

**Attention is drawn to the order
prohibiting publication of certain
information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 205/09
5164698

BETWEEN P
 Applicant

AND A BANK
 Respondent

Member of Authority: Philip Cheyne

Representatives: Philip Skelton, Counsel for the Applicant
 Andre Lubbe, Counsel for the Respondent

Investigation Meeting: 23 June 2009 at Auckland

Determination 25 June 2009

DETERMINATION OF THE AUTHORITY

[1] P worked for the Bank from August 2004 until he was summarily dismissed for serious misconduct on 4 May 2009. P says that he was unjustifiably dismissed and by this application seeks interim reinstatement pending resolution of his personal grievance claim.

[2] The Bank says that P was justifiably dismissed and resists interim reinstatement because of that but also because of the likely effect on other staff and customers if P is reinstated.

[3] Despite mediation the parties were not able to resolve this problem.

[4] As is usual, the findings expressed in this determination are based on untested affidavits and are made solely for the purposes of resolving the claim for interim

reinstatement. Final findings will have to wait for an investigation meeting and the opportunity to test the evidence.

[5] The problem started with events during an outing to a restaurant to mark the departure of the branch manager who had been appointed to another role with the Bank. Starting there I will briefly outline what happened before describing how the Bank responded. I will then assess whether P has an arguable case of unjustified dismissal and permanent reinstatement before considering where lies the balance of convenience.

At the restaurant

[6] NS was the Bank's branch manager before being appointed regional operations manager. A meal at a restaurant was organised for the evening of Friday 24 April 2009 to mark her departure as branch manager. The attendees were invited staff from the branch, some partners, some other staff and NS's mother. NS provided some wine but otherwise attendees paid for themselves. This was a function primarily for staff from the branch rather than a Bank function.

[7] There is some dispute in the evidence about events at the restaurant. P says that he attended with his partner (and now fiancé) and they conducted themselves appropriately at all times and were affectionate towards one another throughout the evening. There is evidence from other attendees to the effect that P was intoxicated and he and his partner had an argument outside the restaurant at one point during which P was very angry. For present purposes P is entitled to the assumption that he can prove his assertion in the face of the contradictory evidence but that appears a weakly arguable position, especially in the light of SK's evidence. She had nothing to drink during the evening and apparently had a clear view of P and his partner outside – they appeared to be arguing. She does not allege any use of force by P. There is also other evidence that P's behaviour made unpleasant what was otherwise an enjoyable occasion.

The drive home

[8] The evening ended, some attendees headed home and others headed off to continue the festivities elsewhere. P and his partner obtained a ride home with Mrs A, a casual customer services officer who sometimes works at the branch. Mrs A was picked up by her husband Mr A who had not attended the restaurant. There is a

dispute about had happened during the drive home to where P and his partner live. P says that he and his partner were cuddling and joking in the back seat and pushing and tickling one another in a sensual manner. Mr & Mrs A say that P's partner told him to let her go and complained that he was hurting her. They intervened and told him to leave her alone. They say that P then stopped holding his partner's head down and forcefully pushed her away. Mrs A's evidence is that P then said *Why? I haven't done anything wrong ... and as for you A* The last part, according to Mrs A, was said in a very aggressive manner.

[9] P is entitled to the assumption that he can eventually prove what he says that Mr and Mrs A misjudged the consensual physical intimacy between him and his partner for an assault. However, I find that to be a weakly arguable case based on the affidavit evidence. It would be surprising if both Mr and Mrs A misjudged the situation. I also note that Mr A was sober.

[10] Mr A continued driving his passengers home. When he stopped the partner quickly went down a driveway and P followed soon after. Mr and Mrs A became concerned that P's partner might be in danger but they were unsure which house down the drive they lived in. Mrs A rang NS expecting she would know. NS was in a car with her mother and a number of other staff. They turned around and drove to the where Mr and Mrs A were waiting.

[11] Several (two or three) of those present went to the house, knocked and called out but got no response. They tried the door and entered. The partner appeared and invited the first ones in. Some of the others came in as well, perhaps a little later. Initially P was in another room. There were some exchanges between those present and the partner about their concern for her safety. There is some evidence about bruises being visible on the partner's arms and her still wearing the dress she had worn at the restaurant. The partner was embarrassed. The evidence is mixed about whether she was asking for help or telling them to leave. It appears that the partner was intoxicated so different things may have been said by her to different attendees at the situation developed. NS's mother put the jug on. Before long P emerged, saying when he saw the assembled group and as he exited the house *You can fucking stay because I'm fucking leaving*. He may have pushed passed one or more people as he exited. The partner then went after him and the assembly decided to leave, which they did.

[12] P's evidence is that he and his partner went to bed when they got home, that NS, Mrs A and some others returned to their house, his partner answered the door and those present invited themselves in despite being asked to leave by her. P says that he got annoyed and left the house to avoid a confrontation.

[13] Once again P is entitled to the assumption that he can prove what he says about events at the house, subject to discounting that part of his account which appears to be hearsay. He was not present when his partner answered the door and his evidence is not that he overheard what was being said at that point. Discounting the hearsay, there only significant difference is whether he swore and pushed passed anyone on his way out.

The disciplinary investigation

[14] RP is the Bank's regional manager. NS reported to him about Friday night's events on Monday 27 April. RP sought HR advice and the HR manager spoke to NS, Mrs A and another staff member from another branch who had been at the restaurant and the house. Management decided to initiate a disciplinary investigation. A letter to that effect was drafted and given to P by RP upon P's return to work after some pre-arranged leave.

[15] There is some complaint about what RP said to P when he gave him the letter. P says that RP told him that it did not look good given a previous issue and suspended him. RP denies suspending P or making the alleged comment. He says that he offered P time off work in light of his apparent upset over the disciplinary investigation and that he limited his comments to the words used in the letter and confirming in response to a question that the situation could result in P's dismissal. The dispute will have to be resolved in due course but for present purposes I should assume P will be able to prove his account. Having said that, there is no grievance about a suspension which in any event would not support interim reinstatement and the comments, if made, only weakly support the possibility of pre-determination.

[16] There was a meeting on 4 May 2009 involving P, his union representative, RP, NS and an HR manager. P provided his employer with written statements from himself and his partner. P's statement describes his conduct towards his partner at the restaurant and in the vehicle as *horse-play* but accepted that he had sworn at Mrs A in the vehicle when she intervened. The partner's statement mirrored P's

characterisation of events at the restaurant and in the car. P gave these statements in response to the allegations that, at the restaurant, he was *intoxicated, sculling wine, ...argumentative, outside pushing [your partner] up against the wall*; and in the car had a *heated argument with [your partner] and pushed her head to the floor and [was] hitting your partner in the chest and verbally abusing the staff member and her partner*. P also referred to his work history, and denied that the function was a work event. Marks seen on his partner at the house were explained as the result of consensual intimacy. P also apologised for verbal abuse of Mrs A which he explained by reason of his drinking too much while on medication for depression.

[17] After an adjournment, the HR manager told P that they disbelieved his explanation and that he was summarily dismissed because of their loss of trust and confidence in him. P's representative asked if there could be a resignation rather than a dismissal but that was declined. Arrangements were made for the return of keys and P's personal possessions.

[18] P subsequently received a letter dated 4 May 2009 giving reasons for the dismissal as follows:

The reason for your dismissal is due to a breach of your employment agreement which included behaviour that is deemed by the Bank as serious misconduct.

The specific concerns relate to you attending a work farewell party for a staff member on Friday 24 April 2009 and you acted in a way that is considered by the bank to be unethical and could have brought the Bank into disrepute. In particular, you were intoxicated at the event and when a colleague and her Husband drove you and your Partner home, you assaulted your Partner psychically and abused your colleague verbally in the car.

