

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 399/07
File Number: 5089466

BETWEEN Raureti Borrell-Johnson
AND UBP Ltd

Member of Authority: Janet Scott
Representatives: Graeme Ogilvie for applicant
 Roger Stewart for respondent
Investigation Meeting: 15 November in Hamilton

Determination: 18 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant says he was unjustifiably dismissed by the respondent. To remedy his alleged grievance, he seeks two weeks' lost remuneration and \$10,000 compensation pursuant to s.123 (1) (c) (i) of the Employment Relations Act 2000.

[2] The applicant also seeks a penalty for breach of the CEA in respect of the respondent's refusal to attend mediation.

[3] The respondent declines the claims and says the applicant was summarily dismissed for serious misconduct.

Background

[4] The applicant has been employed by the respondent on two occasions. The matter now before the Authority relates to his dismissal by the respondent, which ended the second period of his employment.

[5] The applicant commenced the second period of employment with the respondent on 23 March 2006. The applicant worked night shift in the boning room at the respondent's meatworks located at Te Kuiti.

[6] The evidence discloses that the applicant was a good worker with good knife handling skills. He was described as a *natural*. However, the evidence also discloses that the applicant's observance of the hygiene regulations that required him to keep his gear, clothes and locker clean was very poor.

[7] It was the respondent's evidence that the plant, its activities and personnel are subject to stringent hygiene regulations, which are supported by regular inspection and audit procedures. In accordance with this regime, the gear, clothing and lockers of meatworkers are subject to regular (2 hourly), random inspection. When a worker's gear or locker is found, on inspection, to be below the required standard of cleanliness, this is noted on a QA report sheet. On the third such occasion it is the company's practice to issue the offending worker with a warning in accordance with the procedures set out in the collective agreement covering workers at the plant.

[8] The evidence discloses that during the second period of his employment with UBP, Mr Borrell-Johnson received the following warnings:

- 23 April 2006 – verbal warning for failing to inform his supervisor of his absence;
- 30 May 2006 – first written warning, on three occasions his gear had been found to be dirty;
- 11 October 2006 – second written warning, on three occasions his locker was found had been found to be dirty;
- 28 October 2006 – final written warning, on three occasions his gear had been found to be dirty.

[9] On 10 January 2007, the applicant was absent from the workplace. The respondent suspended him for one week in accordance with a provision in the Collective Agreement (CEA) that allows the respondent to suspend an employee as an alternative to dismissal.

[10] Then, on 13 February 2007, following a quality control inspection, Mr Borrell-Johnson clocked up the third in a series of failures in respect of the cleanliness of his locker. The company overlooked this and no action was taken against Mr Borrell-Johnson. However, on 19 February 2007, his locker again failed the QA inspection and the applicant was dismissed from his employment.

[11] It was the applicant's position that his dismissal was unjustified because he was not given any opportunity to discuss the matter. Neither he says was he given any advance notice that he was facing a disciplinary meeting or dismissal and he was not given any opportunity to get advice or to have someone else present at the disciplinary meeting.

[12] It was also the applicant's evidence that he knew he had to keep his gear clean and he was also careful to clean it before putting it away. It was his evidence that he was picked out for inspections and if the company had carried out inspections of other workers, it would have found the gear of those workers to have been in a worse state than his gear. It is also his evidence that at the disciplinary meeting that led to his dismissal, Pere Pou, his supervisor, showed him his knife that had a spot of blood on it. He did not know how it had got there because it had been washed in the normal way. He was also shown his pouch and that had a mark on it as well. It was a rust spot and he had tried to clean it off before but it would not come off. It was Mr Borrell-Johnson's evidence that, after having been shown these items, he was just told that he was dismissed and that he could reapply for his position in three months' time.

[13] Mr Borrell-Johnson said he was gutted at being dismissed. It was embarrassing having to tell his family, friends and work mates why he was not working. He was quite shocked at how quickly he had been dismissed especially as he did not have any idea the company was thinking about dismissing him. He advises that he got a job quite quickly, two weeks after he was dismissed. He seeks two weeks lost remuneration.

[14] Both Pei Whatarangi (night boning room supervisor at UBP) and Pere Pou (night production coordinator) advised the Authority that they had had many discussions with Mr Borrell-Johnson over his unacceptable hygiene practices. Mr Whatarangi said he had even approached Mr Borrell-Johnson's uncle with a view to having him talk to his nephew about it. Both witnesses stated it was very, very

frustrating to have a worker who would not even attempt to wash his gear properly, even after being officially picked up in relation to failures in hygiene on nine occasions in less than one year. All their counselling did nothing to bring home to Mr Borrell-Johnson the need to maintain his gear at an acceptable standard of cleanliness.

[15] It was Mr Whatarangi's evidence that when he arrived at work on 17 February 2007, the technical manager told him that quality control staff had done another random gear check and once again Mr Borrell-Johnson's gear had failed. The matter was passed over to the night production coordinator, Pere Pou.

[16] Mr Pou's evidence was that when Mr Borrell-Johnson's was absent without notice on 10 January, Pei had had approached him. He was frustrated because Mr Borrell-Johnson was already on a final warning. However, he made a case for suspension rather than dismissal. Then when Mr Borrell-Johnson's gear again failed a QA inspection for the third time on 13 February, Mr Pou said he had a discussion with the QA staff and decided to let the matter slide. He met with Mr Borrell-Johnson and told him that he was being given one more chance.

[17] It was his evidence that when he was advised that Mr Borrell-Johnson had failed another gear inspection on 17 February he discussed the matter with Mr Whatarangi and they agreed there was no other choice but to dismiss Mr Borrell-Johnson. However, he said, he also spoke to the technical manager. He did this because he was trying to see if they could let him off again. The technical manager showed him a letter from MAF on the subject of the unacceptability of workers' personal hygiene at the plant and following a discussion it was agreed there was no choice but to dismiss Mr Borrell-Johnson.

[18] Mr Pou said he called Mr Borrell-Johnson to the conference room. He asked Mr Borrell-Johnson if he wanted a representative. Mr Borrell-Johnson declined. He showed him the dirty gear – a knife and pouch with blood on it and a mesh glove with fat ingrained in it, which was smelly. Mr Borrell – Johnson rolled his eyes as if to say, "I've been caught again". He knew it was unacceptable. Mr Pou said he told Mr Borrell-Johnson he was sorry because he was a good worker but had not alternative but to dismiss him. Mr Borrell-Johnson shook his hand and left the plant.

Collective Employment Agreement (CEA)

[19] Mr Borrell-Johnson was not a member of the Te Kuiti Meatworkers' Union however his employment was covered by the collective agreement negotiated between that union and UBP.

[20] Clause 27 of the CEA covers personal conduct and disciplinary procedures. Clause 27.2 sets out examples of offences that will result in dismissal. Such offences include clause 27.2(e):

All parties to this agreement are involved in New Zealand's export food industry, which is dependent on overseas markets for its continued existence. Therefore it is vital that the highest possible standard of work hygiene, personal cleanliness and general tidiness of site, grounds and amenities are consistently maintained. The deliberate refusal to comply with the company's safety and hygiene standards is unacceptable.

[21] Clause 27.4 states:

Disciplinary action will take the form of either a warning, dismissal on notice or instant dismissal. The disciplinary action set out below does not prevent the company from giving employees a final written warning for a first offence if the company regards the breach as serious enough. By agreement between the company and the employee, any other penalty may be imposed such as suspension without pay for a period of time.

[22] Clause 27.5 states:

For offences other than those which would result in instant dismissal disciplinary action will be carried out under the following procedure:

- (a) First offence: A verbal warning will be given by the supervisor or manager. A written record of this will be kept on the employee's file.*
- (b) Second offence: A written warning will be given by the supervisor or manager. A copy of this written warning will be kept on the employee's file.*
- (c) Third offence: A written warning will be given by the supervisor or manager. A copy of this written warning will be kept on the employee's file.*
- (d) Fourth offence: Dismissal notice.*

Verbal and written warnings will lapse after a year from the date the warning was given. Final written warnings lapse two years after the date that final written warning was given.

[23] Clause 27.9 of the agreement provides that at any stage the employee is entitled to have a support person present who may be an official union delegate and at

clause 27.10 it is provided that prior to any employee being dismissed or suspended, the union delegate or deputy delegate will be informed and, if requested by the employee, must be present, together with the employee concerned if the dismissal or suspension is to be carried out. The supervisor or manager will record the time, date and reason for the dismissal or suspension.

Section 103A Test of Justification

[24] The Employment Relations Act 2000 was amended in 2004 by the insertion of a new section 103A:

For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action 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.

[25] In determining this matter I must make an objective assessment of the employer's actions and weigh those actions against those of a *fair and reasonable employer ...in all the circumstances ...at the time....*

[26] The Court has recently examined the test for justification (*Air New Zealand v Hudson* unreported AC 30/06). It was held there that the effect of s.103A is to separate out the employer's actions (including the decision to dismiss) for evaluation by the Authority or the Court against the specified objective standard of what a fair and reasonable employer would have done in the circumstances.

[27] In arriving at a determination in this matter I have had regard to the evidence, the submissions of the parties and relevant case law.

Credibility

[28] Where the evidence of the parties is in dispute it is the evidence of the respondent's witnesses that I prefer. I found the evidence of the applicant to be totally unreliable including his evidence as to his earnings during the first period of his employment with UBP.

[29] I find that the applicant had and has a cavalier attitude to the strict hygiene obligations that were an inherent aspect of his job. He was repeatedly in breach of his contractual obligations in this regard and given the warnings and counselling he received on the subject over a lengthy period there can be no other conclusion than that his actions were deliberate.

[30] For the applicant it is argued that there were numerous procedural problems associated with this dismissal – that there was no full and fair investigation into the matter; that the dismissal relied inappropriately on earlier defective warnings; that the applicant was not offered representation; that the dismissal was predetermined and that it did not conform to the requirements of the CEA in implementing disciplinary e.g. the Union delegate/deputy delegate was not informed prior to Mr Borrell-Johnson's dismissal.

[31] I have considered these submissions but don't accept them for a number of reasons.

- The earlier warnings are not at issue here. Mr Borrell-Johnson never challenged them and the company was entitled to rely on them.
- I accept Mr Borrell-Johnson's gear failed the random QA inspection on 17 February 2007. The company held the gear to show Mr Borrell-Johnson. It is also the case that there was a background of escalating warnings and that Mr Borrell-Johnson was on a final written warning for failed hygiene inspections. Leniency had already been accorded to him in respect of other misdemeanours and failed hygiene inspections over the months of January and February 2007. I am satisfied no further investigation was required other than to put the concerns to the worker and to hear him out before coming to a decision.
- While there was some inconsistency between an earlier statement given by Mr Pou and his evidence given at the investigation meeting as to the gear involved in the 17 February incident, I was satisfied with Mr Pou's credibility and the particularity of his evidence at the investigation meeting - that the blood on the knife would not have led him to dismiss Mr Borrell-Johnson (even given all that had gone before) but the ingrained fat on the mesh glove that was smelly was altogether unacceptable.

- Mr Borrell-Johnson twice told the Authority that the state of his gear (shown to him on 17 February) was “*unacceptable*” although it was also his opinion that it was “*nothing to jump up and down about*”.
- The process followed by the respondent was not perfect but the essence of a fair procedure was present. While the Union delegate was not informed of the proposed disciplinary action, as required by the Collective, I note that Mr Borrell-Johnson was not a Union member. I am also satisfied he was offered the chance to obtain representation which he declined. The critical requirement is that a worker be advised of his right to representation. That requirement was met.

[32] The biggest failing here was the fact that the decision to dismiss Mr Borrell-Johnson was effectively made before he was spoken to by Mr Pou. That normally would lead me to find a dismissal was unjustified. In this case however I have reflected on the employer’s actions and weighed them against the approach that would have been taken by any fair and reasonable employer in these circumstances. I must find that there would not be a fair and reasonable employer in the land that would not have thought in these circumstances “*this is the final straw for Raureti – his number is up*”! A more sophisticated employer would not have admitted this so openly at the investigation meeting.

[33] More importantly, I find that this employer did not want to dismiss this employee and to the very end it looked for ways around its own rules that would have allowed Mr Borrell-Johnson one more chance over and above the numerous chances he had already had and squandered. So while it was the case that the decision was taken prior to meeting Mr Borrell-Johnson I am satisfied that had he had anything to say in explanation or mitigation it would have been considered by the respondent who was most reluctant to dismiss this employee who was an otherwise good worker.

[34] Lastly if I am wrong in my analysis of this matter Mr Borrell-Johnson’s contribution was such that he would have been disentitled to remedies had I found his dismissal to be unjustified.

Determination

[35] Mr Borrell-Johnson's claim is declined. The Authority can be of no further assistance to him.

Penalty

[36] The applicant seeks a penalty for breach of the employment agreement in relation to the respondent's refusal to attend mediation.

[37] The penalty is declined. While the Agreement does refer to resolution of employment problems by referral to the mediation services provided by the Labour Department it does not provide that mediation is mandatory.

[38] The Authority did direct the parties to mediation. The respondent failed to comply with the Authority's direction. However, the Act provides no penalty for a breach of a direction to mediation and that is that. Mr Stewart was advised his non-compliance would be considered in a costs setting.

Costs

[39] The parties are to attempt to resolve the issue between them. If they cannot agree they are to file and serve submissions with a view to having the Authority determine the matter.

Janet Scott

Member of the Employment Relations Authority