New Zealand Employment Relations Authority Decisions

Sturzaker v Ballance Agri-Nutrients Limited (Wellington) [2017] NZERA 2056; [2017] NZERA Wellington 56 (20 July 2017)

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Last Updated: 29 July 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2017] NZERA Wellington 56
3000095

BETWEEN GARRY STURZAKER Applicant

AND BALLANCE AGRI-NUTRIENTS LIMITED

Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Meikle, Counsel for Applicant

Gillian Service, Counsel for Respondent

Investigation Meeting: 22 and 23 June 2017 at New Plymouth

Additional Submissions 26 June 2017 from Respondent

27 June 2017 from Applicant

Date of Determination: 20 July 2017

Employment relationship problem

[1] Mr Sturzaker was employed by Ballance Agri-Nutrient Limited (Ballance) at its Kapuni Plant in New Plymouth for approximately 14 years as a Process Operator until he was dismissed on 30 March 2016 for verbally abusing his supervisor.

[2] The incident that caused Mr Sturzaker's dismissal occurred on 23 February

2016. Mr Sturzaker was in a meeting that day with his Shift Supervisor Ray Markham, the Kapuni Plant Manager John McKay and Production Coordinator Sam Stewart to discuss why Mr Sturzaker had not reported to work as rostered the previous day.

[3] When Mr McKay asked why Mr Sturzaker was not at work the previous day, Mr Sturzaker said he took the day off to ensure he did not go into overtime hours

because Mr Markham told him that employees were not to work overtime. Mr McKay then asked Mr Markham to respond. Mr Markham said *"that's not quite right"* then he was cut off from saying anything else by Mr Sturzaker who had become visibly angry and spoke over him.

[4] Mr Sturzaker stood up and in a raised voice said to Mr Markham *"you are a fucking liar and you are not worth the skin you are living in"*. Mr McKay, Mr Markham and Mr Stewart say Mr Sturzaker spoke these words in a venomous manner then abruptly left the room.

[5] Mr Sturzaker's said he became angry because Mr Markham had called him (Mr Sturzaker) a liar, when (from his perspective) Mr Markham was the liar. Mr Sturzaker told the Authority that he was just speaking the truth by pointing that out.

[6] When questioned by the Authority about his actions Mr Sturzaker did not accept that anyone else in the 23 February 2016 meeting was entitled to express their view on what he said had occurred. From Mr Sturzaker's perspective they already all knew what had happened, because they were aware of Mr Markham's advice to staff about overtime, so Ballance management had no right to question him about it.

[7] Mr Sturzaker went so far as to suggest that Ballance, by meeting with him on

23 February to discuss why he had not turned up to work the previous day, Ballance management had bullied, harassed and attempted to intimidate him.

[8] I do not agree with Mr Sturzaker's view about that. There was nothing improper or inappropriate about the way Ballance engaged with Mr Sturzaker on

23 February to discuss his absence from work on 22 February.

[9] Ballance commenced a disciplinary process which initially involved two disciplinary allegations. During the disciplinary investigation Ballance removed one of its disciplinary concerns.

[10] That left one allegation of serious misconduct that Mr Sturzaker's comments to Mr Markham breached Ballance's Code of Conduct because he had engaged in *"direct verbal abuse of any manager, supervisor, employee, contractor or consultant"*.

[11] Mr Sturzaker denied directing verbal abuse at his supervisor, Mr Markham. Mr Sturzaker said his comment to Mr Markham was not abusive so was not capable of being viewed as serious misconduct. Alternatively Mr Sturzaker said that even if he had engaged in serious misconduct, he should not have been dismissed for it.

[12] Mr Sturzaker was represented during the disciplinary process by his union, E tū. One of Mr Sturzaker's co-workers Mr Andre Moore (an E tū delegate) and Ms Jennifer Natoli (an E tū organiser) both represented Mr Sturzaker.

[13] The first disciplinary meeting was held on 11 March 2016, the second on

22 March 2016 and the third meeting, at which Mr Sturzaker was dismissed, was held on 30 March 2016.

[14] Mr Sturzaker claims his dismissal was unjustified. Mr Sturzaker said he was dismissed for swearing which he said was normal in the workplace.

