

Determination Number: WA 145/05

File Number: WEA 116/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Peter Corin (applicant)
AND	Progressive Meats Limited (respondent)
REPRESENTATIVES	Simon Mitchell for the applicant Annie King for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 18 August 2005
SUBMISSIONS	25 & 31 August and 2 September, 2005
DATE OF DETERMINATION	2 September 2005

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Peter Corin says the Company unjustifiably dismissed him – statement of problem received on 8 April 2005. He originally sought reinstatement but that claim was abandoned at the investigation on 18 August. He continues to seek lost wages and compensation to be determined by the Authority for humiliation, etc and costs.

2. The Company says Mr Corin was justifiably dismissed for serious misconduct as a result of his threatening and intimidating behaviour – statement in reply received on 28 April.
3. The parties underwent mediation but their employment relationship problem remained unresolved. They subsequently agreed to a one-day investigation in Napier on 18 August. Witness statements and an agreed bundle of relevant documents were usefully provided in advance. Efforts by the party during the investigation to settle the matter on their own terms were not successful. At the conclusion of the investigation agreement was reached on a schedule for closing comments.

Dismissal

4. The relevant facts are not in dispute.
5. The Company operates a meat processing plant in Napier.
6. Mr Corin started working for the Company in 2000.
7. The applicant was given a written warning on 15 June 2004 for a sky-larking incident on 27 April. It was effective for 12-months. He was warned that future misbehaviour could result in his dismissal. Mr Corin refused to sign the warning but took no other action in respect of it.
8. On 29 September 2004 Mr Corin volunteered to use his vehicle to collect degreasing fluid for use on the respondent's slaughter chain. During that time he was given a \$40 parking ticket.
9. The applicant was unhappy about the ticket. He was working a short day and the value of his earnings, he says, was negated by the amount of the parking ticket fine. Mr Corin also felt aggrieved because he believed his vehicle had been singled out, on that and earlier occasions. He saw himself as having been penalised while doing his employer a favour. He says he also felt under pressure at that time because of arrival of a new baby.

10. Mr Corin was told that an office worker was possibly responsible for his vehicle being ticketed. He approached that person in her office and expressed the hope she had nothing to do with his vehicle being ticketed. The office worker told Mr Corin she was not responsible. She suggested that another person may know why he received the ticket. Immediately after her encounter with Mr Corin, the office worker wrote a complaint to her supervisor. In it she said, amongst other things, that “... *I was not happy because Peter was yelling and very aggressive and he has an attitude problem*” (document 9).

11. Mr Corin attempted to locate the other person. Initially he had no success. The applicant says he decided to attract the person’s attention by leaving a note on a whiteboard in the area where that person worked. It said (verbatim):

(Name), you better not of had anything to do with the ticket on my BMW.

PS if you haven’t got a problem with me you have now.

(document 3)

12. The note was drawn to the other person’s attention. Shortly afterward the two men spoke to each other. The other person says he first became aware of Mr Corin’s presence because the latter was some distance away and was “*yelling abuse at (him)*” (document 7). During the Authority’s investigation the other person confirmed he could not hear what Mr Corin was shouting but it was “*not a nice tone*”.

13. In their conversation the other person told Mr Corin he had nothing to do with the ticketing of the applicant’s car. It is agreed that either that day or the next Mr Corin accepted the other person’s explanation and apologised to him.

14. Later on the same day Mr Corin was told by his supervisor that he, the applicant, had “*opened a can of worms*” (par 18 of applicant’s statement).

15. On 5 or 6 October the applicant received written advice of a disciplinary meeting. The first disciplinary meeting was held on 12 October. Mr Corin attended along with his representative. A second disciplinary meeting was convened on 14 October: at

its conclusion Mr Corin was dismissed. A letter to the applicant from the Company of the same date advised he was summarily dismissed with payment of one week's notice for serious misconduct following "*the allegation of a threat and intimidation*" (document 6).

16. Specifically, Mr Corin was found to have acted in breach of the following part of clause 22.3 of the relevant collective employment agreement:

- *Hitting, fighting, offensive personal abuse and threatening or intimidating people are all examples of failure to control anger, are potentially dangerous and are unacceptable forms of behaviour in a decent workplace.*

(document 1)

17. Mr Corin found work, albeit at a lesser rate of pay, shortly after his dismissal.

Applicant's Position

18. There is no evidence of threatening or intimidating conduct by the applicant. His conduct was not sufficiently severe to justify dismissal. While the terms of the note – and the placing of it – appear unwise, it does not make any threat. The note written by Mr Corin, when objectively assessed, also does not amount to threatening or intimidating behaviour. It is a different thing to tell somebody there is a problem than to make a specific threat. Nobody appears to have felt threatened or intimidated by it. The contact between Mr Corin and the other person ended with a peaceful discussion. The two men parted on reasonable terms: there was no threatening or intimidating behaviour on the applicant's part.

19. The collective agreement, at clause 22.3, places threatening behaviour and intimidation in the context of hitting, fighting and offensive personal abuse: that is not the type of conduct exhibited by the note or Mr Corin's behaviour. The note can be seen as unwise but does not amount to serious misconduct when taken against the totality of the discussion between the applicant and the other person and the way in which it was conducted.

20. Consistent with relevant case law and the facts of this case, the Authority should consider:
- The nature of the work place,
 - The exact words used,
 - Whether the recipients felt threatened or intimidated; and
 - The overall facts of the matter including the discussion between the applicant and the two others, and – in respect of one – the apology and hand shaking.
21. When looked at in its proper context the conduct was not sufficiently severe to justify dismissal. Mr Corin was entitled to a further warning notwithstanding the existing warning that he had not signed but which it is accepted he took no formal steps to challenge.
22. The applicant raised issues of disparity at the disciplinary meeting – refer to the Company's notes of 12 October and Mr Corin's comment that he "*seems to be singled out*". The respondent has clearly condoned, or not dismissed, employees for conduct that was far more threatening and/or intimidating than that of the applicant's. The relevant principles to be applied by the Authority are set out in *O'Connor v Wellington City Council* [1999] 2 NZIRL 128 and *Cooke v Transrail Limited* [1996] 1 ERNZ 610.
23. The employer failed to conduct a full and proper inquiry: Mr Corin was not made exactly aware of what was being treated as threatening and intimidating. Nothing set out the actual allegation against him. It is for the Company to satisfy the Authority that it conducted a full and fair inquiry.
24. Contribution is best determined by determining whether the note was of legitimate concern such as to justify a reduction in remedies. Whether there was contribution is best determined by assessing whether or not the applicant acted in a way that was threatening or intimidating. Placing the note was unwise, however it does not contain a threat. Any reduction for contribution should therefore be small.

25. Mr Corin was very stressed and upset by his dismissal, particularly because others behaved in a more serious way but were not dismissed. He gave a number of examples of what he said were instances amounting to disparate treatment including instances where he claims he was subjected to threats of violence. Mr Corin says a Company supervisor was present on one occasion but no action was taken by the respondent.
26. Mr Corin says his unjustified termination resulted in grave financial consequences: he almost lost his house, had to borrow money to pay the mortgage and was obliged to sell his boat so as to keep financially afloat (no pun intended).

Respondent's Position

27. In its submissions the Company says it was concerned with the note left by the applicant. It accepts that the two people confronted by Mr Corin felt neither intimidated nor threatened but says that is not the point: the point is what would have happened had Mr Corin met the person who was responsible for his vehicle being ticketed? What "*problem*" (refer to the note set out above) would he then have delivered on that person?
28. The applicant clearly intended to take some action against whoever was responsible but what action he intended will never be known. It was not light hearted as is demonstrated by the applicant's offer during the respondent's investigation to undertake an anger management course.
29. In respect of one of the applicant's allegations of disparity of treatment, the Company says it looked into Mr Corin's claims but took no action because it attributed the event to provocation by the applicant, notwithstanding not obtaining from him his version of events and his response to the claim of provocation.
30. The Company was entitled on the evidence it had to find that the behaviour of the applicant was such that it could dismiss him. In the event it finds that dismissal to be unjustified then contributory fault should be set at a high level.

Discussion and Findings

31. The relevant law in respect of dismissal personal grievances can be summarised by reference to the following: in *Northern Distribution Union v BP Oil* [1992] 3 ERNZ 483 the Court of Appeal described the kind of conduct that will justify summary dismissal as, "... conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship" (p. 487).

32. In *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 the Court of Appeal said it had to be satisfied that "the decision to dismiss was one which a reasonable and fair employer could have taken". And:

The burden on the employer was not that of proving the employee's serious misconduct to the Court, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

(457); and

In a case of summary dismissal, if the employer showed that the conduct was such that a fair and reasonable employer could see it deeply impaired basic trust and confidence, it would hardly be necessary to consider, as a separate step, whether in all the circumstances the employee ought to have been dismissed. That depended on whether the fair and reasonable employer took into account all the relevant circumstances of the conduct and the particular relationship in determining that the necessary confidence and trust had been deeply impaired.

(458)

33. In *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315, the Court of Appeal endorsed, at 330, the observations of Richardson J in *Air New Zealand v Johnston* [1992] 1 ERNZ 700:

A dismissal is unjustifiable if it is not capable of being shown to be just in all the circumstances. Justifiability is directed at considerations of moral justice. Whether a dismissal is justifiable can only be determined by considering and balancing the interests of worker and employer. It is whether what was done and how it was done ... is just and reasonable to both parties in all the circumstances including ... the reason for the dismissal.

34. I am satisfied that the Company has failed to establish that its decision to dismiss Mr Corin for serious misconduct was open to as a fair and reasonable employer. I arrive at this conclusion for the following reasons.
35. The respondent's position before the Authority appeared to be one of relying on Mr Corin's behaviour overall such as to amount to serious misconduct. However the Company's submission say Mr Corin was dismissed because of his note.
36. The letter requiring Mr Corin's attendance at a disciplinary meeting has not been produced: it may have been mislaid. It is not clear what advice it contained and how specific it was as to allegations against him.
37. It is not clear if the applicant was ever put on notice as to what it was that he was alleged to have done amounted to threatening and intimidation and that he faced dismissal per clause 22.3 of his employment agreement.
38. The absence of specific allegations and – I find – of an evidential base on which to support the Company's conclusion means that the respondent cannot justify Mr Corin's termination.
39. At the time it initiated its investigation was the Company concerned about his behaviour toward the office worker, his note or the tone of his shouted (but unheard) comments to the other person, or a combination of all of these matters? When and how were these issues put to the applicant? If the Company relies on the note itself, then I accept the applicant's submissions that, while imprudently worded, it contains no express threat and does not amount to a *"failure to control anger"* (the operative words in clause 22.3). I note that the words *"P.S. if you haven't got a problem with me you have now"* (document 3) and the tone of the applicant's shouted (but unheard) comments did not stop the other person from approaching the applicant.
40. The minutes of the disciplinary interviews with the applicant do not record the respondent identifying to Mr Corin what was threatening or intimidating about his note. During his meetings with the Company he was asked what it meant. Mr Corin replied that he *"didn't mean anything"* by the note and conceded *"that it was stupid"* (document 4). The minutes do not record why the Company did not accept that

explanation: it did not pursue the matter further in that interview or the following one on 14 October.

41. The minutes of the meetings on 12 & 14 October are also not clear as to the allegation facing the applicant. They instead record Mr Corin's account of his behaviour. No mention is made in the minutes of the memo prepared by the office worker describing her encounter with Mr Corin (document 9), following the ticketing of his vehicle being put to the applicant. The minutes do not record any other information from the office worker or the other person, or a summary of their evidence, being put to the applicant. The minutes do not record the reasons for the respondent rejecting the applicant's explanation.
42. As set out above, I find that the note contains no express threat and does not amount to a failure to control anger. The information available to the respondent does not support an alternate claim that the applicant's overall behaviour amounted to serious misconduct. Significantly I find, the office worker's statement to the Authority of 14 July 2005 (also document 9) records her denial that she ever said the applicant was abusive or threatening: however she does describes him as "*yelling and intimidating*". That view was repeated during the Authority's investigation where the witness also said that, while Mr Corin was angry, she could not say she had concerns for her safety or for the other person who she recommended the applicant speak to. This is not fair and reasonable evidence of threatening or intimidating behaviour at a level of serious misconduct. An adequate investigation by the Company at the time would have drawn the same evidence that in turn would then have been discussed with Mr Corin.
43. The other person did not make a contemporaneous record of his encounter with Mr Corin. Other than obtaining the note from the other person, the Company does not appear to have interviewed him at the time of investigating Mr Corin's conduct or put his views to the applicant in its two disciplinary meetings. The minutes do not record the other person's views or his concerns being put to the applicant. In his evidence to the Authority, the other person said that staff told him of the note and that they were concerned, even frightened. Consequently, he returned to the workplace to look into the matter. It was then that he heard Mr Corin shouting and assumed it was related to him and to the note. He says Mr Corin's tone was not nice but he could not

hear what he was saying. He approached the applicant. The applicant either apologised that day or the next, to him. While intemperate, this is not fair and reasonable evidence of threatening or intimidating behaviour at a level of serious misconduct. I am satisfied that an adequate investigation at the time would have disclosed this information, for the parties' consideration.

44. There is no evidence of the Company investigating in any way what Mr Corin might have done had he located the person responsible for his ticket, or of any concern it might have had in that regard being put to him.
45. The Company's evidence fails to justify its decision to dismiss the applicant for serious misconduct: it does not establish a connection between his behaviour and that decision. The absence of specificity by the Company in approaching this matter unfairly denied Mr Corin an opportunity to address his employer's concerns. The Company thereby failed to meet the minimum requirements for procedural fairness: *NZ (with exceptions) Food Processing etc IOUW v Unilever New Zealand Ltd* [1990] 1 NZILR.
46. Mr Cronin's conduct toward the office worker and to the other person was clearly unpleasant: they say he was shouting and his tone was not nice. One says he was intimidating. However these were not put to the applicant at the time.
47. The Company found that Mr Corin's conduct amounted to "*a threat and intimidation*" (document 6). But it has failed to identify or establish what behaviour on his part amounted to a threat and intimidation, such as to amount to serious misconduct.
48. It therefore follows from the above that the respondent has failed to demonstrate it carried out a full and fair investigation that in turn disclosed conduct by Mr Corin capable of being regarded as serious misconduct: *Oram*, above.
49. Having found for the reasons set out above that the Company cannot justify Mr Corin's dismissal it is unnecessary for me to consider the arguments of disparity raised on the applicant's behalf.

Remedies

50. The remedies sought by Mr Corin are lost wages and unspecified compensation for humiliation, etc as well as costs. By promptly finding work after his dismissal I am satisfied Mr Corin clearly made appropriate effort to mitigate his losses following his unjustified dismissal. It therefore follows that he must succeed with his claim for lost wages: s 123 (1) (b) of the Act applied.
51. Given the circumstances of Mr Corin's unjustified dismissal, and in particular his contributory fault (discussed below), I can see no reason to direct payment of lost remuneration for longer than the 3-month period provided by ss. 128 (2) & (3) of the Act. The parties are best placed to calculate the remuneration lost to Mr Corin.
52. I am also satisfied from the applicant's evidence that he was distressed by the circumstances of his unjustified dismissal. I am satisfied from the evidence presented to the Authority that the compensation for the degree of humiliation, etc experienced by Mr Corin is properly set at \$10,000: s. 123 (1) (c) (i) of the Act applied.

Contributing Behaviour

53. Mr Corin's unjustified dismissal resulted from his actions in inappropriately and loudly pursuing with completely unrelated individuals the issue of his car being ticketed. Any concern Mr Corin had about the ticket was between himself and the agency who issued it. Mr Corin was in no position to view himself as having been "*targeted*" (the applicant's description) when he elected to park illegally after acknowledging he had received written warnings in the past not to park in that area. His acknowledgement that the note was stupid and his offer to undertake an anger management course is evidence he accepted, at the time, that his behaviour was unwarranted.
54. I am therefore satisfied that the applicant's actions contributed to the respondent's unjustified decision to terminate his employment and the remedies awarded him should be reduced accordingly. I am satisfied that Mr Corin's contribution is properly measured as 20%: s. 124 of the Act applied.

Determination

55. For the reasons set out above I find in favour of Peter Corin's claim that he was unjustifiably dismissed by Progressive Meats Limited. The respondent is therefore directed to pay to Mr Corin the following monies:
- a. What the applicant would have received by way of earnings but for his unjustified dismissal, for the 3-month period following that dismissal, less any income earned during the same period: leave is reserved to the parties if they are unable to reach agreement on the relevant amount. That amount is to be reduced by 20% contributory fault.
 - b. Compensation for humiliation, etc of \$10,000.00 (ten thousand dollars) less 20% for contributory fault.
56. The parties are to attempt to reach agreement on the matter of costs failing which leave is reserved for the matter to be put to the Authority.

Denis Asher

Member of Employment Relations Authority