

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 49
5549603

BETWEEN FILIPO VAI
 Applicant

A N D GOODMAN FIELDER
 NEW ZEALAND LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Greg Lloyd, Counsel for Applicant
 Jennifer Mills and Emily Kempkers, Counsel for
 Respondent

Investigation meeting: 5 May 2015 at Wellington

Submissions Received: At the investigation meeting

Date of Determination: 6 May 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Filippo Vai, was dismissed by the respondent, Goodman Fielder New Zealand Limited (Goodman Fielder) on 31 March 2015. He claims the dismissal is unjustified.

[2] Amidst other remedies Mr Vai seeks reinstatement. He also does so on an interim basis pending a substantive consideration of his claims.

[3] Goodman Fielder is of the view Mr Vai's claims lack merit and it opposes the application for interim reinstatement.

Background

[4] Goodman Fielder produces food products at various plants. One of those is a sweet bake factory in Palmerston North at which Mr Vai worked as an operator on a slice extruder machine. He was considered an experienced operator having worked for Goodman Fielder for 18 years and performing his current role for 12.

[5] Goodman Fielder says Mr Vai breached its health and safety requirements by extending his hand into an operating extruder in order to clear a blockage on 10 March 2015. After investigating the matter it decided Mr Vai had acted in a manner that threatened his personal health and safety and contravened its policies and procedures. Goodman Fielder concluded Mr Vai did so despite knowledge of its requirements and was no longer confident he could be trusted to comply in future. It concluded his actions warranted dismissal in the circumstances.

Determination

[6] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from the consideration of various questions which culminate with a conclusion to the overarching question of what does the overall justice require.¹

[7] The questions to be considered are:

- (a) Is there an arguable case Mr Vai's dismissal is unjustified;
- (b) If so are there adequate alternate remedies available to Mr Vai and is he likely to attain the reinstatement he seeks after a substantive investigation;
- (c) Where does the balance of convenience lie; and
- (d) What does the overall justice of the case require?

[8] With respect to the question of whether or not Mr Vai has an arguable case the answer is yes. An interim application is decided on untested affidavit evidence. Here the parties disagree about a number of factual issues including whether or not Mr Vai

¹ *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

actually extended his arm into the extruder's hopper and whether the approach he took to the blockage has previously been approved via earlier training.

[9] There are questions about the extent and effectiveness of Goodman Fielder's dissemination of its requirements including possible contradictions in documentation advising how blockages are to be cleared and whether or not Mr Vai attended meetings at which Goodman Fielder's requirements were explained shortly before the incident that led to his dismissal. There are then questions about whether the equipment in question was the subject of a risk assessment and therefore whether anyone knew if Mr Vai's action was hazardous. Finally there are issues that arise from the fact Goodman Fielder saw fit to modify the extruder after this event.

[10] Goodman Fielder's attempts to persuade me the bulk a number of these issues are ancillary and irrelevant to its decision given various admissions by Mr Vai and the resulting destruction of trust and confidence fail to convince me. There is debate about the context in which the alleged admissions were made and whether or not they constitute an acknowledgment of wrongdoing. Indeed the argument is potentially undermined by Goodman Fielder's view Mr Vai did not understand the seriousness of his alleged breaches. Furthermore I am persuaded that even if Goodman Fielder's assertions about what influenced its decision is correct that may not be enough to render the dismissal justified if some of Mr Vai's allegations regarding past practices, behaviours and training are found to have substance.

[11] Resolution of the differences require a testing of evidence that will only occur in a substantive hearing. If Mr Vai's assertions survive that test he will not only have an arguable case but, in all probability, a successful one.

[12] Turning to alternate remedies. Goodman Fielder say ... *the applicant's concern is focused on his recovery of earnings and damages* and it is argued those remedies will remain available should he succeed. In other words there is an acceptable alternate remedy.

[13] I disagree. Mr Vai also seeks reinstatement and the alacrity with which he initiated the claim indicates his desire to return is real. Furthermore he has provided evidence which shows his financial state, in particular his liquidity and cash flow situation, is parlous. The evidence suggests he would be hard pressed to carry himself

over till he receives an award of damages should he be successful and damages do not therefore constitute an adequate remedy.