[15] Ballance says Mr Sturzaker's dismissal was justified. It says Mr Sturzaker's behaviour went beyond just swearing and amounted to direct verbal abuse of his supervisor, which was identified under the Code of Conduct as serious misconduct.

Issues

[16] The issues for determination were:

(a) Was Mr Sturzaker's dismissal justified?

(b) If not, what if any remedies should be awarded? (c) What if any costs should be awarded?

Was Mr Sturzaker's dismissal justified?

The test of justification

[17] The justification test in s.103A of the Employment Relations Act 2000 (the Act) requires the Authority to objectively assess whether Ballance's actions, and how it acted, were what a fair and reasonable employer could have done in all the

circumstances at the time Mr Sturzaker was dismissed.[1]

1 Section 103A(2) of the Act.

[18] When assessing justification the Authority must have regard to Ballance's compliance with its good faith obligations in s.4(1A) of the Act and to each of the four procedural fairness tests in s.103A(3) of the Act because a fair and reasonable employer is expected to comply with its statutory obligations.

Compliance with good faith obligations

[19] Section 4(1A) of the Act required Ballance to provide Mr Sturzaker with access to relevant information and an opportunity to comment on that before he was dismissed.

[20] Ms Natoli asked Ballance to disclose copies of all relevant information but says she did not receive copies of everything. Mr McKay says he did disclose everything but he did it in an informal way by handing some documents to Mr Moore and some to Ms Natoli.

[21] However Ballance failed to keep a complete record of exactly what documents were disclosed, how each document was disclosed, when each document was disclosed or to whom each document was disclosed. Ballance was therefore unable to prove that hard copies of all relevant documents had been disclosed to Mr Sturzaker before he was dismissed.

[22] Although this failure would normally undermine an employer's ability to

justify a dismissal, in this case it does not.

[23] The requirement in s.4(1A) is to give *"access"* to information. I am satisfied Ballance did give Mr Sturzaker *"access"* to all relevant information because all relevant information was provided to Mr Sturzaker at least verbally, if not also by hard copy.

[24] A review of the transcripts of the disciplinary meetings (prepared by Mr Sturzaker based on his representatives' recording of the meetings) and testing of the evidence given by the witnesses who attended the disciplinary meetings, established that all relevant information considered by Mr McKay was discussed with Mr Sturzaker during the disciplinary process.

[25] Mr Sturzaker therefore had access to relevant information and a reasonable opportunity to respond to it before he was dismissed.

Compliance with procedural fairness requirements

[26] Section 103A(3) sets out minimum procedural fairness requirements which the

Employment Court has referred to as 'tests'.

[27] Section 103A(3)(a)-(d) of the Act requires an employer to sufficiently investigate its concerns, raise its concerns with the employee before they are dismissed, give the employee a reasonable opportunity to respond to its concerns and genuinely consider any explanations the employee has provided before the employee is dismissed.

[28] Section 103A(4) of the Act enables the Authority to consider other

'appropriate factors'. Section 103A(5) of the Act prohibits the Authority from finding that a dismissal is unjustified solely because of minor procedural defects that did not result in unfairness to the employee.

[29] Ballance complied with its obligations under s.103A(3) of the Act.

[30] Mr McKay sufficiently investigated Balance's concerns by speaking to Mr Sturzaker immediately after he swore at Mr Markham to try and understand what had happened from Mr Sturzaker's perspective. It also went through a fair and proper disciplinary process before dismissing Mr Sturzaker.

[31] Ballance set out its specific disciplinary concern in a letter to Mr Sturzaker. The disciplinary allegation letter explained that his comment to Mr Markham potentially amounted to direct verbal abuse of a supervisor which under the Code of Conduct was viewed as serious misconduct.

[32] Mr Sturzaker was on notice that summary dismissal was a possible outcome of the disciplinary process if Ballance concluded his comments to Mr Markham amounted to serious misconduct.

[33] The disciplinary letter recorded some background issues involving inappropriate conduct by Mr Sturzaker which had not given rise to disciplinary action previously but which had caused Ballance to decide that a disciplinary process was required to address his 23 February comments.

[34] Mr Sturzaker was advised of his right to representation and was fully supported by his union throughout the process. He actively participated in all stages of the disciplinary process.

[35] Mr Sturzaker had a genuine opportunity to give his explanation to the allegations, to comment on all of the information Mr McKay was considering and to put forward other matters he wanted Mr McKay to consider.

[36] The evidence did not support Mr Sturzaker's claim that Mr McKay predetermined the outcome of the disciplinary process. Mr McKay approached the disciplinary process with an open mind and genuinely considered Mr Sturzaker's explanations and representations before deciding to dismiss him.

[37] Mr McKay had genuine reasons based on reasonable grounds for deciding not to accept Mr Sturzaker's explanation about why his comments to Mr Markham did not amount to serious misconduct. There was sufficient evidence available to Mr McKay to enable him to fairly and reasonably reach that conclusion.

[38] Ballance advised Mr Sturzaker of its preliminary view that he had engaged in serious misconduct and that dismissal was a likely outcome. Mr Sturzaker was given an opportunity to address these preliminary findings before a final decision was made about his ongoing employment.

Substantive justification

[39] Serious misconduct is conduct which fundamentally undermines the trust and confidence which is inherent in an employment relationship.

[40] Ballance identified the sort of behaviour it considered would be fundamentally destructive of the employment relationship by setting out examples of serious misconduct in its Code of Conduct, which was circulated to all employees.

[41] The Code of Conduct is expressly incorporated into Mr Sturzaker's terms and conditions of employment and his offer of employment, and the Collective Agreement as well as the Kapuni General Terms and Conditions of Employment. Mr Sturzaker confirmed he was aware of and familiar with the Code of Conduct.

[42] Ballance bears the onus of establishing on the balance of probabilities that it held a genuine view based on reasonable grounds that Mr Sturzaker's behaviour

amounted to serious misconduct. Ballance must also establish that its conclusion about that was one that a fair and reasonable employer could have reached in all the circumstances.

[43] Mr McKay did not accept Mr Sturzaker's view that his comments to Mr Markham were not capable of being viewed as direct verbal abuse. Mr McKay was present when the comments were made.

[44] Mr Sturzaker jumped up and stood over Mr Markham. Mr Sturzaker directed his anger and comments at Mr Markham who remained seated. Mr Sturzaker cut Mr Markham off after Mr McKay had asked Mr Markham to give his view of Mr Sturzaker's explanation about why he had not been at work the previous day.

[45] Mr Sturzaker's comments were on the face of it abusive of Mr Markham, were specifically directed to Mr Markham, they were said in an angry, aggressive, intimidating manner, and could be objectively viewed as an attempt to demean and undermine Mr Markham.

[46] Mr McKay did not accept Mr Sturzaker's claim that his comments to Mr Markham were not serious because it was just swearing. Mr McKay accepted that swearing was common place but said that Mr Sturzaker went beyond simply swearing at Mr Markham.

[47] Mr McKay concluded that what was said and how it was said and the context within which it was said was more serious than mere swearing. Mr McKay was clear that Mr Sturzaker was not dismissed for simply swearing.

[48] I agree with Mr McKay that the comments Mr Sturzaker admits he made directly to Mr Markham can objectively be viewed as being abuse or abusive in the circumstances in which they were made. Mr Sturzaker's actions therefore fell within the serious misconduct category in the Code of Conduct.

[49] Mr McKay did not accept Mr Sturzaker's view that he was just speaking the truth about Mr Markham. Ballance did not agree that Mr Markham was a liar or that Mr Sturzaker's comments to Mr Markham were factually correct. A fair and reasonable employer could have reached that conclusion based on the evidence that was available to Mr McKay at the material time.

[50] Ballance has established on the balance of probabilities that it was objectively entitled to conclude that Mr Sturzaker had engaged in serious misconduct because his admitted comments to Mr Markham amounted to direct verbal abuse of a supervisor.

