

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**WA 40/08
5089986**

BETWEEN LEON ROPATA COOPER
 Applicant

AND LEVIN MEATS LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Donna Lima, Advocate for Applicant
 Andrew Bell, Counsel for Respondent

Investigation Meeting: 2 April 2008

Determination: 10 April 2008

DETERMINATION OF THE AUTHORITY

The problem

[1] Mr Leon Ropata Cooper (“Mr Cooper”) claims his dismissal from his employment with Levin Meats Limited (“Levin Meats”) is unjustifiable. Levin Meats defends the claim. Mr Cooper asks the Authority to investigate and resolve the problem by formal orders in his favour for reimbursement and compensation.

[2] The parties were unable to resolve the differences between them by the use of mediation.

The facts

[3] Mr Cooper commenced employment at Levin Meats in May 2006 as a process worker. The employment was Mr Cooper’s first since leaving school. The terms of the employment were recorded in a written individual employment agreement.

[4] At the time of his dismissal, Mr Cooper worked in the Loadout Bay. In this area, boxes of meat are removed from a conveyor belt and stacked on to shelving for freighting.

14 May 2007

[5] On 14 May 2007 Mr Cooper was working with his co-worker and cousin Mr Michael Solomon ("Mr Solomon"). Mr Cooper was tasked with applying adhesive to cartons with the use of an electric glue gun. The adhesive when applied is very hot at 180 degrees celsius. Mr Solomon was tasked with retrieving cartons from a moving conveyor belt. Mr Solomon sustained an injury to his hand when he lifted a carton with exposed adhesive that had been applied by Mr Cooper.

[6] Mr Joshua Pakau, storeman ("Mr Pakau") was also working the loadout area. I accept his evidence that he saw Mr Cooper apply adhesive to a carton liberally where it did not require adhesive and where it would most likely have been handled by Mr Solomon. He saw Mr Solomon handle the carton. Mr Pakau then immediately approached the loadout supervisor Mr Robert Hapeta ("Mr Hapeta") to inform Mr Hapeta of what he had seen. I accept that he went to inform Mr Hapeta that Mr Cooper had applied adhesive to burn Mr Solomon. Another storeman Mr Romaine McDonald ("Mr McDonald") accompanied Mr Pakau. Mr Pakau told Mr Hapeta what he had seen.

[7] Contemporaneously Mr Cooper and Mr Solomon similarly approached Mr Hapeta. Mr Hapeta directed Mr Solomon to the office to place his burned hand under running cold water. Mr Pakau and Mr McDonald then returned to their duties.

[8] Mr Solomon tells the Authority he cannot recall comments had made to Mr Hapeta. Mr Hapeta is however clear. He tells the Authority and I accept his evidence, that Mr Solomon said Mr Cooper had been clowning around with the glue gun and had put glue on the bottom corners of a carton where he (Mr Solomon) had picked it up. When Mr Hapeta asked if Mr Cooper had done so on purpose, Mr Hapeta says Mr Solomon said Mr Cooper "had been being an egg".

[9] Mr Hapeta asked Mr Cooper what had happened. I find that Mr Cooper said Mr Solomon had burned his hand on some wet glue. I do not accept the evidence Mr Hapeta gives of discussions he had with Mr Cooper later that day. I find that he had only one further exchange with Mr Cooper at about 4.20pm and that he simply told

Mr Cooper that he (Mr Cooper) would have to see the plant manager Mr Phillip John Puketapu ("Mr Puketapu") the following day.

[10] Mr Solomon saw a doctor and the doctor provided a report to Levin Meats of Mr Solomon's injury that same day. Mr Solomon was deemed unfit for work.

15 May 2007

[11] At 8.30am on 15 May 2007, Mr Puketapu approached Mr Cooper where Mr Cooper was working in the loadout area. I find that Mr Puketapu told Mr Cooper they needed to have a "chat". Mr Cooper accompanied Mr Puketapu to the office.

[12] Present in the office although he took no part in the meeting was Mr Hapeta. I accept Mr Cooper's evidence that Mr Puketapu asked if he knew why they were meeting and that Mr Cooper replied he did not. I find that Mr Puketapu explained they were meeting because of Mr Solomon's burn to his hand the previous day. I find that Mr Puketapu then asked Mr Cooper if he wanted "someone with him". Mr Cooper tells the Authority he did not know what that meant. I find that Mr Cooper shrugged his shoulders. I further find he did not expressly decline the invitation.

[13] Both Mr Puketapu and Mr Hapeta give evidence to the Authority that Mr Cooper was asked directly by Mr Puketapu if he had deliberately applied glue to burn Mr Solomon. They both also give evidence that Mr Cooper said "Yes". They also both say when asked why he would do such a thing especially when he had been warned previously that Mr Cooper said he found it funny watching his workmates getting burned.

[14] Mr Cooper responds that Mr Puketapu asked him whether he had intentionally applied glue to the box. He says that he responded affirmatively to that question because that was the very task he was charged with. He denies saying he found it funny to watch his workmates getting burnt.

