

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Mafa Papali'i (Applicant)
AND Cadbury Confectionary Limited (Respondent)
REPRESENTATIVES Poi Teei, for Applicant
Paul Tremewan, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 8 February 2005
SUBMISSIONS 23 February 2005, 10 March 2005, 16 March 2005
DATE OF DETERMINATION 22 March 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] Mr Papali'i used to work on the afternoon shift at Cadbury's factory. Between January 2003, when he started there, and September 2004 he established himself as a good worker. Unfortunately in September 2004 he got into an altercation with another worker on the factory floor. When this came to the attention of Human Resources Manager, Stephen Meek, he investigated and decided that Mr Papali'i had physically attacked, threatened and intimidated the other worker. Cadbury's Code of Conduct provided that such behaviour amounted to serious misconduct and so Mr Meek dismissed Mr Papali'i.
- [2] Mr Papali'i does not feel that the matter was properly investigated and disagrees with Mr Meek's conclusions. He is upset that well before this incident, he had asked his supervisor for help in dealing with the other worker but did not get the support he needed. He says therefore that he has a personal grievance of unjustified dismissal.
- [3] All this also came at a very bad time for Mr Papali'i as his baby son was seriously ill in hospital and he and his wife were already stretched trying to cope with this and care for their other two children as well.
- [4] My task now is to review the process Mr Meek followed in order to decide whether the dismissal was justified. The issues for me to determine are:
- whether Cadbury conducted a full and fair inquiry into the alleged incident;
 - whether, as a result of that process, it was open to Mr Meek to conclude that serious misconduct had occurred;

- if so, and in all the circumstances, whether it was open to the respondent to dismiss Mr Papali'i;
- if not, whether Mr Papali'i contributed to the personal grievance situation by his conduct and what if any remedies he is entitled to.

Mr Meeks's inquiry

- [5] Mr Meek produced all the notes from his investigation to the Authority. Those notes are the principal source of the following summary.
- [6] On the evening of Thursday 16 September 2004 a member of the afternoon shift, Mr B complained to the Shift Manager, Terry Harrison, that he had been in an incident with Mr Papali'i involving grabbing of uniforms, bad language and raised voices. He said he felt unsafe as a result. Mr Harrison immediately suspended both men on pay and reported what he had heard to Mr Meek. Mr Meek was off site on Friday 17 September but was able to contact Mr Papali'i at home and told him that the matter would be addressed on Monday.
- [7] Mr Meek and Mr Harrison interviewed Mr Papali'i on the Monday afternoon. Mr Meek and Mr Harrison then talked to Mr B and two other witnesses to the incident before re-interviewing Mr B and Mr Papali'i.
- [8] Both interviews with Mr Papali'i consisted of a series of open-ended questions in which Mr Meek simply asked Mr Papali'i to give his account of what had happened. Mr Papali'i responded by saying that Mr B fiddled with the computer which controlled the production process in Mr Papali'i's work area. If production in Mr Papali'i's work area had been affected he would have been held responsible so he asked Mr B to stop. Mr B ignored him. A brief argument ensued. Mr Papali'i did not mention any intimidation or threats although he agreed that he had grasped Mr B's uniform whilst remonstrating with him. He also said that Mr B struck him; Mr B's version was that he gave Mr Papali'i a light slap.
- [9] Other witnesses' accounts contained additional details. Most significant were comments by two bystanders that they recalled that Mr Papali'i had raised his arm as though to strike Mr B, before others intervened. Mr Meek did not tell Mr Papali'i this or anything else that the other witnesses had said. Nor did he put any allegations to Mr Papali'i for comment at either meeting. These are serious procedural flaws. Mr Papali'i could not respond fully without knowing what he was to respond to. (I note also that Mr B made no mention of Mr Papali'i raising his arm against him.)
- [10] Mr Meek did ask Mr Papali'i "why he had grabbed Mr B." In the course of his second interview, Mr Papali'i brought up that he had previously gone to his supervisor (Mr McLean) for help regarding Mr B's attitude. Mr Meek met briefly with Mr McLean to ask him about this. Mr McLean confirmed that Mr Papali'i had raised concerns with him about four weeks earlier and that he had spoken to Mr B about them. Mr Meek left it at that; the entire record of this interview was two or three lines of notes. He did not ask Mr McLean the nature of the concerns or whether had followed up to see if the problem was addressed.
- [11] Unbeknown to Mr Meek, Mr McLean did know other something else which was, in my view, relevant. He knew that Mr B was a relatively new and young staff member whose attitude, behaviour and work practices had been causing serious problems between him and other co-workers. Not only was he said to be difficult to work with, but his refusal to follow instructions had caused major disruption to production. On a previous occasion, his failure to follow an instruction led to the line being shut down for some time. The team had complained to Mr

McLean and in response management had worked with the whole group, including Mr B, to address the issues.

- [12] The problems Mr Papali'i experienced with Mr B when he moved into his work area were a repeat of the earlier issues and this was what he wanted Mr McLean to address. At the time of the incident between him and Mr B, he had heard nothing more from Mr McLean and believed his request had gone unanswered.
- [13] All this was, in my view, relevant to the inquiry but because Mr Meek's interview with Mr McLean was not sufficiently thorough, he missed it. I conclude that Mr Meek failed to follow up adequately on the information Mr Papali'i gave him about the previous problems between him and Mr B.
- [14] At the end of the interviews, Mr Meek and Mr Harrison discussed the information they had gathered. They had formed a view that he had not been provoked and showed little remorse, which they construed as meaning that he thought his actions were justified.
- [15] They concluded that Mr Papali'i had grabbed or attacked Mr B and intimidated him, and that these actions were serious breaches of the Code of Conduct. Mr Meek and Mr Harrison then met for the third time with Mr Papali'i and told him of their conclusions, and that the penalties for these breaches could be instant dismissal.
- [16] They then asked him whether he could give them any reasons why they should not dismiss him over these breaches. Mr Papali'i (MP in this extract from Mr Meek's notes where Mr Meek is SM) told them:

MP I can't afford to lose my job I have a sick boy in hospital. I was trying to do my best and trying to do my job. I am really sorry this has happened because you guys are so busy, it has taken so much of your time. I like working here and I never meant to hurt anyone. Want to know was it threatening to two people?

SM (Ans. No just KB.)

MP It will never happen again. It's just finished with it was one of those things.

SM Thanked MP, we will consider what he had to say."

- [17] Even here, towards the conclusion of the third interview and at the end of Mr Meek's inquiry, Mr Papali'i was not told precisely what he was said to have done. Mr Papali'i's confusion over the specifics of the allegation against him was tellingly revealed in his question about whether he was accused of attacking one or two persons. Unfortunately, Mr Meek did not pick up on this cue that Mr Papali'i was unclear about what was being alleged against him. Instead of stopping, clarifying the allegations and seeking Mr Papali'i's comments he carried on regardless to the next stage of the process.
- [18] This was a final brief discussion between Mr Harrison and Mr Meek in which they considered:
- that Mr Papali'i did not have any blemishes on his work record;
 - that he was considered 'a valuable contributor';
 - their conclusion that there had been a breach of the Code of Conduct;
 - Mr Papali'i's family situation (his baby son was in intensive care at the time) and the fact that this was probably a reason for him to lose his cool perhaps quicker than usual;
 - that employees have a right to not be exposed to violence at work.

[19] They decided to dismiss and told Mr Papali'i in a brief meeting later that day. Also later that day, Mr Burgess was given a formal warning. On 22 September the Company wrote to Mr Papali'i recording the reasons for the dismissal.

Conclusions

[20] I have no doubt Mr Meek set out to conduct a thorough enquiry. Unfortunately his interviewing techniques let him down. He failed to put the allegations or the other witnesses' accounts to Mr Papali'i for comment. Because his interview with Mr McKean was so cursory in nature, he also failed to get all the relevant information from him. These are serious procedural flaws and lead me to conclude that Cadbury did not conduct a full and fair inquiry into the allegations against Mr Papali'i.

Was it open to Mr Meek to conclude that serious misconduct had occurred?

[21] Mr Meek did not have a full response from Mr Papali'i and he had not gathered all the necessary information from Mr McLean. This meant that he did not have the whole picture. He did not have enough information to proceed to a decision and should not have done so. It was not therefore open to him to conclude that serious misconduct had occurred.

Was it was open to the respondent, in all the circumstances, to dismiss Mr Papali'i?

[22] Because I have already found that it was not open to Mr Meek to conclude that serious misconduct occurred, the dismissal is unjustified. It was not open to Mr Meek to dismiss Mr Papali'i at all. However, I make some further comments about the circumstances.

[23] Assuming for a moment that Mr Meek had in front of him all the information that came out at my investigation meeting, and that nothing new would have come out if Mr Papali'i had had a chance to hear the allegations against him, I still consider it uncertain that the dismissal would have been justified. The first reason for this is the disparity of treatment between the two workers involved in the incident; although Mr B had also touched Mr Papali'i he was warned rather than dismissed. In addition I consider insufficient weight was given to the following factors:

- Mr B's conduct, which though probably not malicious, was certainly very provoking. On a previous occasion, his failure to heed a direction had caused the line to be shut down for some time. If it had happened this time, Mr Papali'i would have been held responsible;
- The fact that Mr Papali'i had asked for help to deal with Mr B and had been ignored, so that management shared responsibility for the incident which arose;
- Mr Papali'i's difficult personal circumstances and his need for support during this time.

Summary

[24] I conclude that:

- the inquiry was not full and fair;
- it was not open to Mr Meek to conclude that serious misconduct had occurred; and
- it was not open to the respondent, in all the circumstances, to dismiss Mr Papali'i.

[25] Mr Papali'i has established that he does have a personal grievance. I must now determine remedies.

Remedies

[26] Contributory conduct is the first issue here. Even in cases (like this one) where a dismissal is unjustified, the actions of the person who has been dismissed may be taken into consideration in determining remedies. Section 124 of the Employment Relations Act 2000 sets out:

“124 Remedy reduced if contributing behaviour by employee

Where the Authority or the Court determines that an employee has a personal grievance, the Authority or the Court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,-

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.”

[27] The Court of Appeal has explained how this works in the case of *Ark Aviation Ltd v Newton* [2001] 1 ERNZ 133. At paragraph [43] of that decision the Court stated:

“The present case is one where the employer has dismissed the employee for misconduct without having conducted a fair and reasonable inquiry into its legitimate concerns. ...In our view, matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation, or fault on the part of the employee resulting in the dismissal. They will then form part of the ‘situation which gave rise to the personal grievance’... There is no threshold...that requires such knowledge or awareness to derive exclusively from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of dismissal.”

[28] Although Mr Meek did not have the full picture in front of him, he did have some reliable information. Mr Papali’i’s own account confirmed that there had been a heated exchange between him and Mr B. Also, as both parties agree, Mr Papali’i is older than Mr B as well as being taller and bigger in build. In my view, given his greater stature and maturity he should have known that he was going to seem intimidating to Mr B. Although these factors are not enough to justify dismissal, they do amount to contributory conduct. I am satisfied that remedies should be reduced by 20% as a result of this contributory conduct.

[29] The remedies sought are reinstatement, lost earnings and compensation for hurt and humiliation.

Reinstatement

[30] Reinstatement is the primary remedy in cases of unjustified dismissal and if sought, must be provided for unless it is impracticable. Cadbury is strongly opposed to reinstatement. The first reason for this is that Mr Papali’i waited more than two months before seeking reinstatement. The company says that this indicates that he does not genuinely want his job back. I do not agree. Two months was not an excessive time for Mr Papali’i to find and brief a lawyer and for his lawyer to make a formal claim of reinstatement. I am satisfied that Mr Papali’i’s claim is genuine.

[31] Cadbury also submits that reinstatement is inappropriate in cases involving serious misconduct in particular where there has been violence or the threat of violence, or breakdown in workplace relationships. However, because of the inadequate process Mr Meek followed neither violence nor even the threat of violence has been properly established. As for the relationships in the workplace, other staff members (including a supervisor) came forward during my investigation to tell me how well thought of Mr Papali’i was and how there had never been any suggestion of inappropriate behaviour from him before. Mr Meek and Mr Harrison

also confirmed that in his relatively short time at the factory, Mr Papali'i was a good worker. None of this evidence suggests that workplace relationships have irretrievably broken down. There is nothing to suggest that major problems are likely to arise if Mr Papali'i is returned to the workplace.

[32] It is also relevant to the claim of reinstatement that Mr B was not dismissed. Since Mr Meek's investigation was not sufficiently thorough to establish that Mr Papali'i's conduct was of a more serious nature than that of Mr B, I see no reason why the final outcome for the two men should differ. I also note that while there was contributory conduct, it was not at a high level and was not sufficient to make me doubt that reinstatement could work.

[33] The company has not convinced me that reinstatement would be impracticable in this case. Therefore **I order that Cadbury Confectionary Limited immediately reinstate Mr Papali'i to his former position or one comparable.**

Lost wages

[34] Dismissed workers must make all reasonable efforts to mitigate their losses. At the time of the investigation meeting Mr Papali'i was still unemployed, which I find surprising when the job market is so buoyant. He did not volunteer much information about what he had done to find work and even when I questioned him, he told me very little. He has not convinced me that he has done enough to mitigate his losses. For this reason, **I decline to make any award at all of lost wages.**

Compensation

[35] Because of his personal situation this dismissal could not have come at a worse time for Mr Papali'i. In addition, as he told me, he had previously considered himself a good worker and found it very embarrassing to be dismissed.

[36] Taking all these factors into consideration, if there had been no contributory conduct I would have awarded Mr Papali'i the sum of \$10,000.00. However because of his actions, I deduct 20% from this figure. **Cadbury Confectionary Limited is ordered to pay to Mr Papali'i the sum of \$8,000.00 in terms of s.123 (c) (i) of the Employment Relations Act 2000.**

Summary of orders

[37] **Cadbury Confectionary Limited is ordered to pay Mr Papali'i the sum of \$8,000.00 compensation for hurt and humiliation and to reinstate him to his former position.**

[38] I remind the parties that if they need help in sorting out the arrangements for Mr Papali'i's return, they may go back to mediation.

Costs

[39] I leave it to the parties to discuss this issue but if it cannot be resolved they have 28 days in which to request that I determine it.