[14] Turning to whether or not reinstatement is likely should he succeed in a substantive hearing. The answer is yes. As Mr Lloyd submitted Goodman Fielder's arguments as to why reinstatement should not and will not occur are essentially twofold. First they rely on an assumption the company's view of the facts will be upheld. Given the conclusion there is an arguable case that is not a given. Second they rely on an argument Mr Vai can no longer be trusted to act in a safe manner and a return will severely undermine Goodman Fielder's efforts to ingrain a safety culture in the workplace by rewarding unsafe conduct.

[15] With respect to the question of trust I note this is Mr Vai's first infraction in 18 years. He does not show a propensity for unsafe conduct and he has addressed the issue by giving an undertaking he will act as instructed if returned. With respect to the undermining argument I note and accept Mr Lloyd's submission these concerns are overstated. I also note the argument would be severely damaged should Mr Vai's assertions Goodman Fielder's conduct contributed to the situation be found to have validity. Given the evidence (albeit untested affidavit) I have to conclude that should Mr Vai succeed in a substantive investigation permanent reinstatement is a real possibility.

[16] Finally there is the question of where the balance of convenience lies. Goodman Fielder's argument it favours the company is similar to that tendered in support of its assertion permanent reinstatement is not likely to occur. I have already addressed that in [15] above but make a couple of further comments.

[17] Goodman Fielder places some weight on the Authority's conclusion in *Harris v Fonterra Co-Operative Group Limited*.² That case can, I conclude, be distinguished from the present one. There is a significant difference between a supervisor condoning unsafe practices as occurred in *Harris* and a worker who, if some of his allegations are correct, was acting in either an approved manner or in a situation where the correct approach was unclear due to contradictory instructions. *Harris* also involved what was clearly skylarking. This doesn't.

² [2011] NZERA Christchurch 197

[18] Another aspect of Goodman Fielder's position regarding the undermining of its policies is a reference to its *zero tolerance* approach to safety breaches.

[19] The Court has concluded that while *zero tolerance* policies may be admirable in principle, *the devil is, as always, in the detail of what is meant by a policy that has been sloganised*. Such policies cannot be reasonable if they purport to apply to any involvement in the offending behaviour and it cannot be reasonable to dismiss all such employees who are so involved. While the Court accepted an employer is entitled to have a *zero tolerance* policy in the sense that employees engaged in culpable behaviour may be liable to dismissal the policy does not absolve the employer from a critical assessment of all of the relevant circumstances as they applied in the individual circumstance.³ The conclusion there is an arguable case means questions exist as to whether or not that critical assessment has occurred.

[20] Another aspect of Goodman Fielder's approach is an assertion Mr Vai cannot be trusted as he appears incapable of recognising his culpability. If he is correct about acting in accordance with approved practices that is not overly surprising.

[21] Lastly there is the issue of when the substantive investigation can occur. Goodman Fielder comment on the fact the Authority could hear the matter in May yet is incapable of doing so due to Mr Lloyd's commitments. While that is largely true it is not totally so with Goodman Fielder also rejecting a May date. Given issues with both parties I take this no further as the substantive hearing will likely occur late June or early July which is not that far away.

[22] Having considered the affidavits and submissions and for the above reasons I conclude the balance of convenience favours Mr Vai.

[23] My conclusion Mr Vai has an arguable case, that should he be successful his circumstances render damages payable at some future date an inadequate remedy and that the balance of convenience favours him, leads to a conclusion the balance of convenience also favours Mr Vai.

[24] Accordingly I order Mr Vai be reinstated with effect from 7 May 2015 to his position of operator 2 at Goodman Fielder on an interim basis pending the outcome of the substantive matter. While so engaged Mr Vai is to adhere to any lawful and

³ See for example *Housham v Juken New Zealand Limited* [2007] ERNZ 183 (EmpC) at [25]

reasonable instruction given by his employer and especially any that may pertain to how he is to clear any blockages the extruder may suffer.

[25] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority