

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 83
5316245

BETWEEN BERNARD ANDERSON
 Applicant

AND SILVER FERN FARMS LTD
 Respondent

Member of Authority: P R Stapp

Representatives: P Cranney, Counsel for the Applicant
 T Cleary, Counsel for the Respondent

Investigation Meeting: 17 March 2011 at Whanganui

Submissions Received: By 31 March 2011

Determination: 17 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Anderson was a delegate for the New Zealand Meat Workers Union. He was employed by Silver Fern Farms Ltd at its meat processing plant at Waitotara.

[2] First Mr Anderson has challenged a final warning (dated 30 June 2010) that he was given for an incident that occurred on 27 May 2010 for failing to follow a reasonable request from his supervisor. The reason for the warning was that Mr Anderson left work before the end of his shift. He says he left early because he was assaulted by the supervisor, and this was not taken into account at the time. Also, he claimed that he has been treated differently from his supervisor, who received a verbal warning.

[3] In another matter, Mr Anderson was dismissed on 2 August 2010, for serious misconduct, relating to an altercation that occurred at the end of the shift with other employees on 22 July 2010.

[4] The plant manager and human resources manager became aware of serious allegations against Mr Anderson that were raised with them on Tuesday 27 July 2010. The allegations related to Mr Anderson's behaviour at the end of the night shift on Thursday 22 July 2010 when he allegedly intimidated other employees. He denied intimidating anyone, but says he raised a legitimate concern in his role as a delegate on behalf of himself and other members of the Union.

[5] A number of statements were obtained from witnesses and an investigation meeting was held with Mr Anderson on 27 July 2010. Further meetings were held on 28 July 2010 and 29 July 2010. Between these two latter meetings the Union was advised that Silver Fern's investigation had been concluded and documents of a sequence of events were handed over by the company to the union. The documents disclosed the possibility of serious misconduct on the part of Mr Anderson. The sequence of events was discussed at the meeting on 29 July 2010 and Mr Anderson took issue with some parts of the documents and requested further witnesses to be interviewed. The company complied and obtained further statements from other employees. It concluded nothing came from these statements that would have any material affect on their deliberations and nothing indicated any contradictory information likely to affect the report.

[6] Another meeting occurred on 2 August 2010. Mr Anderson was advised that there was no change in the company's position and that it stood behind the sequence of events report that had been prepared. Mr Anderson was advised that the most probable consequence was a finding of serious misconduct had occurred. He then apologised for his actions and suggested that his move to the day shift meant that he had no Union delegate responsibilities. The meeting was adjourned. When the meeting was reconvened the Union raised an issue in regard to the previous warning dated 2 June 2010 that related to the events of 27 May. Mr Anderson and his Union representative were advised that any decision would be based only on the recently concluded serious misconduct. Mr Anderson was then advised that he was dismissed. This was confirmed in a letter dated 13 August 2010 with the reasons for the

dismissal. That related to serious misconduct under clause 37 of the Collective Agreement involving verbal and/or physical abuse or assault of another person.

Issues

[7] The issues in this matter are as follows:

- a. Was the warning (dated 30 June 2010) in regard to the incident on 27 May 2010 justified in all the circumstances?
- b. Was Mr Anderson treated differently to the supervisor involved in the incident on 27 May to cause any disparity of treatment?
- c. Would a fair and reasonable employer have dismissed Mr Anderson on 2 August 2010 for serious misconduct in regard to the events on 22 July 2010?
- d. Both parties are seeking costs.

[8] The respondent has denied all the claims from the applicant.

The facts

[9] Mr Anderson was given a warning (dated 30 June 2010) for an incident on 27 May 2010. The reason for the warning was related to the belief that Mr Anderson intended and did leave work earlier than the usual finishing time. His supervisor says that he told Mr Anderson twice what the normal finishing time was and that he was to return to his work station. Despite that Mr Anderson says he was told the finishing time was earlier than usual, and he told another employee to stop pushing carcasses in to the work area. I hold that the finishing time was the usual time. In this regard I accept that Mr Anderson was told again the correct time for finishing but refused to accept this and pushed carcasses back out of the work area. He was told to go back to his work station but refused. He left work early. There were claims made about an altercation of pushing, but that was not an allegation relied upon by Silver Fern at the time. Mr Anderson claimed he left early because he says he was pushed by his supervisor. It has subsequently emerged as part of his employment relationship problem separately later when the Union raised it later and included it in the statement of problem filed in the Authority. Further no personal grievance about the warning was raised at the time and was left until after the dismissal. Mr Anderson did make a

note on the warning record dated 30 June that he left after he was pushed in the chest by the supervisor. A statement produced, but prepared for the company's investigation at the time highlights that the supervisor's version in context was somewhat different but that she did push Mr Anderson, and she accepted pushing him was inappropriate for which she received an oral warning. Mr Anderson became aware of this outcome much later. He claims now that he has been treated differently.

[10] Silver Fern conducted an investigation into these complaints. Mr Anderson denied doing anything wrong and contended he was looking after the interests of his members. It was concluded by Silver Fern that there had been a refusal by him to follow a lawful instruction and that Mr Anderson left his work station early. The company considered that this was Mr Anderson's failure to obey a lawful instruction. He was issued with a final warning (dated 30 June 2010).

[11] Unfortunately for the employer the details of the reasoning for the warning were not explicitly stated in the record of warning (30 June 2010) and in the letter of warning (30 June 2010). However, I am satisfied from the notes and the direct evidence that Mr Anderson left work earlier than the usual finishing time was the reason when he had been told the usual finishing time and to return to his work station. The details were read to Mr Anderson at the time according to the direct evidence and supported by the notes. The employer considered mitigation issues. The reasons were different for the warnings given to each employee.

[12] The next matter related to the incidents on 22 July 2010. The company obtained various statements about Mr Anderson's alleged behaviour on 22 July 2010. This behaviour occurred when the chain broke down and jammed, whereupon carcasses had to be stopped from entering the trim area. Mr Anderson advised the person scanning carcasses to scan more carcasses. She refused and Mr Anderson became abusive. Mr Anderson left the trim area and went to the wash room where he had an altercation with the quality assurance assistant supervisor. When the chain was freed Mr Anderson continued to abuse that supervisor until the night shift supervisor intervened. Mr Anderson then abused the scanner again causing the night shift supervisor to intervene again.

[13] Mr Anderson requested additional people to be interviewed and the company complied. It found nothing more from these people to assist Mr Anderson. Mr

Anderson was provided with an opportunity to comment on the company's proposal to dismiss him. The union raised the prior warning. He was then dismissed.

Determination

[14] I will deal with the final warning first. The warning was entirely justified. Mr Anderson deliberately left work early after being reminded of the requirement for finishing time. It was not within his responsibility to change the arrangements. Another person had to fill in his role. I accept at first Mr Anderson's reason for leaving had more to do with the decision by his supervisor to continue processing and that Mr Anderson was looking after the interests of his members. That was at the cause of the altercation between Mr Anderson and the supervisor who was trying to assert her self. The response from the company to issue the warning was open to a fair and reasonable employer based on Mr Anderson leaving early when he would have reasonably understood the usual finishing time, I hold. Also, the company's decision was supported by the Waitotara employees' handbook that makes provision for misconduct which could result in dismissal for a refusal to obey a lawful instruction.

[15] During the Authority's investigation it emerged that Mr Anderson was not given copies of statements and notes provided at the time when he reasonably should have been. However, I find that this was not fatal because the reason relied upon related to Mr Anderson leaving work early which was a known fact at the time and that he had been told the finishing time was the usual time. Also he has now made much of the allegations around the supervisor's push to support his reason for leaving. However, I am satisfied that was put to one side by Silver Fern at the time in regard to Mr Anderson, but actioned against the supervisor separately with an oral warning for that person's behaviour. As such there was no finding on who was responsible and who pushed who first. I am satisfied that Mr Anderson finished early and this was contrary to the instruction he had been given as to the finishing time supported by the notes and direct evidence, compared with Mr Anderson now relying on the push for his reason to leave early, which was raised by him later.

[16] Also, I hold that it was not plausible for Mr Anderson to say that he left because things may have got out of hand (from the incident notes) and when he said in his evidence that he moved away (to the boning room) and simply left work because of the time (his written statement).

[17] Next, the events on 22 July 2010 have been clearly illustrated by the evidence from the company. In this regard Mr Anderson's behaviour at the end of the night shift was serious. It was open to a fair and reasonable employer to reach the conclusions that it did on the information available and relying on misconduct that could result in dismissal in the Waitotara employees' handbook. The employer's response to determine that Mr Anderson's actions amounted to serious misconduct was justified because:

- a. The people directly involved gave information about Mr Anderson's behaviour. There is no reason to suggest they made it up. They reported the behaviour and that has been consistent throughout.
- b. There were at least two other witnesses to the events at the time, and they gave evidence before the Authority. First one was a contractor who referred to a call out for the jammed chain. He heard an argument occurring between Mr Anderson and the quality assurance assistant supervisor in the wash room. He saw them still arguing at the pre-trim area. He saw and heard the night shift supervisor telling them that was enough, and these latter two left for the office, whereupon Mr Anderson started again to abuse the scanner person. The contractor was concerned enough about that to go and get the night shift supervisor. Secondly, the next witness needed to be summonsed for the Authority's investigation. He was a meat worker (broom employee on the chain) employed at the time and attested to being in the wash room during the altercation, hearing raised voices, and hearing swearing and seeing a physical chest push by Mr Anderson on the quality assurance assistant supervisor. He also says he heard Mr Anderson abuse the scanning person. He says he could see she was upset. This witness was challenged and his reliability questioned by the applicant. However the company relied on the witness's information at the time and before the witness was dismissed by the company for dishonesty.
- c. One of the people Mr Anderson asked to be interviewed at the time confirmed that the meat worker referred to above (summoned to the Authority's investigation) saw what happened in the wash room.
- d. Mr Anderson did not see other witnesses but was not able to challenge the veracity of their evidence and reliability of what they say they saw happen.

- e. The differences recalled by the witnesses in regard to the altercation are not significantly such to suggest that the altercations did not occur, I hold.
- f. Mr Anderson accepted at the time that he reacted inappropriately. He was sorry. He did apologise to the scanner person.

[18] I conclude that from the information available to the employer at the time a fair and reasonable employer would have reached the conclusion that serious misconduct had occurred. There were no procedural defects likely to affect the outcome. Mr Anderson's exuberance for his union role did not justify his reaction to the scanner person, the quality assurance supervisor and the night shift supervisor. Furthermore, although he has quite a different view on the events of 22 July he has not been able to produce any sufficient evidence to say that the witnesses and people involved have made up their versions and are unreliable. As such I conclude that the company's decision was justified.

[19] Mr Anderson's claims are dismissed.

[20] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority