

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Gerry Erin Te Kare (Applicant)
AND Toll New Zealand Consolidated Limited (Respondent)
REPRESENTATIVES Geoff Davenport, Counsel for Applicant
Nikki Dines, Counsel for Respondent
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 20 January 2005
21 January 2005
DATE OF DETERMINATION 10 February 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr Gerry Te Kare, says he has been unjustifiably dismissed and unjustifiably suspended by the respondent, Toll New Zealand Consolidated Ltd (“Toll”). He seeks compensation and reimbursement of lost wages. He also seeks reinstatement. Toll admits dismissing Mr Te Kare but denies that any of its actions were unjustifiable.

Mr Te Kare took up permanent employment with Toll as a hoist operator in October 2002. In January 2003 he was elected as a union delegate. In July 2003 an incident occurred between Mr Te Kare and his supervisor. Mr Te Kare suffered an injury to his lip and accused the supervisor of assault. He also went to the police but decided not to proceed with the complaint. The employer contended that Mr Te Kare had agreed to the course of action which was taken vis a vis the supervisor. Mr Te Kare denied this but I find he did acquiesce. I am surprised that the employer did not take more serious steps with regard to the supervisor; I would have expected at least a verbal warning. This matter is relevant solely because the applicant has contended that there was disparity of treatment. I accept that the treatment, including the nature of the investigation, was disparate but Mr Te Kare did agree to it. That provides the rationale and justification for the disparity.

On 22 January 2004 Mr Te Kare went to see his supervisor, Mr Mike Sumner. Mr Te Kare was concerned about the use of video cameras. Mr Sumner said that Mr Te Kare was angry and abusive and threatened him with physical violence. Mr Te Kare denied making threats. Shortly after the meeting Mr Te Kare telephoned Mr Scott Wilson, the union organiser and asked him to follow up on the video camera issue. Mr Sumner, after speaking to Ms Gracie in HR, also contacted Mr Wilson and told him there had been a confrontation between him and Mr Te Kare. He asked Mr Wilson to come to the site. Mr Sumner said that Mr Te Kare had threatened him and that Mr Te Kare was to go home until a meeting was set up. Mr Wilson accepted that he did not object to this course of action.

Later that day there was a meeting to discuss the incident. Present were Mr Grant Harford, who was to be the decision maker, Ms Sarah Caunter of HR who had been employed by Toll for about three months, Mr Wilson, Mr Te Kare, Mr Robin Kakahi, union delegate, and Mr Sumner, the complainant. I do not need to traverse the events of the meeting in any depth. Suffice it to say that during the adjournments Mr Sumner remained with Mr Harford and Ms Caunter. He says he took no part in making the decision. I accept that. It is quite possible that Mr Harford asked Mr Sumner some questions during the adjournments. Mr Te Kare was obviously not privy to these. The applicant says, quite rightly, that Mr Sumner's remaining with Ms Caunter and Mr Harford during the adjournments, created at the very least an appearance of bias.

In my estimation it also led to actual bias. I do not think that either Ms Caunter or Mr Harford, who struck me as an honest and straightforward person who did his utmost to answer questions as honestly and accurately as his recollection permitted, went into the meeting with any bias against Mr Te Kare. In fact neither of them knew him and their dealings with Mr Sumner had been limited. Credibility was a critical issue in the disciplinary proceedings. I asked both Ms Caunter and Mr Harford how they could possibly have had an open discussion about credibility with one of the parties seated in the same room. The responses I received did not allay my concerns.

The disciplinary meeting was flawed not only by the bias inherent in Mr Sumner's remaining with the decision maker and adviser during the deliberations but also by the fact that matters that were taken into account were not put to Mr Te Kare for his comment, the most pertinent being the relative reputations of the participants in the altercation. Mr Te Kare was given no opportunity to comment on the likely outcome of a finding that he had been at fault – the decision to dismiss was made during an adjournment during which a trespass notice was prepared and given to Mr Sumner to sign.

The decision to dismiss was not one that a fair and reasonable employer could have made.

As to the suspension – for that is what it was – that also was unjustified. A decision to suspend should have been made by an impartial person, not by the other participant in the altercation.

The most important remedy sought by Mr Te Kare is that of reinstatement. This is also the primary remedy. The respondent is opposed to this saying it has lost trust and confidence in Mr Te Kare, that there are health and safety issues and that he would have to work with Mr Sumner. Mr Te Kare had no previous warnings for abusive or unsafe behaviour. It is easy for an employer to say it has lost trust and confidence. The problem for Toll in opposing reinstatement in this case is that the opposition derives solely from the premise that the conclusions it reached about what was said and done during the altercation were correct. I have found that that cannot be so because the investigation was flawed. The same comments apply to the health and safety concerns. Mr Te Kare is to be reinstated immediately to his former position or to a position no less advantageous than the one he held at the time of the unjustified dismissal.

Mr Te Kare also seeks a total of \$20,000 in compensation. This amount is very high. While the evidence showed that there had been distress suffered it did not merit such a high award. The respondent is to pay the applicant the sum of \$4,000 pursuant to s.123 (1) © (i).

Mr Te Kare is entitled to reimbursement of lost wages. This is sought for a period of ten months during which time he had some part time employment for which he was paid \$10,783.19. The difference in income is \$17,017. Should there be any dispute about the amounts leave is reserved to come back to the Authority.

I turn now to the issue of contribution. Whatever happened, it was sufficient to cause Mr Sumner enough anxiety and concern to complain and to suspend Mr Te Kare. It is evident that at the least a heated discussion took place. Mr Te Kare cannot escape some responsibility for that. I set the level of contribution at 50%. The level of remedies awarded is to be reduced accordingly.

The parties should endeavour to resolve the issue of costs. If they cannot do so they should agree on a timetable for the filing of memoranda. If this is not possible I will set a timetable.

Dzintra King
Member of Employment Relations Authority