

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 300/07
5039424

BETWEEN FA'AMOANA AFUIE
 Applicant

AND FYRAN MARINE LTD t/a
 Fyran Boats (a wholly owned
 subsidiary of Caspex
 Corporation Ltd)
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Iuni Sapolu for Applicant
 Jo Phipps for Respondent

Investigation Meeting: 8 May, 9 May, 17 July 2007

Further information 23 July 2007
received

Determination: 1 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This employment relationship problem has arisen as a result of an altercation in the workplace between Mr Afuie and his co-worker Mr Kapoor. It ended when Mr Kapoor sustained an injury to his nose and was put off work (on ACC) for three days. Mr Kapoor claimed that his injury was caused by Mr Afuie, who had head butted him. Mr Afuie agreed that he and Mr Kapoor struck heads but said that this was accidental.

[2] The incident was investigated by Factory and Production Manager Chris Pascoe and Human Resources consultant Robyn Commins. They interviewed Mr Afuie and Mr Kapoor as well as two other staff members who had reported that they witnessed the incident. The other witnesses gave accounts very similar to that of Mr Kapoor. Mr Pascoe and Ms Commins concluded that they must accept that Mr Afuie had head-butted Mr Kapoor. They also concluded that unless they dismissed Mr

Afuie, they would be seen to condone violence in the workplace. Mr Afuie was dismissed for serious misconduct.

[3] Mr Afuie claims that the investigation into the incident was not a fair one and that Mr Pascoe and Ms Commins should have accepted his account of what had happened in preference to those of the other men. He says that his dismissal is therefore unjustified.

[4] Part way through my investigation into his personal grievance Mr Afuie raised a separate claim that the holiday pay he received at the end of his employment was incorrect. In response Fyran Marine Ltd reviewed their pay records and concluded that rather than owing Mr Afuie holiday pay they had in fact overpaid him, and counter claimed accordingly.

Issues for determination

[5] Section 103A of the Employment Relations Act 2000 provides that:

“...the question of whether a dismissal...was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[6] In order to justify a dismissal for serious misconduct an employer must demonstrate that it reached a genuine and reasonable belief that serious misconduct did in fact occur. The employer must also demonstrate that in all the particular circumstances of the case a fair and reasonable employer would have dismissed.

[7] Other than in a clear case of self defence there can be no question that a deliberate assault in the workplace will amount to serious misconduct. There has been no assertion here that Mr Afuie acted in self defence. His case is simply that the injury to Mr Kapoor was caused by the two men accidentally colliding heads. The issues for determination are therefore:

- i. Whether Mr Pascoe and Ms Commins formed a reasonable and genuine belief that Mr Afuie deliberately head butted Mr Kapoor;
- ii. Whether in all the circumstances at the time a fair and reasonable employer would have dismissed Mr Afuie and
- iii. Whether Mr Afuie's final pay was correct.

Did Mr Pascoe and Ms Commins form a genuine and reasonable belief that serious misconduct had occurred?

[8] It was in May 1987 that Mr Afuie first went to work in the boat building enterprise that is now operated by the respondent. Apart from a short break in service he worked there until he was dismissed on 5 December 2005. The business was taken over by the respondent in July 2005 but most of the staff (including Mr Pascoe) transferred to the employment of the new company. At the time of dismissal Mr Afuie had been a leading hand for some time and was acknowledged by all to be a very skilled and experienced boat builder.

[9] At lunchtime on 1 December Mr Afuie and his son were sitting in the factory canteen eating when they heard Mr Kapoor using offensive language. Mr Afuie's son was only 15 at the time and was employed on a casual basis. Mr Afuie was concerned at the use of this language in the hearing of the boy and asked Mr Kapoor to stop. A brief argument ensued, before Mr Kapoor left and returned to the factory. Shortly after Mr Afuie followed Mr Kapoor and found him at the rear of the factory.

[10] Mr Kapoor was perching or leaning on a workbench against the back wall of the building, talking with another staff member (Mohammed) who was a couple of metres to one side of him. Mr Afuie approached Mr Kapoor and stood immediately in front of him. Further heated discussion took place. This much is not materially in dispute, nor is it in dispute that the heated discussion ended with Mr Kapoor being taken to the doctor with a bleeding nose.

[11] Mr Pascoe was on his own lunch break when the incident occurred and was off site. He told me that he received a phone call from Chris Wilmoth, Projects Manager, telling him that Mr Afuie had head butted Mr Kapoor and to get back to

work quickly. When Mr Pascoe returned he took Mr Afuie aside and asked him what had happened. He says Mr Afuie responded:

“that he got angry and was angrily taking and nodding his head. Dinesh had stood up from the bench and they collided heads. I said to Moana that as it was serious I would have to suspend him.”

