

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 433/10
5284984**

BETWEEN VAUGHAN BURGESS
 Applicant

AND CARTER HOLT HARVEY
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Blair, Counsel for Applicant
 David France, Counsel for Respondent

Investigation Meeting: 9 September 2010 at Auckland.

Submissions received: 17 September 2010 from Applicant
 17 September 2010 from Respondent

Determination: 6 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Vaughan Burgess, claimed he was unjustifiably dismissed from his employment with Carter Holt Harvey Limited (“CHH”) following involvement in a fight on 27 August 2009 with a co-worker, Mr John Paterson.

[2] Specifically Mr Burgess says that a fair and reasonable employer would have found that he acted in self-defence when assaulted by Mr Paterson, and not have dismissed him.

[3] Further Mr Burgess says there was disparity of treatment, Mr Burgess having been dismissed and Mr Paterson having received a final written warning as a result of the incident.

[4] CHH says that it carried out a full and fair investigation and that Mr Burgess was found to have committed serious misconduct in accordance with the company Work Rules and was therefore justifiably dismissed. CHH says that a fair and reasonable employer would not have found grounds to support a finding that Mr Burgess acted in self-defence. CHH further says that the disparity of treatment was justifiable.

Issues

[5] The Authority is required to determine the following issues:

- a) Was the decision to dismiss Mr Burgess on the basis of serious misconduct a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 (“the Act”)?
 - a. Was there substantive justification for finding a breach of Work Rule 5 such that dismissal was the appropriate outcome?
 - b. Did CHH unjustifiably fail to take into consideration an explanation of self-defence on the part of Mr Burgess?
- b) Was there disparity in the treatment of Mr Burgess such as to render the decision to dismiss Mr Burgess one which was not available to CHH as a fair and reasonable employer?

Background Facts

[6] Both Mr Paterson and Mr Burgess were employed by CHH at Penrose Mill as Spare Operators, and on 27 August 2009 were engaged in operating the Rewinder machine. Mr Paterson had been employed longer, and was more experienced on the Rewinder machine than Mr Burgess.

[7] Both Mr Burgess and Mr Paterson were members of the National Distribution Union (“NDU”), and as such were covered by the terms and conditions of employment as set out in the Penrose Mill Collective Agreement between CHH and

the NDU, and by the Penrose Mill Code of Employment and Work Rules (“the Work Rules”) .

[8] The Work Rules provided at Rule 5 that:

1. *Fighting or the use of physical violence is prohibited*

If you fight or use physical violence you will be stood down while the matter is investigated. Provocation will not be accepted as an excuse for fighting or violence.

Employees who fight, use physical violence or in other ways injure other employees may be dismissed forthwith.

[9] On 27 August 2009 Mr Paterson was engaged in training Mr Burgess on the Rewinder machine and it was common ground that a verbal incident took place; Mr Paterson stating that Mr Burgess was not responding to his training whereupon he walked away from the Rewinder machine, Mr Burgess stating that Mr Paterson became agitated and started verbally abusing him.

[10] Mr Paterson left the Rewinder machine and entered the smoko hut. Mr Burgess followed Mr Paterson into the smoko hut and an altercation took place between the two men. There were no witnesses to the altercation.

[11] Mr Burgess left the smoko hut and returned to the Rewinder machine. Mr Paterson followed shortly afterwards and joined Mr Burgess at the Rewinder machine. After a short time Mr Paterson left the Rewinder machine and went to see Mr Adams, the Shift Foreman, to whom both men reported.

[12] Mr Adams stated that Mr Paterson reported that there had been a ‘scuffle’ between himself and Mr Burgess. Mr Adams took a statement about what had occurred from Mr Paterson, which he typed up and asked Mr Paterson to read and check. Mr Paterson read, and signed the statement.

[13] Mr Adams said that he noticed a red mark, which appeared to be a graze, on the side of Mr Paterson’s head at this time.

[14] During this interview with Mr Paterson, Mr Franklin, the Production Manager, entered Mr Adam's office. Mr Paterson told Mr Franklin that Mr Burgess had hit him on the side of his head. Mr Franklin said that there was a noticeable red mark above Mr Paterson's ear, and as he was aware that Mr Paterson had recently been involved in a mugging incident as a result of which he had suffered a head injury, he sent Mr Paterson to see the doctor.

[15] Mr Franklin then left Mr Adam's office and Mr Adams proceeded to interview Mr Burgess. Mr Adams took a statement from Mr Burgess, typed it up and asked Mr Burgess to check it and sign it. Mr Burgess did so.

[16] Following these interviews, Mr Paterson and Mr Burgess were suspended on full pay, pending an investigation.

[17] On 28 August 2009 there was a meeting between Mr Paterson, Mr Burgess, and Mr Keepa of the NDU. The purpose of the meeting was to assist the two men to prepare for the investigation meetings which were to be held on 1 September 2009.

[18] Mr Keepa explained to the Authority that it was normal in situations involving two union members for a separate union organiser to be appointed to represent each member. However in this case Mr Keepa said that relations between the two men were cordial and friendly, both wished to support each other to the extent of wanting to have a joint investigation meeting, and consequently he felt that he could represent both men himself.

[19] On 1 September 2009 the investigation meetings took place. Mr Burgess and Mr Paterson were interviewed separately. Present at the meeting with Mr Burgess were Ms Vandersloot, shift delegate, Mr Muller, site delegate and Mr Keepa, union organiser, Mr Franklin and Ms Price, Human Resources Advisor.

[20] Following this meeting, Ms Price telephoned Mr Burgess and Mr Keepa to inform them that there would be a disciplinary meeting on 9 September 2009. Ms Price additionally fully briefed Mr Bendikson, Mill Manager, on the investigation which had been undertaken.

[21] Ms Price also confirmed that she had informed Mr Paterson and Mr Keepa that the disciplinary meeting for Mr Paterson would be held on the same date.

[22] Prior to the disciplinary meeting with Mr Burgess, the disciplinary meeting with Mr Paterson, at which Mr Keepa represented Mr Paterson, took place on 9 September 2009.

[23] At the disciplinary meeting with Mr Burgess on 9 September 2009, Ms Price said, and both Mr Burgess and Mr Keepa agreed, that there was an opportunity provided to review the record of the investigation meeting and to make corrections or alterations. It was confirmed by Mr Burgess and Mr Keepa that these minutes were an accurate record of what had been said at the investigation meeting on 1 September 2009.

[24] During the disciplinary meeting, Mr Burgess was provided with a further opportunity to explain what had happened on 27 August 2009. Ms Price stated that CHH also sought further details of what had occurred for purposes of clarification.

[25] CHH adjourned the meeting with Mr Burgess to consider the explanations provided by Mr Burgess and Mr Paterson at their separate disciplinary meetings. CHH concluded that Mr Burgess had assaulted Mr Paterson, causing an injury to Mr Paterson's head. This conduct on the part of Mr Burgess was held to be a breach of Rule 5 of the Work Rules, and held to be serious misconduct.

[26] The meeting was reconvened and Mr Burgess was advised that his employment was terminated on the basis of serious misconduct, resulting in summary dismissal.

Determination

Was the decision to dismiss Mr Burgess a justifiable decision?

[27] Section 103A Employment Relations Act 2000 sets out the test of justification:

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"

[28] The Work Rules specified at Rule 5 that employees who used physical violence or otherwise caused injury to another employee "*may be dismissed forthwith*". Mr Burgess told the Authority that he was aware of the Work Rules and knew that fighting was not tolerated on site.

Substantive Justification

[29] CHH is obliged to show that the action taken and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. These circumstances include the explanations as provided by Mr Burgess and Mr Paterson.

[30] The first explanations were provided shortly after the incident on 27 August 2009. Mr Burgess states in his signed statement:

I followed him into the smoko hut to calm down the situation; however it escalated to the point where he pushed me into the door. I then kicked him in the leg as he approached me; we also threw a punch at each other...

[31] Mr Paterson said in his signed statement

I proceeded to the smoko hut, where he followed directly behind me. In the smoko room he approached me while shouting at me. As he lent into me, I pushed him away. He then attempted to kick me in the groin, and then swung a punch at my left temple.

[32] At the investigation meeting on 1 September Mr Burgess provides a variation in the explanation of what had occurred in that he no longer refers to a kick or a punch having taken place. The revised explanation is recorded as Mr Burgess having:

..put his leg out as he regained his balance to stop John coming any closer. The two men then pushed towards each other and held on to one another.....John looked at his glasses which had moved during the scuffle. Vaughan was unsure how John's glasses moved (could have been during the embrace, Vaughan said his hand or fingers may have bumped them – he did not have any recollection).

[33] At the meeting on 9 September Mr Burgess had confirmed that the notes recording the meeting on 1 September were accurate. Mr Burgess then explained again what had happened on 27 August 2009, this third explanation was recorded as being:

Vaughan stated that he raised his leg to try and maintain distance between himself and John. Vaughan was unsure where his leg landed on John's leg. Vaughan stated the two men came together and there was an open handed push impacting with John's glasses. John's hand was on Vaughan's shoulder area.

[34] Mr Bendikson, who had the authority to make the dismissal decision, said that he regarded the first of these three statements, the explanation given following the incident on 27 August, as being the more accurate on the basis that it was contemporaneous. The further two versions of events given by Mr Burgess he regarded as having been an attempt to minimise what had occurred; however Mr Bendikson said he had had no doubt that there had been a physical altercation between the two men, as a result of which one person had sustained an injury.

[35] Mr Bendikson explained that CHH took a zero tolerance view of fighting and confirmed his personal belief that the site should be violence free, especially in view of the large amount of dangerous equipment on site.

[36] It was accepted that Mr Burgess having worn steel-capped boots, a deliberate kick could have caused significant injury to Mr Paterson, and there was no evidence

as to such an injury. However CHH had found that Mr Burgess had kicked or raised his leg such as to impact Mr Paterson in the groin area, and that Mr Burgess had made contact with Mr Paterson with enough force to cause an abrasion above his ear. Mr Bendikson said he had concluded that “*there was clear evidence that Mr Paterson had been physically assaulted by Mr Burgess.*”

[37] Mr Keepa when questioned by the Authority, accepted that health and safety was of paramount importance on sites of the nature of the Penrose Mill site. Mr Keepa also stated that when he had interviewed Mr Burgess and Mr Paterson, both men were aware that their actions on 27 August 2009 could result in their dismissal.

[38] I find that there was sufficient evidence in the explanations provided by Mr Burgess, for CHH, as a fair and reasonable employer, to reach the conclusion that there were substantive grounds for deciding Mr Burgess had breached Rule 5 of the Work Rules. Such a breach of the Work Rules constituted serious misconduct and justification for summary dismissal.

Self-defence argument

[39] There was potential in the altercation on 27 August 2009 for both Mr Paterson and Mr Burgess to be found to have breached Work Rule 5 and indeed, Mr Keepa confirmed that both men anticipated dismissal as a consequence of their actions. Self-defence could be presented as a mitigating factor to be taken into consideration by the fair and reasonable employer.

[40] Mr Burgess gave evidence at the Investigation Meeting held by the Authority on 9 September 2010 that he had been acting in self defence.

[41] Section 103A of the Act requires the Authority to have regard to all the circumstances at the time the dismissal occurred.¹ The Authority is to evaluate the actions taken by the employer against the objective standard of what a fair and reasonable employer would have done in the circumstances. The Employment Court in *X v Auckland District Health Board*² stated:

¹ *Air New Zealand v Hudson* [2006] 1 ERNZ 415

² [2007] 1 ERNZ 66

*This test does not, however, give the Authority or the Court unbridled licence to substitute their views for that of the employer.*³

[42] The question for determination is whether on the explanations given by Mr Burgess to CHH at the time the dismissal occurred, there were grounds for CHH as a fair and reasonable employer to find self-defence on the part of Mr Burgess.

