after 17 January 2006 and therefore nothing further was required to be put to Ms Nelson.

[70] Ms Nelson knew that this was the next step in the investigation procedure. Mr O'Brien advised at the outset that he would comment on the decision if he wished to. After Ms Nelson and Mr O'Brien were advised of the decision to dismiss Mr O'Brien made submissions to the effect that the penalty was too harsh. Ms Vee said that if there had been new matters raised by Mr O'Brien that they had not considered in making their decision they would have taken them into account. But there were not. I do not find in the circumstances as recorded in the

transcript of that meeting unfairness in the almost immediate delivery of the decision in this case.

[71] I now consider whether Ms Nelson should have been dismissed. In the Employment Court judgment of *Fuiava v Air New Zealand Ltd* (Auckland AC51/06, 12 September 2006) Travis J took into account issues of safety in determining whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[72] I accept that Ms Vee and Ms MacLellan found the decision to dismiss a difficult one. They took into account that Ms Nelson was a team leader with an exemplary record and had been employed for such a long time. She also appeared to have been a popular employee. Against that it was felt her action in throwing a knife in anger was a gross breach of the health and safety rules and of her role as a team leader and that they could no longer have trust and confidence in her as an employee.

[73] Provocation was advanced by way of explanation to the conduct. It was felt that Ms Nelson had been trained to deal with the situation where her emotions are heightened to the point of anger and that she should have gone out to cool off. There had been discussion during the investigation process that Ms Nelson could have complained to Ms MacLellan if she felt Ms Kimber had not adequately dealt with the situation. There was concern that there was emotion and temper involved in the conduct with the knife and blame put on other people for the action. It was felt that there could not be the trust in Ms Nelson that her behaviour would be different in the future. They concluded that Ms Nelson knew throwing a knife was a breach of the health and safety procedures. There was also consideration of an earlier incident where an employee of Meadow Mushrooms had been dismissed for pointing a knife at another employee in another branch and the need to be consistent.

[74] Ms Nelson was a team leader with responsibilities and authority within the shed. Her employer was entitled to expect that she would lead by example by maintaining a high standard of safety in the shed generally. Her action of throwing a knife when angry with no idea as to where it landed was dangerous and reckless and was unacceptable behaviour from a team leader. Safety is clearly an important consideration for Meadow Mushrooms in terms of the collective agreement that they negotiated with the Union. Ms Nelson's conduct damaged the trust and confidence that Meadow Mushrooms had to have in her as team leader and in my view they were entitled on that basis to decide that her continued employment was no longer possible.

Determination

[75] I find that Meadow Mushrooms Limited carried out a full and fair investigation into the allegation that Ms Nelson threw a knife in the mushroom shed. As a result of that investigation, conduct was disclosed that Ms Nelson threw a knife when angry which a fair and reasonable employer would regard as serious misconduct. I find that the decision to dismiss Ms Nelson was justifiable because it was what a fair and reasonable employer would have done in the circumstances at the time of dismissal. Ms Nelson's dismissal was justified and I am unable to help her any further.

Costs

[76] I reserve the issue of costs.