

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 10/09  
5133650

BETWEEN KEVIN WAYNE CHANDLER  
Applicant  
AND PRIME PINE KAIKOURA  
LIMITED  
Respondent

Member of Authority: Helen Doyle  
Representatives: Applicant self represented  
Danny Smith Advocate for the respondent  
Investigation Meeting: Kaikoura 19 December 2008  
Determination: 28 January 2009

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] Kevin Chandler commenced employment at Prime Pine Kaikoura Limited (Prime Pine) on 7 May 2007 as a general factory hand and was party to an individual employment agreement with Prime Pine dated 3 May 2007. Mr Chandler moved into the role of forklift driver but his duties still fell under the general description of factory hand.

[2] Mr Chandler was dismissed on 2 April 2008 for reasons set out in a letter of termination that he had used racial and defamatory language and threatened to bash another employee with a hammer. Mr Chandler says that his dismissal was unjustified and he seeks lost wages from the time of dismissal until the date of the investigation meeting.

[3] Prime Pine says that they stand by the dismissal and they do not consider it to be unjustified.

**The issue**

[4] I explained to Mr Chandler and Danny Smith, who represented Prime Pine, the test in s.103A of the Employment Relations Act 2000 with respect to whether Mr Chandler's dismissal was justified or not. Under that test I am required to objectively evaluate Prime Pine's actions including the decision to dismiss against what a fair and reasonable employer would have done in all the circumstances.

[5] The issues therefore to determine are:

- Did Mr Chandler's actions amount to serious misconduct;
- Was the decision to dismiss Mr Chandler what a fair and reasonable employer would have done in all the circumstances?
- If the dismissal was unjustified then is Mr Chandler entitled to lost wages and is there an issue of contribution

**The events leading to the decision to dismiss**

[6] Jon Chandler was the then manager of Prime Pine and he made the decision to dismiss. Although they share the same surname Jon Chandler and Kevin Chandler are not related. Jon Chandler was only available by telephone during the Authority's investigation meeting.

[7] Mr Smith who represented Prime Pine attended all the meetings held as part of the disciplinary process with Mr Chandler and gave evidence about the meetings. There were written meeting notes available that I have had regard to although I accept the notes are not taken verbatim.

[8] On 31 March 2008 there was an incident between Mr Chandler and another employee Dave. Jon Chandler first came to know of the matter because he heard Mr Chandler saying something over the radio. Mr Chandler says that because Dave on his forklift trying to push him off he asked Jon Chandler over the radio *to come to the tip yard and get Dave off my forklift now.*

[9] Jon Chandler in a written statement dated 31 March 2008 which was provided to the Authority wrote that he heard Mr Chandler say over the radio *Jon, get the black c... off my forklift or I will bash him with a hammer.* Jon Chandler wrote; *we looked*

*in the direction (we were in Smoko room) and saw Kevin driving towards us past kilns. We were confused as to what was going on so I made no comment and passed it off as some kind of horse play or joke.*

[10] Mr Chandler did not recall the events occurring in that order. He said that after there was no response by Jon Chandler to his radio call for assistance he went to the office and asked the person who worked in the office where Jon Chandler was. Mr Chandler said he told her that he had been assaulted by Dave and that *if that black c... puts his hands on me again I will crack his head open with a hammer*. I think it more likely that Jon Chandler overheard Mr Chandler say words to that effect again at that point whilst he was being asked to come to the office.

[11] Mr Chandler said that he then went to find Jon Chandler and eventually met up with him. Mr Chandler said that he told Jon Chandler what had gone on with Dave and said that if Dave did it again he would have no choice but to *crack him with a hammer*. Mr Chandler recalled Jon Chandler saying *well that is a bit extreme*. Mr Chandler said he responded *it is better than waiting for you*.

[12] There were three meetings held with Mr Chandler following that exchange as part of a disciplinary process. Mr Chandler was advised to bring a support person to each meeting as a witness and that at the same time as the disciplinary process was being undertaken by Mr Chandler there was also a process being undertaken with Dave.

[13] The first meeting with Mr Chandler was held on 1 April 2008. Mr Chandler took another employee with him to the meeting as a witness, Jim Tanner. Jon Chandler was present at the meeting with Mr Smith.

[14] Mr Chandler was advised as recorded in the notes that a formal complaint had been received from Dave about threats he had heard and racial remarks and an informal complaint made by other staff about the racial remarks. I am satisfied Mr Chandler had an opportunity to tell his side of the story at that first meeting.

[15] He gave an explanation along the following lines. Mr Chandler's job was to place packs of wood down using the forklift to enable Dave to undertake his job filleting the wood. Mr Chandler said that Dave had been moody/sulky for about a week. He said that he had placed a pack of wood down where it was at Dave's

direction after several unsuccessful attempts and Dave was not happy. Mr Chandler then backed the forklift and turned the motor off and asked Dave *what is the problem*.

[16] Dave then came towards the forklift and hopped on it. Mr Chandler said in his evidence at the Authority investigation meeting that Dave grabbed him by the collar trying to pull him out of the forklift and then trying to push him saying *fuck off I will do it myself*. I am not satisfied that Mr Chandler said as part of his explanation during the meeting on 1 April that he was grabbed and pulled. I find it more likely, and I accept Mr Smith's evidence about this which is consistent with the notes, that Mr Chandler only said that Dave gave him a push on the shoulder at that meeting. The notes record Mr Chandler saying that *he would have hit him with the hammer and crack his head and he felt threatened*.

[17] Mr Chandler said that it was at this point that he got on to the radio to get Jon Chandler. The notes taken during the 1 April meeting by Mr Smith reflect Mr Chandler was asked if he felt comfortable working at the site after the incident. Mr Chandler's response was that he had a hammer by his seat and *I will use it if I have to*. The meeting then closed.

[18] Mr Smith said that Dave when questioned admitted that he pushed Mr Chandler when he was up on his forklift. Nothing that formed part of the interview process with Dave was put to Mr Chandler during his disciplinary meetings to comment on and I find that Mr Chandler's version of events must have been accepted.

[19] A second meeting took place on 2 April 2008. Mr Chandler attended again with Mr Tanner as his support person and Jon Chandler with Mr Smith. Jon Chandler opened the second meeting according to the notes by advising that that part of the investigation was to ascertain if the threats and racial comments were serious misconduct. There was an additional matter raised at that meeting that other staff interviewed had stated that they had heard threats that if they don't do it right Mr Chandler would bash them around the head with a piece of wood.

[20] Mr Chandler accepted that he had made a threat about using a piece of wood but I find that he went on at that meeting to explain that it was said as an expression of frustration because nothing was changing. Mr Smith recalls Mr Chandler again referring to a threat to use a hammer if Dave put his hands on him again. The notes

do not make reference to that but it is recorded that [Mr Chandler] *doesn't regret his actions and if Dave puts his hands on him again he would do it again*. There was no allegation that Mr Chandler had made physical contact with Dave and notes are somewhat unclear in that regard. I do accept Mr Smith's evidence to the extent that there was nothing said to satisfy Jon Chandler that the threat was withdrawn. The meeting then ended.

[21] A third meeting took place later in the day on 2 April 2008. Mr Chandler again attended with Mr Tanner and Jon Chandler with Mr Smith. Mr Chandler was advised that Jon Chandler had finished his investigation and Jon Chandler read out a dismissal letter that he had prepared. The material part of that letter related to the actions that were considered to be serious misconduct. They were Mr Chandler repeatedly threatening to bash another member of the staff with a hammer and using racial and defamatory language while referring to another member of staff.

[22] Mr Chandler was advised that it was decided that he should be summarily dismissed and he was paid for the hours he worked on 2 April 2008 together with holiday pay. At that point Mr Chandler accepted that he did go into a rage and I find it likely that there were some threats made by him at that time.

[23] Jon Chandler wrote a letter to Mr Chandler on 6 May 2008 and made some comments in that letter that in my view are helpful to my assessment of the decision making process. The issues for Mr Chandler that led to Jon Chandler's response were that abusive language was not classified as serious misconduct in his employment agreement, and that Dave had kept his job after assaulting him and that threatening to bash someone with a hammer was taken out of context.

[24] Jon Chandler said in his letter to Mr Chandler that Mr Chandler's dismissal was justified solely on the basis of his threatening Dave with a hammer, but viewed in this context the racial and defamatory language was also serious. Jon Chandler said in his letter that the final conclusion was that *for the safety of staff, it is simply not possible for us to allow anyone on our site who is making such threats and is clearly unremorseful*.

[25] Jon Chandler when he was connected by telephone during the Authority investigation meeting said that he would not have dismissed Mr Chandler for the racial and defamatory comments alone.

[26] I conclude from the evidence that the reason Mr Chandler was dismissed is different from the letter of termination read at the final disciplinary meeting on 2 April 2008. The letter of termination sets out two reasons for dismissal, but I find that the reason for the dismissal was that Mr Chandler threatened to use a hammer on another employee if that other employee put his hands on him again.

### **Did Mr Chandler's threats amount to serious misconduct**

[27] Mr Chandler's individual employment agreement contains a list of behaviours that constitute serious misconduct and those that constitute misconduct. The list is not exhaustive and there is a final bullet point that provides any other such offence that may be considered by the employer to constitute serious misconduct.

[28] There is no dispute that Mr Chandler made the threat that was relied more than once.

[29] Serious misconduct is a type of conduct that deeply impairs the necessary confidence and trust that must exist in an employment relationship. In making an assessment about conduct and its seriousness a fair and reasonable employer must take into account the relevant circumstances.

[30] The relevant circumstances in this case were that Mr Chandler had been pushed by Dave following a heated exchange between both of them about the placement of wood. Mr Chandler had requested assistance at that time from Jon Chandler using his radio in language which the employer concluded in my view reasonably, was unacceptable. Jon Chandler initially passed it off as some kind of horseplay or joke and did not respond over the radio. Jon Chandler was approached by Mr Chandler and Dave and he spoke separately to both of men and they were both the subject of a disciplinary process.

[31] A fair and reasonable employer would have wanted to make some assessment as to whether the threats were serious threats or whether they formed part of an angry outburst after being pushed by Dave. The first occasion the threat was made was directly after the pushing by Dave when there was a good deal of anger partly because Mr Chandler felt Jon Chandler did not respond. I find that a fair and reasonable employer would conclude, given the threat was made again at the first meeting on 1 April 2008 and there was no retraction during the 2 April 2008 meeting, that Mr

Chandler was serious about his threat. Prime Pine had health and safety obligations to Dave and its other employees and had the threat to use a hammer been carried through by Mr Chandler if Dave pushed or otherwise assaulted Mr Chandler serious injury could have resulted.

[32] I find that threatening to use a hammer on another employee if assaulted is a threat that a fair and reasonable employer would consider to be serious misconduct. Mr Chandler's conduct in making the threats did amount to serious misconduct.

**Was the decision to dismiss Mr Chandler what a fair and reasonable employer would have done in all the circumstances?**

[33] As part of the decision making process a fair and reasonable employer would want consistency in disciplinary outcomes in situations where conduct is similar and arises out of the same circumstances. If there is no consistent outcome and no adequate explanation then it can lead to a strong sense of injustice on the part of the person who is dismissed. There are employment cases where the Authority or Employment Court has been required to consider whether there has been disparity between the treatment of employees. Mr Chandler did not use that term but was clear that he felt it was unfair that Dave who had assaulted him had retained his job and had received by way of outcome a final warning.

[34] The Court of Appeal in *Chief Executive of Department of Inland Revenue v Buchanan (No 2)* ERNZ [2005] 767 confirmed that there are three separate issues that require consideration for the legal test of disparity. They are

- Is there disparity of treatment?
- If so, is there an adequate explanation for the disparity?
- If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[35] The conduct of both men arose from the same set of circumstances. The threats made by Mr Chandler came about after he had been pushed by Dave and were threats if there was a repeat of Dave's conduct rather than of a wider or more general nature to others. Mr Chandler did not respond to the push in any physical way at the time it occurred and the threat was made for the first time over the radio when he called the manager to assist. Mr Chandler's threat was to take matters into his own

hands in the future if it occurred again. Dave also took matters into his own hands when he hopped onto a forklift and pushed Mr Chandler requesting he get off because he was not happy with the placement of wood.

[36] The threat by Mr Chandler about the hammer if assaulted in the future could have resulted in serious harm if carried through although it may never have been carried out. Dave got onto Mr Chandler's forklift and pushed Mr Chandler. Mr Chandler said during the disciplinary process that he felt threatened by this and Dave felt threatened by Mr Chandler's threat. Dave received a final warning which enabled him to retain his employment but Mr Chandler was summarily dismissed. I find objectively assessed that there was disparity of treatment between Dave and Mr Chandler.

[37] The explanation given in terms of the difference in treatment was that there was no conclusion reached that Dave intended to assault Mr Chandler although there was no finding it was an accident. Technically the push was assault although at the less serious end of the spectrum. It was the push though that started the matter.

[38] I have then considered other matters to see if there are adequate explanations for the difference in outcome. There was a file note that Mr Chandler had been spoken to by Jon Chandler on 25 February 2008 about his temper tantrums and had been advised that yelling and screaming is not acceptable behaviour. Mr Chandler accepted the contents of that file note but that would not in my view on its own be an adequate explanation for the difference in disciplinary outcome. There was racial and offensive language used immediately after Mr Chandler was pushed but Jon Chandler said that on its own the language would not have resulted in dismissal so that could not explain the difference. The earlier threat about a piece of wood had been explained I have found by Mr Chandler as an expression of frustration. Mr Chandler was not advised that was taken into account in making the decision to dismiss. I have considered whether a threat to use a hammer if assaulted again is more serious than an actual assault. Could the difference in disciplinary outcome be explained on that basis? The threat was made because of the fact that Mr Chandler was pushed. I do not find that a fair and reasonable employer would conclude that a threat to use a hammer on another employee if assaulted again would be more serious than the actual assault itself. They are both serious matters. A fair and reasonable employer would have concluded in all the circumstances that existed here that the threat was as serious

as the actual assault that preceded it but I do not find that a fair and reasonable employer would conclude it was more serious. There is no adequate explanation for the disparity in treatment.

[39] I have then considered whether the dismissal was justified notwithstanding there is no adequate explanation for the disparity, because of the nature of Mr Chandler's conduct. In *Buchanan* the different outcomes involving other employees involved different judgements calls by different managers in different circumstances and did not indicate an unreasonable decision in relation to the respondent employees. In this case Jon Chandler made both decisions in terms of disciplinary outcomes for Mr Chandler and for Dave following the investigation of their conduct arising from the same set of circumstances. The conduct of both Dave and Mr Chandler was of a serious nature. A fair and reasonable employer would have considered the need for consistent disciplinary outcomes for Mr Chandler and Dave unless there was a clear reason why there should not be consistency.

[40] I find in this case that a fair and reasonable employer would not have arrived at a different disciplinary outcome for Dave and Mr Chandler in the circumstances. Prime Pine did and it follows that Mr Chandler was unjustifiably dismissed from Prime Pine because Dave who had pushed Mr Chandler before Mr Chandler made the threats not dismissed but given a final warning.

## **Remedies**

### ***Contribution***

[41] The Authority is required to consider the extent to which the actions of Mr Chandler contributed towards the situation that gave rise to the personal grievance and, if required, reduce the remedies that would otherwise have been awarded.

[35] I find that Mr Chandler clearly contributed in the blameworthy way to his dismissal and his conduct was such that a lesser penalty could only have been a final warning. The language Mr Chandler used about another employee although not the reason for his dismissal, was offensive and racially abusive. Mr Chandler has to take responsibility for what he says in the employment relationship. What he said about using a hammer intimidated those that he worked with and made them afraid. His words directly impacted on the level of trust that both Mr Chandler's employer and his fellow employees had to have and should be able to have in him. Mr Chandler

had previously been spoken to by Jon Chandler about the unacceptability of screaming and yelling.

[36] I find that the contribution by Mr Chandler to his personal grievance is significant. I assess the level of contribution at 60% to reflect this.

### **Lost wages**

[37] Mr Chandler by way of remedy wants to recover wages he had lost from the time of his dismissal until the date of the Authority's investigation meeting. I am not satisfied from the evidence that all Mr Chandler's wages were lost as a result of the actions of Prime Pine. I have listened carefully to Mr Chandler and it appears that at least for a period of time Mr Chandler was in receipt of a sickness benefit and would not have been able to work in any event. I asked Mr Chandler about the reason he was in receipt of a benefit and he advised me that it was because of the actions of Prime Pine and the stress they caused him. I have accepted that evidence. Mr Chandler said he was only on the sickness benefit for a short period and then went onto the unemployment benefit. There was no evidence of any attempts to find other work although in later months Mr Chandler did undertake some part time work.

[38] This is not a case where I intend to exercise my discretion and order Prime Pine to pay to Mr Chandler a sum greater than three months ordinary time remuneration.

[39] The contribution I have assessed has to be deducted from three months wages. That is 13 weeks wages less 60%. Mr Chandler should be paid on my assessment just over five weeks wages but I shall leave it to the parties to calculate the actual amount with leave reserved to return to the Authority if there are difficulties in that regard.

### **Costs**

[40] Mr Chandler represented himself so there are no issues of costs. He is entitled to recover his filing fee of \$70. I order Prime Pine Kaikoura Limited to pay to Kevin Chandler the sum of \$70 being his filing fee.

