

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Raymond Ball (Applicant)
AND New Zealand Dairy Foods Limited (Respondent)
REPRESENTATIVES Rose Alchin, for Applicant
Anthony Drake, for Respondent
MEMBER OF AUTHORITY Y S Oldfield
INVESTIGATION MEETING 23 February 2005
FURTHER SUBMISSIONS 14 March 2005, 18 March 2005
DATE OF DETERMINATION 19 July 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] The respondent employed Mr Ball as a Process Operator from September 2002 until 12 December 2003, when he was dismissed for serious misconduct. This action followed an incident between him and his supervisor on 3 December in which a window in the staff cafeteria was broken and Mr Ball suffered injuries. After an investigation both men were summarily dismissed.
- [2] Mr Ball had previously had an unblemished work record. He says that the incident was not a fight but an unprovoked attack against which he was largely defenceless. He says that he was an innocent party who suffered the consequences of the supervisor being seriously stressed. Mr Ball says that management knew that the supervisor was having trouble coping with the job but failed to address this or to take it properly into consideration before proceeding to dismiss him. He also says that in failing to protect him from a foreseeable assault the company was in breach of its obligations to provide a safe workplace, which in turn gives rise to a disadvantage grievance. He says that his dismissal was procedurally unfair and substantively unjustified, and seeks reinstatement to his position.
- [3] The issues for determination are:
- Whether the respondent conducted a full and fair inquiry into the incident;
 - Whether a decision to dismiss was open to a fair and reasonable employer in the circumstances, including the fact that the supervisor was having difficulties coping with his job, and if not;

- Whether the applicant contributed to the situation which gave rise to the personal grievance and whether reinstatement is reasonably practicable in all the circumstances; and
- Whether there was a breach of the obligation to provide a safe workplace.

Was the respondent's inquiry full and fair?

- [4] The incident came to the attention of the National Distribution Manager Chris Zaayman, during the night shift of 3 December 2003. He made sure that both Mr Ball and Mr Fox did not work the remainder of their shift. The next day Distribution Supervisor Adam Benjamin (to whom Mr Fox reported) conducted interviews with him and Mr Ball. He reported on these to Mr Zaayman. Mr Zaayman decided that he needed to conduct a full inquiry and would do so with Mr Benjamin's help. Also on 4 December Mr Zaayman spoke to Human Resources Manager Robyn Beguely and obtained her confirmation that the process he proposed was satisfactory.
- [5] That process began on 8 December with Mr Zaayman and Mr Benjamin conducting a formal disciplinary meeting with Mr Ball. Mr Ball was accompanied by several union delegates. He was asked about the incident and offered a chance to explain himself. At the end of the meeting he was suspended. Later that day a similar meeting was held with Mr Fox. His account of what had happened was very close to that of Mr Ball.
- [6] A further meeting was held with Mr Ball on 11 December. This time union organiser Mark Apiata-Wade also attended. Mr Zaayman outlined the facts as they had been found and asked Mr Ball for his response. He and his representatives agreed that there was little dispute in relation to the basic facts of what had happened.
- [7] I was provided with several sets of notes recording what Mr Fox and Mr Ball recounted of the incident. Although these were taken by different note takers at different meetings they were all similar and witnesses agreed that they were essentially correct. The following is taken principally from Mr Zaayman's notes of the 8 December meeting.
- [8] On 3 December during his night shift meal break Mr Ball was sitting in the cafeteria eating when he asked Mr Fox what task a fellow team member was on that night. Mr Fox replied along the lines: "*If you were fucking listening I wouldn't have to keep telling you this shit. I'm tired of staff not listening in meetings.*" Mr Ball replied that he had only listened for his own duties. More angry words followed from Mr Fox and Mr Ball answered: "*I'm not in the mood for this shit, I don't have to take this crap.*" Mr Fox replied: "*You'll take whatever crap is coming your way*" to which Mr Ball replied "*Fuck off.*"
- [9] Mr Fox then walked over to where Mr Ball remained eating his dinner and pushed him on the shoulder, asking him if he "*wanted to go*" that is, have a fight. Mr Ball (who was still seated) replied "*whatever*" and tried (unsuccessfully) to move Mr Fox away with a push to his leg. He attempted to carry on with his meal. Mr Fox then flicked or flipped the plate from which Mr Ball was eating and hit him on the back of the head. At this, Mr Ball lost his patience, rose to his feet and pushed Mr Fox in the face. Mr Fox then grabbed Mr Ball and put him through a window. Mr Ball sustained a cut to his shoulder (right through his heavy company jacket) which required four stitches. Others present then broke the two men up, although Mr Fox continued to speak in a threatening manner to Mr Ball. Mr Ball left and went to get treatment for his shoulder.

- [10] The following day, Mr Fox contacted Mr Ball and the two men cleared up the matters between them. Since that time, Mr Fox has done everything he can to assist Mr Ball with the consequences of what happened, including helping him to find work after he was dismissed.
- [11] This case is unusual in that both Mr Fox and Mr Ball were very well regarded workers with no prior history of any employment problems, much less anything as serious as fighting on the job. Both are married men with children. Mr Fox was known as a very capable and skilled supervisor. Mr Ball was known by co-workers (including management) as a quiet, mild mannered person. Mr Fox's own description of him was him "*a really quiet guy, [who] normally is not the sort of person who would retaliate.*"
- [12] My own impressions of Mr Fox and Mr Ball were entirely consistent with the way each had been described in the evidence. Mr Fox was clearly a natural leader with a confident manner. Mr Ball was a reserved, even diffident man with an unassuming manner. Mr Fox is taller and much more powerfully built than Mr Ball. Although a young man himself Mr Fox is older than Mr Ball who is in his late twenties.
- [13] The other relevant matter which was within the knowledge of the respondent during the inquiry concerns difficulties Mr Fox had been experiencing on the job in the period leading up to this incident. In the latter part of 2003 Mr Fox was struggling with problems both at home and at work. He found the role of night shift foreman hard because of short staffing and because there were no managers on duty during the night shift to assist him with any problems which arose. In addition working nights was not helping the difficulties he was experiencing in his marriage. These matters were apparent to others. Delegate Barry Millett told me that normally, Mr Fox was well respected and was not a supervisor with whom members had problems. However, he said, in the three to four months before his dismissal Mr Fox was not himself. Mr Millett knew that Mr Fox was having problems at home and attributed his changed behaviour to this.
- [14] In around July or August 2003 Mr Fox approached Mr Benjamin and told him that he was having personal problems which were affecting his ability to do his job. Mr Benjamin knew already that short staffing was putting extra pressure on Mr Fox. He arranged for him to take two weeks off work to give him a break from the situation. Mr Fox found this helpful but only in the short term.
- [15] Mr Benjamin took all of this seriously enough to mention it at a management meeting attended by Mr Millett sometime around the time that Mr Fox took leave. However there was no further discussion about how Mr Fox was getting on until around 6 November when he approached Mr Benjamin again to say he was not coping with the job. Mr Fox initially asked to be moved to day shift but then changed his mind as he felt the consequent reduction in pay would outweigh the benefits. Mr Fox believes he told Mr Benjamin that the only real solution was for him to step down from the job of supervisor altogether. Mr Benjamin does not recall this but agrees that when they initially discussed a transfer to day shift Mr Fox was prepared to take a position below supervisor level.
- [16] Mr Benjamin considered Mr Fox to be a very good supervisor and did not want to lose him. He made the suggestion that Mr Fox step down from the role of supervisor for a short period. Mr Fox rejected this as he felt that in a temporary situation, people would still come to him for help anyway. Mr Benjamin also suggested that Mr Fox approach the Employee Assistance Programme but Mr Fox did not pursue this suggestion.

- [17] Sometime later in November Mr Benjamin touched base with Mr Fox at shift changeover and was told that he was okay. He and Mr Fox had a good working relationship and he felt that Mr Fox had probably benefited from getting things off his chest.
- [18] Nothing more happened prior to the incident on 3 December, and Mr Zaayman was unaware at the time of what had been discussed between Mr Benjamin and Mr Fox. He became aware of these issues for the first time during the disciplinary process when they were raised by way of background to and explanation for Mr Fox's behaviour.
- [19] Following the meeting of 11 December Mr Zaayman, Mr Benjamin and Ms Beguley discussed the matter between themselves. Robyn Beguely understood "*basically the two employees had been involved in a brawl.*" On the basis of what she was told, she supported a decision to dismiss. On 12 December there was a further meeting with Mr Ball and his representatives at which he was told he was dismissed. Although the dismissal was summary Mr Ball was paid 3 weeks pay in lieu of notice in recognition of the fact that he was the sole breadwinner of a young family.

Determination

- [20] No fault can be found with the essential format of the process followed. Mr Ball and his representatives agree that over the course of the first three meetings he was told the purpose of each meeting, the issues to be discussed, and the possible or likely outcomes. He was also given an opportunity to respond. The respondent had available to it all relevant information.

Was it open to a fair and reasonable employer to dismiss?

- [21] Mr Fox has openly accepted, at all times, that he was the instigator of the incident. However, it was Mr Zaayman's view that even though Mr Fox started the conflict, Mr Ball had a choice about how he responded. He says he concluded that Mr Ball chose to react aggressively and retaliated when he did not have to. He took note of Mr Ball's use of bad language which he felt inflamed the situation. He felt Mr Ball could have taken steps to avoid what happened. In this way, he felt that Mr Ball shared responsibility for what had happened.
- [22] He told me:
- "by essentially giving as good as he got, Raymond allowed the argument to escalate into a brawl. I felt therefore that the appropriate sanction was dismissal."*
- [23] I asked Mr Zaayman what Mr Ball should have done. He told me that he should not have touched Mr Fox, even after being struck. He believed Mr Ball should have got up and walked away. He felt this was still feasible even after Mr Fox had approached Mr Ball and stood over him in his seat.
- [24] Mr Ball's perception of the events of 3 December was that he was a victim of a puzzling and random attack. (Mr Fox confirmed to me, as he had to management at the time, that he had no problems with Mr Ball.) Mr Ball told me:
- "I didn't start the argument, I tried to ignore Dion and stop him from hassling me. I did everything I could to diffuse [sic] the situation. When I retaliated it was in self-defence."*
- [25] Mr Ball told me he felt powerless in the situation although he had acknowledged to Mr Zaayman at the time that he lost his patience which he regretted.

Determination

- [26] When I first saw the statement of problem in this case I was curious as to what arguments the union might advance in support of Mr Ball's case. A dismissal for fighting on the job, in circumstances where company property was damaged and health and safety put at serious risk, seemed likely to be justifiable, especially where a thorough fact-finding process had been conducted under the scrutiny of experienced union delegates.
- [27] As I have already indicated this process did elicit the information needed to make a decision. The respondent was in possession of the essential facts of the incident, as well as relevant knowledge of the work histories and personalities of the two men, including Mr Fox's recent personal and work related difficulties. The question for me to determine is simply whether this information provided reasonable grounds for the respondent to conclude that there was misconduct of such seriousness that Mr Ball's dismissal was justified in the circumstances.
- [28] I have concluded that it did not. In my view, Mr Zaayman was operating under a completely unrealistic expectation that Mr Ball should somehow have managed a situation that was in fact completely beyond his capacity to control. Mr Ball was the subordinate in every way. All the power in the interaction was with the supervisor who was older, bigger, and more confident than Mr Ball. Mr Ball should have been able to rely on Mr Fox for guidance and an appropriate example. Faced with an extreme breach of this trust, in difficult circumstances, he initially did a reasonable job of handling what was happening. Remaining seated, and continuing with his meal, was in my view the least provocative stance to take, and he was of course entitled to sit and have his break.
- [29] Unfortunately this did not work. Mr Fox was determined to fight. I do not share Mr Zaayman's view that Mr Ball could still have extricated himself once Mr Fox was standing over him at the table. I consider that it had already become impracticable for Mr Ball to retreat from the conflict. By the time he rose to his feet and tried to push Mr Fox away, he had been backed into a corner. It was not reasonable for the employer to expect that he would simply remain seated and be hit while he tried to eat, and the force he used (a push, not a blow) was not excessive. It was in my view a reasonable use of force in self-defence.
- [30] I note also that Mr Zaayman saw Mr Ball's use of bad language as a compounding feature of his perceived misconduct. I do not share this view. This was a robust environment in which Mr Ball was responding in the same vein that had been used to him by his immediate manager. It was also a young man speaking. "Fuck off" in the vernacular may simply mean "go away." I also accept (as submitted by Ms Alchin) that "whatever" in its current idiomatic usage is at best equivocal. In many situations it should indeed be understood as a truculent form of "no." I acknowledge of course that tone of voice is critical to conveying the true meaning in such situations but as I have said, after meeting Mr Ball I find it difficult to imagine him taking a provocative tone at all.
- [31] I see nothing in the bare facts of the incident to indicate that Mr Ball "gave as good as he got." Nor is an assumption or inference to this effect reasonable given his reputation and general demeanour. Instead the facts (consistently with what was known of him) indicate that Mr Ball reacted to defend himself against persistent bullying. In such circumstances it cannot be said that his conduct impaired the essential trust and confidence of the relationship. It was not open to a reasonable employer to dismiss him.

Was there a breach of the obligation to provide a safe workplace?

- [32] There can be no argument that Mr Ball's health and safety was endangered by Mr Fox's behaviour. Ms Alchin argues that the risk Mr Fox's conduct posed was foreseeable and that Mr Ball has a further grievance of disadvantage based on the respondent's failure to take steps to manage this risk.
- [33] I do not accept this argument. Although Mr Fox told Mr Benjamin that he was having problems, as set out above, what he said to Mr Benjamin was not sufficient to alert Mr Benjamin to the fact that his behaviour could pose a risk to the team.
- [34] The risk to Mr Ball's health was not foreseeable and for this reason the separate claim of disadvantage fails.

Remedies

- [35] I have concluded that the dismissal was unjustified and Mr Ball has made out a personal grievance. Remedies now fall to be determined.
- [36] Mr Ball claims compensation for hurt and humiliation arising out of the dismissal. It came two weeks before Christmas and three weeks before his third child was due. Mr Ball and his wife had lost their first baby and so for them the period leading up to the due date was already an anxious time. They were also under financial pressure first with Christmas and secondly in meeting the cost of specialist obstetrician care. Mr Ball had planned on meeting some of these expenses by taking the opportunity to work extra hours over Christmas at penal rates. This opportunity was lost to him through the dismissal. He told me that the financial and other worries at this time caused great stress in his relationship with his wife. With Mr Fox's help Mr Ball did find work soon after his dismissal however he has not earned as much as he would have with the respondent. He claims reimbursement of these on-going losses of remuneration.
- [37] Mr Ball also seeks reinstatement. The respondent says that to reinstate would send a message that fighting is acceptable. In addition the respondent says that a lengthy period elapsed between the dismissal and the lodging of the application in the Authority and in the meantime there has been a restructure which means that there is no suitable position available.

Determination

- [38] I do not accept that Mr Ball contributed to the situation that gave rise to his personal grievance. Remedies are not to be reduced on that account.
- [39] Mr Ball is entitled to reimbursement of his lost earnings. I also find in principle that he should get his job back since I do not accept that the necessary trust and confidence in the relationship has been destroyed. Whether this is possible given the respondent's assertions about current and proposed restructuring is not clear as these were not fully canvassed in the evidence. Instead the respondent suggested that (in the event that I find the dismissal to be unjustified and reinstatement to be appropriate) the parties should be referred back to mediation to discuss remedies.
- [40] If it is indeed the case that Mr Ball would by now have been made redundant, this would preclude reinstatement but would impact on remedies for losses arising out of the dismissal. (Recent authority on this issue can be found in *Yukich v Carter Holt Harvey Ltd* [[2004] 1

ERNZ 78] and *Carter Holt Harvey Ltd v Yukich, CA 42/04 4 May 2005.*) In the circumstances I consider the respondent's suggestion that the parties return to mediation to be a sensible one.

[41] The parties are ordered to attend further mediation within 28 days of the date of this determination, for the purposes of discussing remedies (including reinstatement and reimbursement of losses arising out of the dismissal) and costs. Should they find it impossible to reach agreement further submissions on these issues should be provided to the Authority within a further 21 days after that.

[42] I am however able to determine the level of compensation to be ordered for hurt and humiliation. In all the circumstances I consider that Mr Ball is entitled to a substantial award under this head. The respondent is ordered to pay to Mr Ball the sum of \$15,000.00 compensation pursuant to s.123 (c) (i).

Y S Oldfield
Member of Employment Relations Authority