[51] The Employment Court has accepted that an employee who told his employer to *"go and get fucked"*,2 or who told a supervisor to *"fuck off"* had engaged in conduct that was capable of being viewed as serious misconduct because it had fundamentally undermined the essential trust and confidence in the employment relationship.3

[52] Ballance was entitled to reject Mr Sturzaker's claim that he only acted in the way he did because he had been ambushed by Mr McKay, Mr Stewart and Mr Markham.

[53] Mr Sturzaker knew these three people well. Mr Stewart was a friend of his. The conversation took place in a calm, quiet, familiar setting. It was an informal discussion and there had not been any suggestion of disciplinary action resulting from the discussion.

[54] Mr Sturzaker was just asked to explain why he had not reported to work the previous day as rostered in circumstances where he had not applied for and had not been granted leave.

[55] It was open to Ballance to reject Mr Sturzaker's claim that he had been provoked by Mr Markham's alleged *"lying"*. Mr Markham, who had been asked to respond, only said five words in a calm and non-accusatory manner. That cannot reasonably be seen as provocation.

[56] Mr McKay did not accept Mr Sturzaker's claims that his comments towards Mr Markham were part of Balance's normal workplace culture. There was no evidence of any other employee abusing a supervisor or manager in the same or similar way Mr Sturzaker did to Mr Markham.

[57] The only reliable evidence of another instance of an obscenity being directed at managers involved Mr Sturzaker calling Mr Markham *"an arrogant cunt"* then

storming out of training Mr Markham was running in July 2015.

2 *Reed v Smith and Garthwaite* (1997) 5 NZELC 98, 451.

3 *Dodd v DE & LM Spence Ltd t/a Pak N'Save* [2002] NZEmpC 173; [2002] 2 ERNZ 572.

[58] When that occurred in July 2015 Mr Markham addressed it by calming Mr Sturzaker down then making it clear to him that his comment was unacceptable and inappropriate. Mr Sturzaker apologised and undertook it wouldn't occur again.

[59] In light of that assurance Mr Markham decided not to take the matter further so did not inform his manager of the incident at that time. This incident therefore did not come to Mr McKay's attention until mid-December 2015.

[60] In mid-December Mr Sturzaker again became angry towards Mr Markham when Mr Markham had a discussion with Mr Sturzaker about the need to take annual leave over the Christmas period. Mr Markham and Mr Sturzaker both agreed to escalate the annual leave issue to Mr McKay to resolve.

[61] During the meeting with Mr McKay, Mr Markham and Mr Sturzaker about the annual leave issue, Mr Markham referred to Mr Sturzaker's inappropriate comments in July 2015 and to the anger Mr Markham claimed Mr Sturzaker had expressed the previous day towards him (Mr Markham) over the annual leave issue.

[62] Mr McKay dealt with this information by making it clear to Mr Sturzaker that he was not to swear at Mr Markham again and that if he did then *"it would be taken further"*. Mr McKay did not take any further action in light of Mr Sturzaker's agreement that he would act appropriately towards Mr Markham in future.

[63] In mid-December 2015 Mr McKay put Mr Sturzaker on notice that swearing and aggression towards Mr Markham would not be tolerated and that further action would be taken if such behaviour recurred. When Mr Sturzaker repeated his behaviour Ballance was entitled to take disciplinary action over it.

[64] There was sufficient information available for a fair and reasonable employer to conclude that Mr Sturzaker's comments

were personally directed at Mr Markham, were abusive, unprovoked, unacceptable and amounted to serious misconduct as defined in the Code of Conduct.

Was dismissal within the range of reasonable responses?

[65] Dismissal is usually one of the potential options available in response to

serious misconduct because of the employee's engagement in conduct that has

fundamentally undermined the trust and confidence inherent in the employment relationship.

[66] However whether dismissal is justified depends on the particular circumstances of each case. Just because Mr Sturzaker engaged in serious misconduct it does not automatically follow that his dismissal is justified.

[67] Ballance bears the onus of establishing that dismissal was one of the potential disciplinary outcomes that fell within the range of responses available to a fair and reasonable employer in all the circumstances of this particular case.

[68] The 'range of reasonable responses' approach means that what some people may view as a harsh dismissal may nevertheless still be a justified dismissal.

[69] I accept Ms Service's submissions that dismissal was within the range of responses that a fair and reasonable employer could have imposed in all of the circumstances at the time Mr Sturzaker was dismissed.

[70] Mr McKay did carefully consider all of the mitigating factors Mr Sturzaker put forward. However Mr McKay had a genuine belief based on reasonable grounds for concluding that dismissal was the appropriate outcome.

[71] Mr McKay did not accept Mr Sturzaker's submission that working long hours and fatigue had caused his outburst because when it happened Mr Sturzaker had just had 35.5 hours off work. Part of Mr Sturzaker's normal duties involved working long hours during a turnaround period so this was an expected part of his role.

[72] The meeting on 23 February also took place around 9am at the beginning of his shift, shortly after his day off. Mr McKay concluded that Mr Sturzaker would likely have been less tired after his day off and because the incident occurred shortly after he had started his shift so his explanation of tiredness did not excuse his conduct.

[73] Mr McKay had a reasonable basis for concluding that Mr Sturzaker's conduct was not simply a flash of anger caused by tiredness but was instead aggressive, insolent language that had the effect of belittling and undermining Mr Markham in front of his colleagues. Mr Markham was understandably shocked by Mr Sturzaker's outburst towards him.

[74] It was reasonable for Mr McKay to have rejected Mr Sturzaker's claim that he was ambushed or provoked during the 23 February meeting. Mr Sturzaker was told that the meeting was an informal discussion with him to understand what had occurred the previous day, not a disciplinary meeting.

[75] Those who had been involved in the situation which gave rise to Mr Sturzaker absenting himself from work on 22 February were present at the meeting so that everyone involved could discuss what had happened with a view to avoiding confusion in future. This was an appropriate way to proceed.

[76] I accept Mr McKay's evidence that he expected that there would be a discussion to resolve the matter and that once the situation had been clarified everyone would get back to work. Mr Sturzaker's response was an extreme overreaction to a low key informal discussion his employer was having with him.

[77] Mr McKay was entitled to conclude that it raised questions about what else would set Mr Sturzaker off in future because he had lost his temper over Mr Markham merely saying *"that's not quite correct"* in a calm and conversational manner.

[78] A fair minded employer could reasonably have been concerned Mr Sturzaker would not act appropriately in the future, particularly if issues arose that Mr Sturzaker felt were unfair to him or did not agree with.

[79] Mr McKay rejected Mr Sturzaker's suggestion that his behaviour should be excused because he had been *"wound up"* about two previous events. One event involved a bet with another employee. The other event occurred when Mr Sturzaker felt he had been unfairly blamed for a health and safety incident.

[80] Neither event was relevant to Mr Sturzaker's conduct towards Mr Markham. Both had been resolved some time prior to the incident on 23 February. A fair and reasonable employer could have rejected this excuse and also have considered it concerning that these sorts of historical and irrelevant events could result in Mr Sturzaker abusing his supervisor months later.

[81] Mr McKay took into account that Mr Sturzaker was a long serving and valuable employee who was a good worker and gave him appropriate credit for those mitigating factors. However Mr Sturzaker's work ethic was not the issue.

[82] Mr McKay was understandably concerned about Mr Sturzaker's attitude. He had failed to adhere to the undertakings he had given Mr Markham in July 2016 and Mr McKay in mid-December 2016.

[83] I accept Ballance's evidence that Mr Sturzaker had received what it described as informal counselling/coaching by Mr McKay, Mr Stewart and Mr Markham about his attitude, inappropriate anger at work and towards colleagues and emotionally volatile outbursts.

[84] Ballance had made Mr Sturzaker aware of the appropriate standards of behaviour so he knew what was expected of him at work. Mr Sturzaker had agreed on two previous occasions, within seven months of the incident the he was dismissed for, to adhere to expected standards of behaviour, particularly towards Mr Markham. Mr McKay was entitled to be concerned that despite these assurances Mr Sturzaker failed to do so.

[85] A fair and reasonable employer could have concluded that action short of dismissal would not ensure that the conduct Mr Sturzaker was dismissed for did not recur.

[86] Although the matter being discussed at the time of Mr Sturzaker's outburst was a genuine and legitimate workplace concern, Mr Sturzaker became so triggered by Mr Markham uttering 4-5 words that he (Mr Sturzaker) had an angry abusive outburst. Mr McKay was fairly and reasonably concerned about Mr Sturzaker's ongoing emotional volatility.

[87] Mr McKay believed that Mr Sturzaker had not taken full responsibility for his actions because he sought to blame others for the incident. That conclusion was open to Mr McKay because it was a position Mr Sturzaker still maintained when giving his evidence.

[88] Mr Sturzaker appeared to strongly believe that Mr Markham was at fault for all of the problems that occurred and he blamed Mr Markham for his dismissal. Mr Sturzaker did not demonstrate any self-awareness or insights into his conduct when giving his evidence to the Authority.

[89] Mr McKay was concerned that if Mr Sturzaker was triggered he would be likely to act out angrily. That concern lead Mr McKay to conclude that dismissal was an appropriate disciplinary sanction to ensure such episodes did not occur again.

[90] Mr McKay's view about that seems to have been borne out by Mr Sturzaker's post termination outburst. Exactly what Mr McKay feared, which had made him concerned that that Mr Sturzaker would not be able to appropriately manage his emotional state in future, occurred within minutes of Mr Sturzaker's dismissal.

[91] Mr Sturazker told Mr Stewart to tell Mr Markham that Mr Markham was *"a dead man walking"*. He also said to Mr Stewart that he *"might need to borrow a screwdriver from him"*.

[92] The reference to a screwdriver arose from a comment that Mr Stewart had apparently made some time earlier about paramilitary groups in Northern Ireland using screwdrivers to 'kneecap' people.

[93] Mr Sturzaker accepted that his comment was in effect a threat to 'kneecap' Mr Markham but says he did not intend to actually do it. Mr Sturzaker's evidence to the Authority that those comments directed at Mr Markham were made as a joke was not credible.

[94] Mr Sturzaker was in an angry and confrontational mood when he made them. He believed his dismissal was unfair and blamed Mr Markham for his dismissal so he acted out towards Mr Markham in an aggressive and inappropriate manner – exactly the conduct he had been dismissed for.

[95] There was sufficient evidence available to enable a fair and reasonable employer to conclude (as Mr McKay did) that Mr Sturzaker lacked insight into his behaviour, was not remorseful, his apology was not genuine but was given in an attempt to keep his job, and that there was considerable risk of the same sort of issue arising again if he was not dismissed.

[96] I therefore find that dismissal was within the range of reasonable responses available to Ballance in all the circumstances as a response to the serious misconduct Mr Sturzaker was disciplined for at the time Mr McKay decided to dismiss Mr Sturzaker.

Outcome

[97] Ballance's actions, and how it acted, was what a fair and reasonable employer could have done in all the circumstances at the time Mr Sturzaker was dismissed4 so it has met the requirements of the s.103A(2) justification test in the Act.

[98] Accordingly, Mr Sturzaker's personal grievance for unjustified dismissal does not succeed.

What if any costs should be awarded?

[99] Ballance as the successful party is entitled to a contribution towards its actual legal costs.

[100] The parties are encouraged to resolve costs by agreement. If agreement is not reached then Ballance has 7 days from

the date of this determination in which to file a costs application. Mr Sturzaker has 7 days from service of that application to file his costs submissions.

[101] The Authority will adopt its usual notional daily tariff based approach to costs so the parties are invited to identify any factors (such as *Calderbank* letters) which they say should result in the notional daily tariff being adjusted.

[102] This matter involved a two day investigation meeting so the notional starting point for assessing costs is $8,000 ($4,500 for day 1 plus $3,500 for day 2). That notional starting tariff will be adjusted if necessary to reflect the particular circumstances of this case.

Rachel Larmer

Member of the Employment Relations Authority

4 Section 103A(2) of the Act.