[12] Mr Pascoe then called Ms Commins (who provides human resources services to the Caspex Group) and was advised by her to set up meetings for the next day with relevant witnesses. Mr Pascoe asked around the staff and found that (in addition to Mr Afuie and Mr Kapoor) three other individuals claimed to have witnessed the incident: Mohammed Hussein, Andrew Chamberlin and one other, who declined to be interviewed.

[13] Mr Pascoe arranged with Mr Hussein and Mr Chamberlin to interview them the next day. As for Mr Kapoor, he had already been taken to the doctor's when Mr Pascoe arrived back at the factory but later in the day he called in to drop off his ACC form and medical certificate. Mr Pascoe observed that Mr Kapoor's nose was swollen and still bleeding slightly. He arranged to interview him on the Friday also.

[14] Mr Pascoe telephoned Mr Afuie that evening and asked him to come in to work for the next day so that he and Ms Commins could take a statement from him. Mr Pascoe's evidence was that he told Mr Afuie it was a serious matter and that he could bring someone with him but Mr Afuie does not recall this.

[15] Mr Afuie arrived alone on the Friday. Ms Commins suggested he should have a support person but he said he was happy to continue alone. She and Mr Pascoe proceeded to interview Mr Afuie. The respondent's notes of the interview which followed record that Mr Afuie reported:

“Dinesh [Kapoor] was leaning on the back bench in a slightly bent position and as Moana [Afuie] was talking he was nodding his head as he tried to get his point across, as Dinesh stood up he hit his nose on Moana's forehead. He didn't see any blood until he was in the front office.”

[16] Mr Kapoor told Mr Pascoe:

“Moana was really mad by now and head butted me in the nose. Mohammed was still there and he helped me, there was blood all over the place it made a real mess. They had to pull Moana off me. I was taken to the medical centre where they gave me 3 days off work.”

[17] The other two witnesses were also interviewed on the Friday. Andrew Chamberlin is recorded as saying that he was at the side doorway of the factory (several metres away) and he:

“saw Moana with his face very close to Dinesh, yelling, although he couldn’t hear what was being said. He could tell Moana was getting furious screaming at him, really in his face. The he looked over a little while later and saw Moana head butt Dinesh.

He saw Dinesh hold his nose, there was blood everywhere...”

[18] Mr Hussein reported:

Moana was yelling at him, Dinesh was leaning against the backbench with his hands in his pockets. Moana came up really close and said don’t swear in front of my son, Dinesh said your son is not my problem, Moana was yelling loudly and then Moana head butted....[it was] deliberate, Moana was very mad at him.”

[19] Also as part of the investigation Mr Pascoe and Ms Commins inspected the area where the incident was alleged to have taken place. They found blood spattered *“one and a half to two metres from the bench where Dinesh said he had been leaning.”*

[20] Mr Pascoe and Ms Commins decided to meet with Mr Afuie again. Mr Pascoe telephoned Mr Afuie’s home on the Sunday night and left a message with his wife to the effect that he was to come in at 9.30 on the Monday. Mr Pascoe’s evidence is that he believes he told Mrs Afuie that her husband should bring a support person however she has no recall of this.

[21] On the Monday morning Mr Afuie arrived alone. After a short discussion Ms Commins stopped the meeting and told Mr Afuie that she felt that (given the seriousness of the matter) he should have a support person. Mr Afuie arranged for his wife to come and join them. While they were waiting, at Mr Afuie's suggestion, Mr Pascoe and Ms Commins interviewed Mr Afuie's son Ese. He was not present when the incident took place but confirmed that Mr Kapoor had used offensive language in front of him and his father in the lunchroom.

[22] When Mrs Afuie arrived the meeting resumed with Ms Commins saying that the matter was serious and that Mr Afuie might lose his job. She outlined to Mr and Mrs Afuie what was contained in the other three statements and asked whether there was any response. Mr Afuie reiterated for the third time that the two men had collided accidentally. He also referred again to Mr Kapoor's conduct.

[23] Mr Pascoe and Ms Commins took a brief adjournment and discussed what they had heard. Mr Pascoe told me that they were satisfied that Mr Afuie had head butted Mr Kapoor. He also told me:

"I was concerned that if Moana was allowed to stay at Fyran Boats then that would send a message to everyone in the factory that violence would be accepted. We also discussed an earlier incident in which Moana had gotten angry and had physically and verbally intimidated another employee."