Arguable case

[19] There is already a finding to the effect that P has a weakly arguable case that his version of events at the restaurant and in the car may be preferred. It is also arguable that P's direct evidence about events at his home will be preferred but there is little relevant conflict about that. The real significance about the events at P's home from the Bank's perspective is that the exchanges that P was not part of and his conduct (swearing, pushing passed and storming off) support its view of P's conduct at the restaurant and in the car. That may be so and it is reflected in the findings about the weakness of P's case on those points.

[20] Part of P's case concerns the way in which the allegations against him grew as they were repeated on the night and subsequently. A difficulty in assessing this arises because I do not have the notes made by the HR manager in her interviews with NS, Mrs A and one other person prior the disciplinary meeting with P. However, there is some distance between the way the allegations were apparently conveyed during the disciplinary meeting (see above for examples) and the description of P's conduct in the respondent's affidavits now before the Authority. Mr and Mrs A in their affidavits do not say that P pushed his partner's head to the floor or that he hit her in the chest. They describe less force than that. However, several of those in the second vehicle report (as hearsay) that P was hitting or beating up his partner. Comparing the respondent's affidavits with the notes made by NS of the disciplinary meeting, it is strongly arguable that the Bank acted on the basis of the somewhat exaggerated hearsay accounts.

[21] There is another aspect to this which gives rise to a strongly arguable point. One of the passengers in NS's vehicle apparently told others in that vehicle her account of an incident between P and his partner the previous weekend at Waihi. That account seems to have coloured the way in which those in the vehicle (including NS) understood Mrs A's phone call. NS was part of the Bank's disciplinary meeting but there is no evidence that the Waihi matter was raised with P during the disciplinary process.

[22] There are some other aspects of the Bank's process which are complained of but it is not necessary to canvass those complaints because of what follows.

[23] In its decision to dismiss the Bank relied on the employment agreement which says serious misconduct includes:

Acts by the employee within or outside of their workplace considered by [the Bank] to be dishonest or unethical or which brings [the Bank] into disrepute.

[24] Honesty is not in issue. The Bank alleged and concluded a breach by P of the remainder of the clause. The words are referenced in the disciplinary letter, the notes of the disciplinary interview and the dismissal letter. A problem for the Bank is that there is no evidence of any disrepute while the phrase in the employment agreement seems to require proof of it. That arguably could result in reinstatement: see *Swann & Ors v ACI NZ Ltd & NZ Amalgamated Engineering etc IUOW* [1990] 3 NZILR 262.

[25] Whether or not P's conduct at the restaurant as described in the respondent's affidavits was *unethical* in any material way for an employer is also arguable. Some people become intoxicated and argue with their partner in public. That might cause unpleasantness for those who witness it or are part of the couples' group but whether it reflects on an employee's ethics is a strongly arguable point. An important part of the context here is that the group at the restaurant were not identifiable to spectators as employees of the Bank. Similar conduct in front of an employer's customers at an employer's function could well be viewed differently.

[26] That leaves the events in the car for consideration. At least to an arguable standard, the use of force as described in the affidavits of Mr and Mrs A may not amount to unethical conduct by an employee so as to cause a loss of trust and confidence by a reasonable employer in the circumstances. P's wrongful use of force (as described) was quickly resolved by the intervention of Mr and Mrs A.

[27] P responded badly to his colleague but was later apologetic. More probably needs to be done to restore that relationship but steps could be taken by P to regain his colleague's confidence. At this point however, it is arguable that P's outburst was not misconduct of sufficient seriousness to warrant dismissal.

[28] From this I conclude that P has an arguable and in some respects a strongly arguable case of unjustified dismissal that could result in reinstatement. I have assessed this principally on the basis on the respondent's affidavits since there is only a weakly arguable case that P's account of the events might be preferred.

Balance of convenience

[29] Of P's colleagues who work in the relevant branch, only Mrs A gave evidence. She is employed as a casual customer services officer who worked *off and on* with P. Her evidence is that she would not work at the branch or with P ever again because she is scared of him. However she says that she is saddened by this and would like to support P getting help. A colleague who works in another branch says that she thinks P has lied about the events and she would not feel comfortable in a working relationship with someone with so little integrity and who is able to physically abuse a woman but not feel that is wrong. However, that person's evidence is that NS said in the car after receiving the phone call that P had *beaten up* his partner. The first hand evidence points to this being an exaggerated description of what happened in the car.

Mrs A's concern is more material for the present. Her evidence appears to leave open the possibility that, under some circumstances, she might moderate her stance.

[30] RP's evidence is that reinstating P in the interim would create a risk for his staff that he considers unacceptable. I do not discount that but there is no evidence of any improper behaviour by P at the workplace; there is only direct evidence about him wrongly using force against his partner when he was drunk. The risk referred to by RP is low and controllable.

[31] Some of the evidence of P regarding the balance of convenience is in an affidavit in reply that was lodged and served. Ordinarily one would expect that material in the original supporting affidavit but no objection was taken to me reading the reply, subject to excluding hearsay material. P says that he had good working relationships with the 12 other branch employees, including a new manager, and points out that none of them have opposed interim reinstatement. P is concerned that customer relationships and sales' prospects will deteriorate the longer he is absent from the workplace. There was a link between sales to customers and P's remuneration. He is also concerned that the longer he is absent from the workplace the more difficult it will be for him to be successfully reinstated if a grievance is eventually established.

[32] In his original affidavit P spoke of the possibility that his career in the banking industry might be destroyed because of the dismissal, the financial problems caused by his loss of income, the difficulty of finding alternative employment given current economic circumstances, the ongoing damage to his reputation.

[33] Not all of the damage arising from these issues is remediable by compensation if a grievance is established in due course.

[34] I conclude that the balance of convenience favours P.

Overall justice

[35] The Bank says that there must be doubt as to P's ability to meet his undertaking as to damages given what is said by him about his financial situation. His circumstances seem to be no different from that of many employees who rely on their regular income from employment to keep up their commitments including living expenses. The prospective loss to the Bank lies in having to pay P in circumstances

where he may have been justifiably dismissed; but where work is provided in return, it is not a loss someone who has given an undertaking is likely to have to meet even if they eventually are found to have been justifiably dismissed. The point about the undertaking does not advance the Bank's defence.

[36] Reference is made to the delay between the dismissal on 4 May 2009 and these proceedings which were initiated on 5 June 2009. The Bank knew nothing of the intended grievance until then. Counsel for P accepted some responsibility for that because of his commitment to urgent but unrelated matters. In this case the Bank has not been prejudiced by the delay. Given that, I do not consider that P should be deprived of interim reinstatement just because of Counsel's delay.

[37] Looking at the matter more broadly, it seems P (and possibly his partner) may have been drunk and argumentative at the restaurant and there may have been a brief physical altercation in Mr & Mrs A's vehicle on the way home that was quickly resolved. Events at the restaurant and at P's house could barely support a justified dismissal. The no doubt well meaning concern of P's colleagues for his partner, at least for most of them, may be founded on an exaggerated understanding of the incident in the car. It cannot be confidently said that what happened in the car will amount to serious misconduct in P's employment. Reinstatement is sought and in light of its primacy as a remedy it is appropriate to order interim reinstatement.

Conclusion

[38] I make an order based on P's undertaking for the interim reinstatement of him to his previous position, pending further order of the Authority. The order is effective from Monday 29 June 2009.

[39] The Bank raised the possibility that P, if successful here, might be reinstated to another Branch. The employment agreement includes provision for the Bank to transfer P to another branch, but I accept counsel's submission that the circumstances described in that provision are not applicable here.

[40] Counsel for P sought an order prohibiting the publication of the applicant's name, his partner's name or other identifying information. Counsel for the Bank did not object. I think the better course is to prohibit the publication of the names of both the respondent and the applicant and his partner: neither counsel objected to that

approach so I make that order pending disposition of the substantive grievance. It should not be assumed that a non-publication order will continue beyond then.

[41] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority