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Toluta'u v Tegal Foods Limited AA351/10 (Auckland) [2010] NZERA 659 (9 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 351/10 5289425

BETWEEN ANTONELLA TOLUTA'U

Applicant

AND TEGEL FOODS LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Sione Fonua for Applicant Raewyn Gibson for Respondent

3 August 2010

9 August 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Antonella (Tony) Toluta'u worked at the Takanini feed mill of Tegal Foods Limited (TFL) for four and a half years.

[2] On 15 September 2009 he was dismissed for unauthorised absence from work four days earlier.

[3] Mr Toluta'u, accompanied by his union delegate Sonny Taiapa, attended disciplinary meetings on 14 and 15 September. At the conclusion of those meetings, and relying on three previous written warnings given to him, TFL dismissed Mr Toluta'u.

[4] In an application to the Authority Mr Toluta'u states he was unjustifiably dismissed and seeks remedies of lost wages and compensation for humiliation and loss of dignity.

[5] TFL, in reply, states its decision to dismiss Mr Toluta'u was justified and carried out in a fair way after hearing from him and taking account of the explanation that he gave at the time.

Issues

[6] The issues for determination by the Authority are:

(i) whether a fair and reasonable employer would have concluded:

(a) Mr Toluta'u was not given permission to leave work on 11 September 2009; and

(b) Leaving was serious misconduct; and

(c) His conduct warranted dismissal (in light of previous warnings and unauthorised absences); and

- (ii) whether in reaching these conclusions, TFL acted fairly (including following a proper disciplinary procedure); and
- (iii) if TFL's decision or how it acted were unjustified, what remedies should Mr Toluta'u be awarded after considering mitigation and contribution; and
- (iv) costs.

The investigation

[7] The Authority heard oral evidence, under oath or affirmation, from Tony Toluta'u; his older brother, Sosaia Toluta'u, who still works at the feed mill; their father, Atalasa Toluta'u, who worked at the feed mill until being redundant earlier this year; Ahmad Jabbar, a shift supervisor at the feed mill; Francis Anders, a production supervisor; Gregor Botha, the site manager; Wharehoe Lissington, TFL's national feed mill manager; and TFL human resources advisor Damian Treanor.

[8] The witnesses answered questions from the Authority member and the parties' representatives had the opportunity to ask additional questions and provide oral closing submissions.

[9] In preparing this determination I have considered the witnesses' answers given in evidence, the parties' statements and submissions, and relevant background documents provided. As allowed for under [s174](#) of the [Employment Relations Act 2000](#) (the Act), I have not recorded here all evidence and submissions received but state findings of facts and issues of law and express conclusions on the issues for determination.

The events of 11 September 2009

[10] On the morning of 11 September Tony Toluta'u received a message at work about a break-in at his home. He went home, which was about ten minutes away from his workplace, and returned to work around 15 minutes after the 'smoko' break. He told Mr Anders that an 'Xbox' (a video game console) had been stolen from his sleep out and that he needed to leave work again to try and find it.

[11] Mr Anders told him it would not look good to leave work because of his "*record*" and said he would not provide 'cover' for him. Mr Anders said he could not stop Tony Toluta'u leaving but he would report his absence to Mr Botha. He also used the phrase "*do what you want*" or "*do whatever*".

[12] Tony Toluta'u replied that he was not going to wait around and left the premises, stopping briefly to talk to his father, Atalasa Toluta'u. As he ran out of work, he saw Mr Anders heading towards Mr Botha's office.

[13] When Mr Anders reported the situation to Mr Botha, Mr Treanor was contacted and a letter was prepared calling Tony Toluta'u to a disciplinary meeting three days later. Tony Toluta'u returned to work around two hours later and was given the letter later that day.

The test of justification

[14] TFL must justify its decision to dismiss Tony Toluta'u, and how it went about making that decision, as what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal: [s103A](#) of the Act. This requires the Authority to objectively review all the actions of TFL up to and including its decision to dismiss him and assess those actions in light of the statutory test.^[1]

TFL's conclusions

[15] A letter from TFL confirming the dismissal stated Tony Toluta'u was "*guilty of unauthorised absence when [he] left the site*" on 11 September and that Mr Anders had made "*clear*" that Tony Toluta'u was "*not authorised to leave*". This was stated to be "*serious misconduct*". Previous warnings were taken into consideration and he was dismissed on notice.

No permission to leave

[16] I find a fair and reasonable employer would have concluded Tony Toluta'u was not given permission to leave work on 11 September 2009.

[17] Tony Toluta'u says he got no clear instruction or direction not to leave work and he understood Mr Anders' words, "*do what you want*" or "*do whatever*", to mean he was allowed to go.

[18] Mr Lissington accepted those words, taken in isolation, could be ambiguous depending on the tone with which they were said. However it was a point that he checked in the disciplinary meetings. He concluded, on a basis which I accept was reasonable, that Tony Toluta'u could not have genuinely held that view because of the context in which Mr Anders said those words. Mr Anders' other comments - about not providing cover and reporting immediately to Mr Botha - clearly indicated

disapproval of what Mr Toluta'u proposed.

[19] Mr Lissington's notes of the 14 September disciplinary meeting - which he had checked with Tony Toluta'u and Mr Taipa during that meeting - confirm Tony Toluta'u had acknowledged in the meeting that he knew Mr Anders disapproved of him leaving the site at that time.

[20] Mr Jabbar and Sosaia Toluta'u both gave evidence attacking the credibility of Mr Anders. Each described an instance where they believed Mr Anders had approved a course of action but later denied doing so. In Mr Jabbar's evidence, this concerned approval to release workers who had completed their duties before their shift was finished. Sosaia Toluta'u said Mr Anders had approved a day's leave to attend a meeting. Mr Anders was able to respond to their evidence with further explanatory details and I was not convinced any negative finding about his credibility was necessary. I consider it more significant that the evidence of Mr Anders and Tony Toluta'u was largely consistent about what each man said and did on 11 September 2009 - at least as it was given in the two disciplinary meetings shortly after. The differences in their evidence were really about matters of tone or interpretation, a factor I was satisfied Mr Lissington had properly explored before reaching reasonable conclusions.

Leaving was serious misconduct

[21] I find a fair and reasonable employer would have concluded Tony Toluta'u leaving work in the circumstances of 11 September 2009 was serious misconduct.

[22] Such an employer must follow its own employment policies and rules. In TFL's case this included a policy on "*discipline and procedural fairness*". The policy includes "*walking off the job*" and "*unauthorised absences*" as examples of serious misconduct. The conduct of Tony Toluta'u on 11 September was within the scope of those examples. It was also more than a case of "*leaving an assigned place of work without permission*" which is given an example of less serious misconduct in the policy and refers to being at work but not in the right place on the site.

[23] Tony Toluta'u was also aware, or should have been aware, of TFL managers having a heightened level of concerns about any absences by him from work. This is because he and his brother Sosaia were called to a meeting with Mr Lissington and Mr Botha in late August. Mr Lissington had identified the brothers as two of four workers with unacceptably high levels of absenteeism. They were advised that further unauthorised absences would not be tolerated. That knowledge is a circumstance supporting TFL's conclusion that leaving work on 11 September was serious misconduct. His leaving without permission was a deliberate act.

Dismissal warranted given previous warnings and unauthorised absences

[24] I find a fair and reasonable employer would have concluded the previous warnings and unauthorised absences supported a decision to dismiss after the event of 11 September.

[25] Tony Toluta'u had a written warning on 16 April 2008 for disregarding safety policies, a written warning on 11 August 2008 for unauthorised absence for three days, and a final written warning on 17 March 2009 for unauthorised absence.

[26] He accepts the first two warnings but disputes the validity of the final warning, saying he was rushed into signing it.

[27] His father, Atalasa Toluta'u, says he had spoken to Mr Botha's predecessor as site manager in March 2009, explained his son's absence was due to a family matter at the time, and had been reassured no disciplinary action would be taken over it. However Tony Toluta'u subsequently signed the final warning and neither he nor his father took any steps to informally or formally challenge that warning or have it removed from his record.

[28] In those circumstances, even if the account of what was said by the then-site manager is true, TFL's managers were entitled, I find, to take account of that final written warning as one factor in the disciplinary investigation some six months later. Mr Toluta'u must be deemed to have accepted the position as it stood - that is, of having a valid final written warning on his record.^[2] The evidence also suggests that it was a position that he acknowledged and did not challenge, either personally or through his union delegate, in the disciplinary meetings on 14 and 15 September.

A fair procedure

[29] There is no real dispute in the evidence over the procedure followed by TFL in its disciplinary investigation. Tony Toluta'u had adequate notice of the meetings and the reasons for them. He was aware dismissal was a potential outcome. He was accompanied by a union delegate who made representations on his behalf. He was given an opportunity to explain his conduct and respond to the concerns of his managers and supervisors. Mr Lissington checked that he had accurately recorded those responses and made inquiries to ensure he was aware of the work history of Tony Toluta'u and any factors which should be considered in deciding on a disciplinary outcome. Time was taken to consider the alternatives and factors for or against dismissal.

[30] An allegation of disparity of treatment arose during the evidence heard at the Authority investigation meeting. Sosaia

Toluta'u was said to have had more warnings for absenteeism and have been offered incentives to improve his attendance rather than the dismissal imposed on his brother.

[31] I find no disparity of treatment in fact between the two brothers, and, that if there were a disparity, it was not an unjustified one.

[32] Both brothers were called to a performance management meeting in late August and cautioned about continued absenteeism. I accept Mr Lissington's evidence that each brother responded differently to that caution. Sosaia Toluta'u spoke to Mr Lissington within a few days to correct some information, identifying little or no absence in recent months, and then continued to maintain good attendance in the following weeks. The response from Tony Toluta'u was different - as seen in his unauthorised absence on 11 September.

[33] Neither was there a disparity regarding incentives prior to the dismissal of Tony Toluta'u. Mr Lissington's evidence was that he had talked with Sosaia Toluta'u about the prospect of an apprenticeship after a further instance of absenteeism in January 2010. However I accept that was an act of encouragement which Mr Lissington undertook because of his assessment of significant improvements in attendance by Sosaia Toluta'u and his potential. It was not something done at the time of or before the dismissal of Tony Toluta'u, which is the time at which the justification of TFL's actions is to be assessed. Neither is it unjustified in light of the different responses regarding attendance apparent in the two brothers' work records.

Determination

[34] For the reasons given I find TFL's actions in deciding to dismiss Tony Toluta'u on 15 September 2009 and how it went about making that decision, were not unjustified. His personal grievance application is dismissed.

Costs

[35] I was informed at the investigation meeting that Tony Toluta'u had been granted legal aid to bring his claim and he would not normally be liable to an award of costs. If there is any issue as to costs TFL may lodge and serve a memorandum within 28 days of the date of this determination and Mr Toluta'u will have 14 days to lodge a reply. No issues as to costs will be considered outside this timeframe except with prior leave.

Robin Arthur

Member of the Employment Relations Authority

[1] *Air New Zealand Limited v V* [2009] ERNZ 185 at [37].

[2] *Minhinnick v New Zealand Steel Limited* [2010] NZEmpC 30 at [23].

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