[15] Mr Puketapu then left the room and returned with Mr Cooper's employment agreement and a termination advice form. Mr Puketapu then referred to clauses in the employment agreement and advised that he would have to "let [Mr Cooper] go". That

was the dismissal. Mr Cooper was asked to sign the termination advice form which he did. He was then told to leave the premises.

The merits

[16] The employee termination advice signed by Mr Cooper and Mr Puketapu expresses the "reason for leaving" as "Termination acting irresponsibly causing injury to fellow worker."

[17] In determining whether Levin Meats' decision to terminate Mr Cooper's employment was unjustifiable the Authority applies the statutory test of justification prescribed at section 103A of the *Employment Relations Act 2000* ("the Act"). That section provides:-

103A. 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

[18] The starting point in the assessment is always the applicable employment agreement. Mr Puketapu relies on the Third Schedule to Mr Cooper's employment agreement and the description of what constitutes serious misconduct which may result in immediate termination, in justification of the termination of Mr Cooper's employment. The provision relied on is this:-

Serious Misconduct Which Could Result In Dismissal

There are certain types of conduct which can lead to immediate termination of your employment. These include but are not limited to:

4. Failing to observe Occupational Health & Safety rules and Operational Procedures or any other irresponsible actions which result in injury to self or other persons or to Employer property or to the property of others, or failure to immediately report any work-related injury.

[19] Mr Puketapu says he had no choice but to dismiss Mr Cooper because of the risk to other employees. He says Mr Cooper knew he could put the meeting off if he wanted "someone present" with him. He further says there was no unfairness to Mr Cooper and that delaying his decision would have been unfair to Mr Cooper.

[20] The third schedule contains this provision on disciplinary procedures:-

Disciplinary Procedures

Should you break any of the above rules or do anything else which your Manager thinks is wrong, you will be told about the allegation and be given an opportunity to comment on or explain your actions.

Your manager may decide that he/she needs to investigate the allegation further and if your alleged breach of the rules is sufficiently serious, you may be suspended on full pay while this investigation takes place.

If your Manager is not happy with your initial explanation and/or the results of the investigation, you will be required to attend a formal disciplinary meeting.

If you wish, you may a representative or witness present during the meeting. You will be given plenty of time to comment on or explain the matter. The person conducting the meeting will then consider your explanation and decide if they need to take disciplinary action.

If you are reprimanded or given a verbal warning a record of the reason for the reprimand or verbal warning will be kept on your personnel file.

If it is decided that your behaviour is bad enough to warrant a written warning, you will be asked to sign the warning. You may record any comments you wish to make on the warning.

You will also be told how long the warning will last. The warning will be retained on your personnel file until its expiry date and you will be given a copy.

[21] I indicated to the parties at the investigation meeting my preliminary assessment that Mr Cooper had not been previously warned. I formed that preliminary view on the basis that I did not consider there had been a formal verbal warning as that action is specified in the employment agreement. Having considered the matter further I here confirm that view. There was no previous formal warning because there was no formal disciplinary procedure which preceded it. Nor is there any record of the reason for it retained on the personnel file.

[22] I note that Mr Puketapu and Mr Hapeta had in mind a verbal warning given to Mr Cooper previously. They were both wrong to rely on such a warning and the effect of it. I have no doubt that it was a material consideration in Mr Puketapu's decision to dismiss. Levin Meats cannot justify a decision to terminate in particular because Mr Cooper had been warned previously because he had not been. Mr Bell for Levin Meats submits Mr Cooper's termination was not on notice but rather was a summary one.

[23] I must first resolve whether Mr Cooper made the admissions Levin Meats says he did. I accept the weight of evidence and consider Mr Cooper's explanation of what he understood he was being asked as implausible in the circumstances. I find that Mr Cooper was asked if he had deliberately put hot glue on the carton so that Michael would be burnt. I find that Mr Cooper said "Yes".

[24] There are procedural fairness matters which are of concern. The employment agreement prescribes a disciplinary process. I find that there was not compliance with that prescribed process. As a matter of equity and good conscience, an employer who fails to follow its own prescribed process in pursuing disciplinary action against an employee allegedly in breach of another provision, is in a very tenuous position indeed in my view.

[25] I refer in this regard to the complete absence of any forewarning to Mr Cooper of the disciplinary process he found himself in. I do not accept that Mr Cooper was told about the allegation and given an opportunity to comment or explain in terms of an initial phase of investigation or enquiry. Though Levin Meats points to Mr Hapeta's interaction with Mr Cooper on 14 May 2007, I find that he did not at any stage that day present Mr Cooper with an allegation requiring his comment or explanation.

[26] There is a second phase of investigation contemplated by the prescribed disciplinary process. This I refer to now as the formal disciplinary meeting. There was nothing formal about any of Mr Puketapu's actions (except the ultimate dismissal) on the morning of 15 May 2007 preceding the dismissal. Mr Cooper was not given advance notice of any formal disciplinary meeting. He ought to have been given that notice and a fair and reasonable employer would have given him the same. Nor was he advised the allegation against him in advance and a fair and reasonable employer would have given him that advice.

[27] An integral part of this same advice is also the invitation to have a representative or witness present. I am satisfied Mr Cooper did not appreciate the significance of whether he would like "someone with him". A fair and reasonable employer would also have extended this advice to the employee in advance of the

formal session. So too would a fair and reasonable employer have permitted a reasonable period for the employee to reflect and consider matters and to take advice about them and also to arrange representation before the time of the formal disciplinary meeting.

[28] I also consider it more likely than not, that in the absence of a statement of the serious nature of matters, Mr Cooper was not in a position to appreciate the significance of his responses and the nature of the involvement that was sought from him.

[29] There is a further dimension of concern to me. Mr Cooper is a young adult at the time of his meeting on 15 May 2007 with Mr Puketapu and Mr Hapeta I understand he was aged 17. I consider it regrettable that those two gentlemen did not appreciate this dynamic of the interaction between them and Mr Cooper. I invite them to reflect on what I suggested to them that their session with Mr Cooper on his own, at the age he was and being unsophisticated, that such circumstances might well have engendered a very real element of intimidation in Mr Cooper. I accept that Mr Cooper has not given evidence of such a feature. The dynamic remains a factor in my present assessment however as one of the relevant prevailing circumstances.

[30] Having regard to the preceding matters, I have reached the conclusion that the circumstances were unfair to Mr Cooper. The procedural deficiencies I have outlined create a very real unfairness in my assessment and are not mere technicalities. They are fundamental breaches of the contractual provisions and Mr Cooper's entitlement at common law to fair and reasonable treatment and the statutory duty of good faith. These deficiencies are wholly unfair in themselves and lead me to conclude the dismissal does not accord with acceptable standards of fairness and are sufficient to render the dismissal unjustifiable. As well, the same unfairness is sufficient to place in doubt the reliability of the responses given by Mr Cooper such that it is unsafe to rely on the decision reached by Levin Meats.

The determination

[31] For the above reasons, and having objectively considered Levin Meats' actions and how it acted as I am required to do by section 103A of the Act, I conclude the actions were not what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. It ought at the very least to have followed its own contractual provision.

[32] I therefore conclude that the decision to dismiss Mr Cooper was not in accordance with section 103A of the Act not being the actions of a fair and reasonable employer. **I find that Mr Cooper has a personal grievance for unjustifiable dismissal.**

Contribution

[33] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Cooper's actions contributed towards the situation that gave rise to the personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[34] I accept the evidence given by Mr Solomon, Mr Wesley Gray, Mr Josh Pakau, and Mr Romaine MacDonald of Mr Cooper's propensity to burn his colleagues with the adhesive from the glue gun by applying it unnecessarily. These witnesses described Mr Solomon frequently previously carrying out such action as a prank. I also accept what Mr Solomon and Mr Pakau said that it was not only Mr Cooper who engaged in the behaviour. They too did as well as others. Mr MacDonald gave evidence that the prank started only when Mr Cooper commenced his employment. Mrs Lima is suspicious and laments how older men more mature than Mr Cooper could both engage and condone such behaviour.

[35] I accept the weight of evidence and reject Mr Cooper's denials on the two occasions when I asked him at the commencement and again at the close of the investigation meeting, that he frequently engaged in conduct deliberately applying adhesive on cartons so that his work colleagues sustained burns to their hands. In this

present instance, I find that Mr Cooper did behave in such a way so as to cause injury to Mr Solomon. That behaviour was blameworthy, seriously blameworthy in my view. I am therefore having made that finding obliged to reduce the nature and extent of remedies to be provided to Mr Cooper. This finding has no impact whatsoever on my primary determination that the dismissal is unjustifiable.

[36] It can be artificial to quantify such contribution as a percentage but I accept it is convenient to do so. I regard this exercise as no more than recognition of the legal principle that no person should profit from their own wrong.

[37] I find that Mr Cooper's actions were completely causative of his dismissal. I further consider that if a fair process had been adopted it is highly likely if not almost certain that there would then have resulted a justifiable dismissal. In the language of the court judgments, this dismissal would have been justifiable had it not been for procedural infelicities.

[38] That being so, I am unable to say that Mr Cooper has suffered loss to be remedied by reimbursement and compensation. I am not permitted to provide remedies to him in this situation. I find his misconduct so serious that it disentitles him from the remedies he seeks. **I make no formal orders on remedies.**

Costs

[39] I thank both Mrs Lima and Mr Bell for their assistance in this investigation. I commend Mrs Lima for her very good work assisting her son. If either party wishes to be heard to apply for costs they must apply in writing within 7 days of the date of this Determination.

Leon Robinson
Member of Employment Relations Authority