

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Matajohn Otene
AND A G Walter & Sons Limited
REPRESENTATIVES Applicant in person
Bill O'Loughlin for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 23 June 2006
DATE OF DETERMINATION 26 June 2006

DETERMINATION OF THE AUTHORITY

[1] At an investigation meeting on 23 June 2006 the Authority examined Mr Matajohn Otene, Mr Bill O'Loughlin and Mr Barry Donaldson, about an employment relationship problem.

[2] Mr Otene, the applicant in this case, had been employed as a driver by A G Walter & Sons Limited, the respondent. Mr O'Loughlin is managing director of Walter's, a firm of haulage contractors.

[3] Mr Otene's employment ended abruptly on 28 February 2006 when he was dismissed by Mr O'Loughlin. The grounds for dismissal were the use of "abusive and foul language" yelled at Mr O'Loughlin and others over a radio telephone by Mr Otene while he was driving on 23 February. The words "fucking cunts" were used several times, audibly to others in the office as well as Mr O'Loughlin to whom they were mainly directed.

[4] Mr Otene's conduct was considered to be of increased seriousness because of the existence of a final written warning which had been issued to him on 8 December 2005 for failing to secure the load on his truck that day.

[5] In the Authority Mr Otene has sought to challenge the justification for both the dismissal and the final warning. He and his former employer have tried unsuccessfully to resolve his grievances in mediation.

[6] The conclusion I must reach from my investigation is that the dismissal was settled between Mr Otene and Walter's a few days after it occurred, and that a grievance in respect of the final warning has not been raised within 90 days and therefore cannot now be resolved by an Authority investigation.

[7] I reach that conclusion for the following reasons. Immediately after he was dismissed Mr Otene was given assistance by Mr Donaldson, an organiser of the National Distribution Union. I find that Mr Donaldson attempted to help Mr Otene by asking Mr O'Loughlin to give him his job back. In doing so Mr Donaldson put it to Mr O'Loughlin that there were "procedural fairness" issues with the dismissal. He was referring, he said, to the speed with which the employer had enquired into the misconduct and had made its decision to dismiss without fully investigating. I would add as a further possible issue, the reliance placed on the earlier warning. On its express terms it had been confined to any repetition of a form of

misconduct that was different from abusive language.

[8] Mr O'Loughlin maintained to Mr Donaldson that the dismissal was justified. When it became obvious that Mr O'Loughlin was opposed to reinstatement Mr Donaldson sought a payment instead, having first discussed that alternative with Mr Otene. Mr Donaldson requested the equivalent of one months pay. Mr O'Loughlin declined to offer that amount but proposed one week. This was offered in addition to one week paid voluntarily even although the dismissal had been a summary one.

[9] I am satisfied that Mr Donaldson discussed the offer of one further weeks pay with Mr Otene before it was accepted. Mr Donaldson said to Mr Otene that he could have time overnight to think about it and even take advice from elsewhere if he wished. He told Mr Otene I find that if he accepted the offer the payment would be in "full and final" settlement of a grievance about the dismissal. Mr Otene responded by telling Mr Donaldson to "grab it."

[10] Mr Donaldson confirmed acceptance with Mr O'Loughlin who wrote a note recording the conversation they had had on 1 March 2006. What Mr Donaldson and Mr O'Loughlin told me about the settlement was the same.

[11] Mr Donaldson helped Mr Otene obtain another driving job quickly after his dismissal. The settlement money has been paid.

[12] I am satisfied that in so many words a grievance was raised with Walter's by Mr Donaldson orally, and that Mr Donaldson was acting as the agent of Mr Otene, on his behalf. I am also satisfied that Mr O'Loughlin in offering the one additional weeks payment was by doing so purporting to settle the grievance Mr Donaldson had indicated would be pursued if the matter was not resolved.

[13] Mr Donaldson is a very experienced union organiser and representative who clearly involved Mr Otene in the discussions, leaving it to him to decide whether to accept or reject the offer of settlement. Given the behaviour on 23 February for which Mr Otene was dismissed, the settlement may well have seemed reasonable to an organiser of Mr Donaldson's experience.

[14] For the above reasons I find that Mr Otene's grievance arising out of his dismissal has been resolved by him through his union organiser. He cannot now reopen it. Had the grievance not been settled, in conjunction with the dismissal the Authority could have looked at the justification for the earlier final warning given to him, since there is a direct link between them. However the warning cannot be looked at on its own, because a grievance about it was not raised within 90 days as required. The warning was issued on 8 December 2005 but a challenge to it was not made until about 23 May 2006, by email to the Authority.

[15] No orders are therefore to be made by the Authority against Walter's in relation to either the dismissal of Mr Otene or the final warning given to him. This investigation is concluded.