[24] Mr Pascoe told me that in his time at Fyran Boats, he had not experienced any staff member striking anyone. On one occasion threats were offered but the individual concerned resigned before disciplinary processes were commenced.

[25] They decided to dismiss and typed up a letter of termination. On reconvening the meeting they advised of their decision and presented the letter. It advised that following an investigation Ms Commins and Mr Pascoe had concluded:

"you followed [Mr Kapoor] to the rear of the factory, had a heated discussion where you yelled at him and then head butted him..."

Your behaviour is deemed to be serious misconduct , no matter what events took place, head butting someone is unacceptable behaviour...

Your employment with Fyran Marine is to be terminated effective immediately.”

[26] Mr Pascoe told me a large proportion of his annual income is based on meeting targets and he knew before he dismissed Mr Afuie that losing him had the potential to impact on his personal financial circumstances. Afterwards he worked in the factory himself to ensure that everything got “out the door” before the Christmas closedown. In addition, as he had feared, dismissing Mr Afuie meant he also lost Ese Afuie as an employee.

Determination

[27] It is submitted for the applicant that the respondent’s inquiry was unfair in the following respects:

- i. He was not formally advised of the nature or details of the complaint or the name of the complainant;
- ii. He was not given medical evidence of the severity of injury to the complainant;
- iii. He was not cautioned regarding the severe consequences he might face if he made a statement nor was he warned that any statement might be used against him;
- iv. He was not advised to seek independent legal advice;
- v. He was not advised to get or provided with an interpreter;
- vi. The decision to dismiss was premeditated;
- vii. The respondent acted in breach of good faith by failing to ask police to investigate the incident.

[28] The applicant challenges the conclusion that serious misconduct occurred. He says that if anything it should be said that the complainant was the aggressor since from a sitting position he suddenly stood to hit Mr Afuie with his head.

[29] In relation to points (i) to (iv) I accept that the respondent handled the matter in a relatively informal way. I also note that the allegations were not put to Mr Afuie

in writing. I consider that this would have been good practice and would have helped to ensure that Mr Afuie was completely clear about what he was required to answer and what his entitlements were regarding matters such as support and representation.

[30] However, this inquiry was narrow in scope. There was no risk of confusion about its subject matter. I am satisfied that Mr Afuie did know exactly what it was about and was able to respond fully on the matters in question. I am also satisfied that he was told, at the start of each meeting if not before, that he was entitled to support or representation if he wished. I note also that Mr Afuie had on at least one occasion served as support person for a workmate in a disciplinary meeting, and so was aware of the purpose of having such a person present. The process was simple and informal but did not lead to any material unfairness to Mr Afuie.

[31] In relation to the issue of the interpreter Mr Pascoe has told me that Mr Afuie was a leading hand of some years experience and had always given the impression that he had a very good grasp of the English language. He was accustomed to giving instructions to his team in that language. (Amongst the workforce at the factory were speakers of many different first languages and the staff communicated with each other in English.) Mr Pascoe said that Mr Afuie had at times acted as an interpreter for other Samoan-speaking staff members.

[32] I am not able to judge Mr Afuie's fluency in English since he gave all his evidence to me through a Samoan interpreter. It may well be that he is not as confident in English as he appeared to Mr Pascoe. However, even if this is the case, I do not think Mr Pascoe can be held responsible for not offering an interpreter to Mr Afuie. I accept that Mr Afuie kept any difficulties he might have had in English well hidden during his time in a leadership role in the factory. It was reasonable for Mr Pascoe to proceed on the basis that Mr Afuie was comfortable using English. Indeed to do otherwise, after their many years of working and communicating together in that language might well have caused offence.

[33] On the issue of whether the decision to dismiss was premeditated, I have noted that when Mr Wilmoth telephoned Mr Pascoe to tell him to get back to the factory, he did say that "*Moana has head butted Dinesh.*" There is therefore the risk that Mr Pascoe did not begin the investigation with an open mind. However, Ms Commins's

involvement in the investigation served to counterbalance this, and no decision was made until all relevant witnesses had been interviewed. I do not accept that the decision was premeditated.

[34] Nor do I accept that the respondent acted in breach of good faith by failing to ask police to investigate the incident. It was not up to the respondent to do this. It was for the respondent to pursue its own investigation, which it did.

[35] In summary, I do find any serious flaws in the respondent's inquiry and disciplinary process. The respondent conducted an adequate and fair inquiry and gathered the relevant information on which to base a decision as to whether serious misconduct had occurred.

[36] I further accept that Mr Pascoe and Ms Commins formed a genuine belief that it had. It was open to them to believe the other witnesses over Mr Afuie (in two of the three cases, Mr Pascoe had worked with them also for some time) and there was no evidence of any ulterior motive to end Mr Afuie's employment. Quite the opposite in fact: he was a very skilled and valuable worker and a great loss to the respondent.

[37] Finally, I accept that the conclusion was reasonable. Apart from anything else, I find it difficult to see how Mr Afuie's forehead and Mr Kapoor's nose could have collided by accident. Mr Afuie is a good two or three inches taller than Mr Kapoor. Even if Mr Kapoor had raised himself from a leaning or perching position to his full height, his nose would have been only at the level of Mr Afuie's chin, and if this were what had happened, it seems unlikely that they would have met with sufficient force to cause the sort of injury and bleeding which occurred. I consider it was entirely reasonable for the respondent to reject the suggestion that the two men collided by accident, much less the suggestion that the complainant was in fact the aggressor.

In all the circumstances at the time, would a fair and reasonable employer have dismissed Mr Afuie?

[38] Once they had come to a genuine and reasonable conclusion that serious misconduct occurred, it fell to Mr Pascoe and Ms Commins to consider all the circumstances.

[39] One matter to be considered under this head is consistency of treatment. Mr Afuie says that there was a disparity between what happened to him and to workers involved in similar incidents who were not dismissed. However he did not provide details of these other incidents. I must therefore accept Mr Pascoe's evidence (paragraph [24] above) that there has not been another similar occasion.

[40] It is not in dispute that Mr Afuie had worked at Fyran Boats for a very long time (even if not for the respondent) and that he was a very skilled and hard working member of the staff. Mr Pascoe and Ms Commins told me that they did reflect on these matters. Balanced against this they also noted the safety implications of what Mr Afuie had done and the serious consequences of being seen to condone violence in the workplace. These factors led them to dismiss.

[41] I accept that all relevant circumstances were taken into consideration. Overall, I conclude that a fair and reasonable employer would have dismissed in these circumstances. I am satisfied that the dismissal was justified.

[42] It has been my assessment that the shortcomings in the disciplinary process were not serious enough to render the dismissal unjustified. In case I am wrong on this point I note that even if the dismissal were found to be procedurally unfair, I consider Mr Afuie's misconduct to be so well established and so serious that this would be a case of 100% contribution on his part, pursuant to s.124 of the Employment Relations Act 2000.

Was Mr Afuie's final pay correct?

[43] It is not disputed that when Mr Afuie's employment was transferred to the respondent it took over outstanding holiday obligations. All employees continued to have a common anniversary (18 December) because the factory had an annual closedown at that time.

[44] Upon his termination in early December 2005 Mr Afuie's holiday pay was calculated as follows: leave balance carried forward 83.5 hours, less leave taken after

18 December 2004, plus 6% of all earnings from 18 December 2004 until the date of termination. This came to a total of \$3,233.75, which was paid out in his final pay.

[45] This was lower than Mr Afuie expected. In particular he believed he was owed at least a further two weeks long service leave. The respondent agrees that Mr Afuie had become entitled to long service leave some time before but says that this figure was included in the balance carried over.

[46] The respondent counter claimed that it over paid him saying that the correct pay on termination would have been 83.5 hours, less days taken, plus 6% of earnings from the first pay week after it took over the business, that is 2 August 2005.

[47] The respondent view is based on a presumption that the leave balance at the takeover point was an accrued balance rather than a physical balance. This would be consistent with the approach used in modern payroll systems however Ms Commins confirmed that the respondent was continuing to use the previous payroll system which was very old.

[48] The pay clerk of the time has left the company and was not available to give evidence. However when I checked Mr Afuie's payslips I found that all of them (from the final payslip of the previous employer through until his termination) bore the same leave balance, 83.5 hours, which indicated to me that it was not continuously updated. I conclude that it is more likely therefore to relate to physical leave (leave owed as at his previous anniversary 18 December 2004.) This means that on termination he would indeed be entitled to 83.5 hours, less leave taken, plus 6% from 18 December 2004.

[49] It follows that the counter claim fails.

[50] Mr Afuie confirmed that he had taken leave at the previous shutdown like everyone else. The effect of this was that he was not challenging the pay clerk's calculations for the period after 18 December 2004, but rather asserting that the leave balance of 83.5 hours was wrong.

[51] The respondent tells me it has no way of checking whether the balance carried forward is correct. This would be a matter for Mr Afuie's former employers. I leave it to Mr Afuie to decide if he wishes to pursue the matter with them.

Costs

[52] This matter is reserved. The parties have a period of 28 days in which to make submissions as to costs.

Yvonne Oldfield

Member of the Employment Relations Authority