

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Kerry Rudman (Applicant)
AND Feltex Carpets Limited (Respondent)
REPRESENTATIVES Karina S Tifaga, Counsel for Applicant
John Button, Advocate for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 16 August 2004
DATE OF DETERMINATION 13 April 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Kerry Rudman says he was unjustifiably dismissed on 18 November 2003 from his employment with the respondent. He sought reinstatement to the same or a similar position; compensation for hurt and humiliation in the sum of \$15,000; reimbursement of lost wages; a penalty for an alleged breach of clause 43.7 of the Collective Employment Agreement and costs.

[2] The respondent denies the dismissal of the application was unjustified and so declined to meet his claims.

[3] The parties attempted to resolve their problems but were unable to do so.

A brief history

[4] The applicant began employment with the respondent on 8 November 1999 as a creeler in the company's Christchurch woven plant. On 26 April 2001 Mr Rudman was issued with a written warning for abusive language. The warning clearly stated *the warning will remain active for a period of 12 months*.

[5] A verbal warning was issued to the applicant on 18 July 2003 for ... *not complying with Rule 32.3* which relates to notification by the employee of absence and a breach of House Rule 4.12 relating to continual lateness.

The events of 7 November 2003

[6] Towards the end of the shift at around 5.45am Mr Walters, the shift manager, went through the creels in the gripper area and observed that the end of shift clean up had not been done. He asked Darryn Murphy if he would clean up around the creels under the mezzanine floor.

[7] Mr Waters continued his rounds of the creels on grippers 8 and 9. He judged that the creel area here also needed cleaning up and spoke to the applicant asking him to clean the area. Mr Rudman responded by asking why it was always him that had to clean up, and Mr Walters said that he was not the only employee who cleaned up this area. At that point the applicant told the shift manager to "fuck off". Mr Walters was taken aback by the applicant's reaction and withdrew to consider the situation. He looked back and observed Mr Rudman beginning to clean the area as he had been asked.

[8] Perhaps that should have been the end of the matter. However, while Mr Walters was observing the applicant he saw Mr Philpott go up to Mr Rudman. Following a brief exchange Mr Walters saw the applicant throw the broom he was using down and walk away from Mr Philpott. As the shift was at its end Mr Walters decided to let the matter lie and speak with the applicant at the beginning of the next shift which was to start at 6pm the same day.

[9] After the shift briefing which ended at about 6.20pm Mr Walters told the applicant that he wanted to meet him at 8.45pm to discuss the incident on the previous shift. The applicant responded by saying that Mr Walters could say what he wanted right there, finishing his statement by saying *just go and write your fucking warning and give it to me*.

[10] Mr Walters again asked Mr Rudman to come to the meeting with a delegate but was told by the applicant to *fuck off*. A verbal altercation at relatively close range took place. Mr Walters challenged the applicant about his abusive attitude to supervisors but Mr Rudman walked off.

[11] Mr Walters approached the Union delegate, Mr Paston and advised him of the incident with the applicant. He asked for his assistance and advised that he intended to suspend Mr Rudman pending an inquiry.

[12] Both Mr Walters and Mr Paston went to gripper 9 where the applicant was working. Mr Walters called to Mr Rudman who did not respond. He then asked the technician to stop the loom. Once the loom was stopped Mr Walters again asked the applicant to come down off the loom so they could talk. Mr Walters told Mr Rudman that he intended suspending him pending an inquiry into the previous incident.

[13] Mr Walters says that Mr Rudman said *you can all get fucked* and walked away. Mr Walters says he asked Mr Paston to see the applicant off the property and to ensure he was all right.

[14] Mr Walters says that he typed out the summary of events leading to Mr Rudman's suspension virtually immediately. He spoke to Mr Sparks, the head site delegate, who he says told him (Mr Walters) that he was not to worry about not being able to give the applicant the reasons for the suspension and that he (Mr Sparks) would inform Mr Rudman.

The employer's investigation

[15] Mr Powell, the weaving shift manager, began to investigate the matter on 10 November 2003. For reasons of alleged potential bias and following an approach from Mr Bob Brough, the Union Field Officer, Mr Stewart, the Plant Manager, withdrew Mr Powell and appointed Mr Marc James to conduct the investigation.

[16] An investigation meeting took place on 17 November 2003 and Mr James made it clear that all previous meetings were void and that he was starting from scratch. The applicant was represented by Mr Sparks and Mr Brough attended as an observer. The minutes of the disciplinary meeting were made available to the Authority and their validity was not challenged by the applicant. At the meeting it was clarified that the point at issue did not relate to refusing to undertake a lawful instruction but rather that the applicant had breached House Rule 6 in that he had employed

indecent or offensive behaviour. It is clear from the minutes also that the applicant had the opportunity to present his view on the incidents and to advance his explanations for his behaviour. Mr Sparks, as the applicant's representative, also had the opportunity to address the meeting on behalf of his fellow member. It was agreed that the meeting would reconvene at 6pm the following day to deliver the company's decision.

The issues

[17] The issues the Authority is required to resolve in this particular matter are:

- Was the applicant's behaviour such that it was capable of being fairly judged as amounting to serious misconduct; and
- Did the employer conduct a full and fair inquiry into the incident including giving serious consideration to the applicant's explanation; and
- Did the employer rely on a "expired" warning in coming to its decision to dismiss the applicant; and
- In the event that the applicant is successful what, if any, adjustments to remedies are required.

Analysis and discussion

[18] I have considered and weighed the evidence in this case with considerable care as some matters are relatively finely balanced. The language used by Mr Rudman falls short of being indecent, nor was it directed personally to Mr Walters. It was however, clearly offensive and amounted to a rejection of Mr Walters' right to manage. In short, Mr Rudman rejected Mr Walters' authority.

[19] I find that the employer, after an initial false start to its inquiry, did undertake a full and fair investigation into the matter. It provided Mr Rudman with the opportunity to discuss his personal difficulties and took into account the medical evidence he produced. The respondent ensured the applicant was represented and having heard from the applicant, the respondent took several hours before coming to its decision to dismiss. I find the procedures followed meet the required standard.

[20] Mr Rudman advanced his argument regarding what he calls *Claytons Managers* yet conceded that Mr Walters was *the boss*. I do not accept Mr Rudman's argument regarding confusion in the chain of instructions because Mr Rudman had worked in this plant under similar situations for some three and a half years.

[21] On the issue of the medication prescribed by Mr Rudman's doctor and the potential for it to cause occasional aggression in the 2/3 weeks after commencement, I reject the argument as the medication said to give rise to some possibility of aggressive behaviour was Paxam. Mr Rudman was in fact prescribed Celebram and the data sheet on that product does not mention this possible, short term side effect.

[22] Turning to the written warning issued in April 2001, I find that that warning had clearly expired when the incidents at the heart of this case arose. That this warning was not removed from Mr Rudman's personnel file once it had expired strongly suggests very poor administration. That is however a far cry from alleging the warning was relied on to dismiss Mr Rudman. I find it was not. The behaviour of the applicant on 7 November 2003 was I find, sufficient in itself of amounting to serious misconduct.

The determination

[23] The relevant law to be applied in circumstances such as these was clearly set out in the able submissions of both representatives. In particular I have been mindful of *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA). I find that the employer was entitled, on the findings of a fair and full investigation, to make a finding of serious misconduct and therefore to elect to dismiss the applicant summarily.

[24] Mr Rudman does not have a personal grievance and the Authority is unable to award him the remedies he seeks.

[25] In respect of the applicant's claim for a penalty in regard to the respondent's failure to remove an expired warning from his personnel file, I decline to award a penalty. However I suggest that the respondent review its procedures in this area without delay if it has not already done so.

Costs

[26] Costs are reserved and in the event that the parties are unable to reach agreement Mr Button is to have 28 days to lodge and serve his memorandum and Ms Tifaga a further 14 days to lodge and serve her reply.

Paul Montgomery
Member of Employment Relations Authority