[43] Mr Bendikson explained that CHH had a zero tolerance attitude towards fighting and violence. However the Employment Court in *Housham v Juken New Zealand Ltd*⁴ considered the issue of physical violence between employees, and held that whilst an employer is entitled to regard these matters as serious misconduct for which the employees involved may be dismissed “*that cannot reasonably extend to every participant in such a confrontation under any circumstances*”. The Chief Judge expanded at para [25]:

An employee attacked by another or reasonably fearing imminent physical attack by another is not required to offer no resistance at all, run (especially if operating dangerous machinery) or meekly submit to the assault. Such an employee is entitled to take reasonable steps in all of the circumstances to avoid actual or imminent assault. Such steps may include what would amount to a technical assault upon the aggressor, pushing the aggressor away, tackling the aggressor to prevent further blows, or the like. No hard and fast rules can or should be provided. Every case is different and what amounts to a reasonable response to actual or impending violence will depend on those unique circumstances as fairly and reasonably ascertained by the employer.

[44] A fair and reasonable employer would be entitled to accept an explanation of self-defence in mitigation of a serious misconduct offence attracting a dismissal outcome.

[45] Mr Bendikson confirmed that he accepted that even under CHH’s zero tolerance policy, an employee was entitled to defend him or her self. Indeed in

³ Ibid at para [94]-

⁴ [2007] ERNZ 183

support of this statement, Mr Paterson's explanation that he had acted throughout the incident in self-defence was accepted by CHH, and Mr Paterson was not dismissed; although he did receive a final written warning for his contribution to the situation as a result of the provocation aimed at Mr Burgess at the Rewinder machine. Mr Bendikson confirmed that he would have given an explanation of self-defence from Mr Burgess due consideration.

[46] Mr Blair for the Applicant said that on the evidence before them CHH erred in finding that Mr Burgess was the aggressor in the altercation and that Mr Paterson was acting in self-defence. In support of that position Mr Blair highlights the signed statements of both Mr Burgess and Mr Paterson provided on 27 August 2009 in which both men make reference to Mr Paterson having pushed Mr Burgess at the outset of the altercation. Mr Blair submits that from that point on Mr Burgess was acting throughout in self-defence.

[47] Mr Burgess raised the issue of self-defence at the Investigation Meeting. It is not for the Authority to substitute its view for that of the employer. What is relevant is how the employer acted in all the circumstances at the time of the dismissal. Of particular relevance is the question of whether Mr Burgess had made clear to CHH during the investigation and disciplinary meeting that he had been acting in self-defence throughout.

[48] At both the investigation meeting and the disciplinary meeting, CHH held, and the records of the meetings confirm, that Mr Paterson provided explanations consistent with a position of self-defence, specifically he had described the 'push' at the investigation meeting on 1 September 2009 as putting '*his hand up to protect himself*'. This action was attributed to the feeling of being threatened by Mr Burgess entering into Mr Paterson's personal space, a reaction exacerbated by Mr Paterson having been involved in an incident outside work just prior to this incident, in which he had been mugged and beaten.

[49] By contrast Mr Burgess in the investigation meeting had not specifically referred to acting in self-defence, but had in fact supported Mr Paterson's contention that he had acted in self-defence in the matter of the initial push, as the record of the meeting, which Mr Burgess and his representative Mr Keepa had reviewed, states:

John was standing right beside the door as Vaughan tried to enter. Vaughan stated that he thought John had got a fright and pushed his arm up.

[50] At the disciplinary meeting Mr Burgess did not, although given the opportunity to do so, correct this recorded explanation of the push by Mr Paterson. The record of the disciplinary meeting with Mr Burgess does not provide evidence that Mr Burgess was arguing that Mr Paterson was the aggressor in the incident and that Mr Burgess was acting in self-defence.

[51] I find that CHH was entitled to conclude from the arguments presented to them by Mr Paterson, that Mr Paterson was not the aggressor but had been acting in self-defence, especially in circumstances in which Mr Paterson, having recently been assaulted, explained that he had felt threatened in light of this circumstance by Mr Burgess coming close to him, and had put up his arm in defence.

[52] The record of the investigation meeting on 1 September with Mr Burgess provided support to this explanation as the record shows Mr Burgess confirming that Mr Paterson had received a fright as he entered the smoko hut and had pushed his arm up.

[53] Mr Bendikson concluded that the later versions of events provided by Mr Burgess gave a 'watered down' version of events but even so did not provide an explanation of self-defence. Mr Franklin gave evidence that self-defence "*was not something we heard from Mr Burgess*".

[54] Mr Keepa, who was present at all the meetings, agreed that while both men said they were defending themselves, Mr Paterson had strongly argued self-defence in a meeting of one and a half hour's duration; whereas Mr Burgess had alluded to self-defence but not taken that line "*so strongly*".

[55] It is possible that if Mr Burgess had been separately advised, he might have argued self-defence more strongly, as indeed he did at the Investigation Meeting on 9 September 2010, but I accept that this argument was not substantively presented to

CHH at the relevant time, this being throughout the investigation and disciplinary processes.

[56] CHH had carried out a full investigation, which included physical demonstrations of what had taken place. Mr Burgess provided a statement immediately following the incident on 27 August, which he was able to have corrected before he signed it. There was an investigation meeting on 1 September, following which Mr Burgess and Mr Keepa were able to review the record of the meeting and make any corrections. There was a disciplinary meeting on 9 September at which Mr Burgess was given a further opportunity to offer clarification. Mr Burgess had representation at the investigation and the disciplinary meetings.

[57] An employer cannot reasonably be expected to find self-defence when this explanation had not been provided to it. I find that CHH did not unjustifiably fail to take into consideration an explanation of self-defence on the part of Mr Burgess.

Disparity of Treatment

[58] Mr Blair submitted that Mr Burgess should have received similar treatment to Mr Paterson, in that he should also have received a final written warning.

[59] Even where grounds for dismissal have been established, the Employment Court⁵ has confirmed that it is the prerogative of the employer to decide whether to dismiss or not. However this right must be exercised in accordance with the principles of fairness and reasonableness.

[60] Mr France helpfully directed the Authority to the Court of Appeal decision in *Chief Executive of the Dept of Inland Revenue v Buchanan*⁶. The judgment outlines three separate issues to be considered in relation to the question of disparity of treatment:

- a) *Is there disparity of treatment?*
- b) *If so, is there an adequate explanation for the disparity?*

⁵ *Cooke v Tranz Rail Ltd* [1996] 1 ERNZ 610

⁶ [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA)

- c) *If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?*⁷

[61] The first issue is the establishment of disparity of treatment. Should disparity be found then the employer may be found to have dismissed unjustifiably unless the employer can provide an adequate explanation for the disparity.

[62] In *Samu v Air New Zealand*⁸ the Court of Appeal stated:

Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.

[63] Following the investigation and disciplinary meetings, Mr Bendikson had reached the view that Mr Paterson had not been the aggressor in the incident on 27 August 2009 but had been acting in self-defence. However Mr Paterson had been guilty of breaching Work Rule 5.2: *“Do not use threatening or abusive language to any other employee.”* Mr Paterson consequently received a lesser disciplinary sanction, a final written warning in respect of his use of abusive language.

[64] By contrast, Mr Bendikson had reached the view by 9 September 2009 that Mr Burgess had breached Work Rule 1: *“Fighting or the use of physical violence is prohibited”*. CHH found that Mr Burgess had committed a more serious offence than Mr Paterson and that consequently a more serious disciplinary sanction i.e. dismissal, was appropriate.

[65] I find that there was an adequate explanation for the disparity of treatment.

[66] In conclusion, I find that Mr Burgess was justifiably dismissed for serious misconduct. I also find that CHH did not unjustifiably fail to take into consideration

⁷ Ibid at para [45]

⁸ [1995] 1 ERNZ 636 (CA)

an explanation of self-defence by Mr Burgess. I further find that there was an adequate explanation for the disparity of treatment between Mr Paterson and Mr Burgess. I am unable to assist Mr Burgess further.

Costs

[67] Costs are reserved. The parties are encouraged to agree costs between themselves. If they are not able to do so, the respondent may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The applicant will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

Eleanor Robinson
Member of the Employment Relations Authority