

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 135
5344297

BETWEEN

MICHAEL DICK
Applicant

AND

PROGRESSIVE
ENTERPRISES LIMITED
Respondent

Member of Authority: R A Monaghan

Representatives: M Whitehead, advocate for applicant
E Warden and V Hodgson, counsel for respondent

Investigation Meeting: 21 February 2012

Additional information
provided: 24 February 2012

Additional submissions
received: 2 and 9 March 2012

Determination: 17 April 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Dick says he was dismissed unjustifiably by his former employer, Progressive Enterprises Limited (Progressive). He had been employed as the butchery manager at Progressive's Countdown store at Westgate, Auckland.

[2] Progressive dismissed Mr Dick because he:

- (a) unwrapped packs of chicken which had reached their 'best before' date, and rewrapped them with new labels containing a 'best before' date which was one day later;

- (b) cut open packs of beef products which had reached their best before date, minced the contents, rewrapped the mince and put it on sale with a new label containing a best before date which was one day later; and
- (c) reversed recorded wastage figures without first ensuring his action was correct.

[3] Mr Dick does not deny that he acted as alleged (except that he denies that his action in mincing the beef amounted to re-grading it) but says his dismissal was unjustified because he was unaware there was a zero tolerance approach to actions of the kind he took, and he believes such practices were tolerated where he worked. He also alleges that there was disparity of treatment in that other employees had not been dismissed after they had acted in a similar way.

Background

1. Terms of employment and company policies

[4] Clause 8.4 of the parties' employment agreement provided that:

The company's work rules and disciplinary procedures apply to employee's employment. The company may introduce new rules, policies and procedures or vary and cancel existing ones.

[5] The code of conduct, a copy of which Mr Dick received in May 2009, provided in part that:

Our Values

... all employees are expected to demonstrate the values and behaviours outlined below:

..

- *Law abiding – we will comply with the rule and spirit of the laws that govern the country and government in which we work, and comply with all company policies when doing our jobs.¹*

Safety and Health

¹ P 5

Destination Zero

Woolworths invites all employees on a journey – and the Destination is ZERO. This means ZERO harm to people, the environment and the community.

...

Employees are required to comply with safety and health policies and processes at all times to protect their health and that of others, including our customers, from potential hazards.²

[6] In 2008 Progressive offered a training course named ‘Focus on Fresh Meat 2008’, which Mr Dick attended. There was a refresher in 2010. The course materials began by saying:

In order for the Meat department to sell fresh, safe, clean, hygienic food we have a number of policies and procedures that have been put in place. Quality product, customer satisfaction and trust is of the uppermost importance when dealing with fresh foods. The policies cover all aspects of safe practices when working and handling fresh product on our supermarkets.

[7] The section on ‘waste and markdown’ began by saying:

Every business has waste and markdowns. The level of waste and markdowns depends on the skill of the department manager. Your markdown figure should always be higher than your waste figure. By carefully monitoring your stock levels and quality you should make decisions hourly on what needs to be marked down and cleared before it turns to waste.

[8] The opening section ended with the following:

ALWAYS MAINTAIN THE ORIGINAL BEST BEFORE DATE

[9] The section on re-grading read:

There is no re-grading!

- *Regrading will only apply on the request of a customer I e marinating product, crumbing product, boning out a leg of lamb etc*
- *The only altering of product will be changing pack sizes from large to small. ...*
- *Inferior product can be trimmed to meet specifications but only within the first 24 hours of receiving goods and before it goes in the meat case*

² P 21

[10] The section on wastage read:

Wastage is any product that cannot be sold as it has failed our quality specifications or passed the best before or use by date. All waste should be recorded on your markdown and wastage sheets. After you have weighted and/or counted the product to be wasted dispose of the product correctly. ...

2. Mr Dick's actions

(a) rewrapping and relabeling packs of chicken

[11] On 20 September 2010 Mr Dick was seen removing the wrapping on packs of chicken, then rewrapping and relabeling the packs. One of the people who saw him, L, later retrieved some 20-30 discarded wrappings still with their labels attached and found the labels showed a best before date of that day. New labels on the rewrapped packs had new best before dates of the next day, and were marked 'reduced' or 'manager's special'.

[12] On 21 September L reported the matter to the store manager, Antony Tasker, and gave him the discarded wrappings. A second employee, C, also reported having seen Mr Dick rewrapping and relabeling product.

(b) mincing

[13] L also saw Mr Dick opening packets of beef products, trimming the fat, mincing the meat, traying and rewrapping it and placing it in the cabinet for sale. Some of the discarded wrappings she had retrieved were for the unwrapped beef products, and showed a best before date of 20 September. The new labels had best before dates of the next day.

[14] An additional concern about this action was that in those circumstances mincing was considered re-grading.

[15] L reported the matter at the same time as she reported the rewrapping and relabeling of the chicken.

(c) reversing recorded wastage figures

[16] As Mr Dick was not rostered to work on 11 September 2010, his duties were covered by another manager. The manager completed a record of the wastage for that day, identifying wasted product in the sum of \$786.60. On 12 September Mr Dick amended the record by reducing the sum to \$331.46 without discussing his action with anyone. This also came to Mr Tasker's attention.

Progressive's response to Mr Dick's actions

1. The disciplinary process

[17] Mr Tasker spoke briefly to Mr Dick on 21 September, with a view to ascertaining whether there was an acceptable explanation or whether the reported matters would need to be taken further. He concluded that disciplinary investigation was necessary. By letter dated 22 September 2010 he set out the three actions of concern, indicated that they were allegations of serious misconduct and that disciplinary action up to and including dismissal could follow, and sought a meeting on 24 September.

[18] In the interim Mr Tasker made additional enquiries, to which the responses not only repeated the allegations against Mr Dick but yielded the information that the assistant meat manager, T, had been seen acting in a similar way. Mr Tasker began a separate investigation into that allegation.

[19] During the 24 September meeting Mr Tasker tested Mr Dick's knowledge of relevant company policies and found that Mr Dick knew and understood the policies.

[20] Mr Tasker then put to Mr Dick the descriptions of his actions regarding the rewrapping and relabeling of the chicken, to which Mr Dick replied first that he had been relabeling for pricing purposes according to the week's specials when he came under a time pressure, and later that he had been under pressure from company policies on markdown and waste.

[21] During further discussion of these points at the investigation meeting it was put to Mr Dick that, if he was under a time pressure, it would have been quicker to apply a new label to the existing packs rather than to rewrap and relabel them. Moreover it was not acceptable to remove and dispose of the existing labels. If a product was relabelled the old label was not to be removed from the pack, and the original best before date was to remain visible. If a product was rewrapped, the original best before date was to be retained. As for the pressure from company policies on markdown and waste, Mr Dick said at the investigation meeting that he had been told to keep wastage figures below \$1,000, and that one of the targets to be met in order to qualify for a bonus payment could be affected by waste and markdown figures.

[22] Mr Dick's response to the concern about mincing the beef was to say he did not mince beef that had reached its best before date, and that he had not re-graded the beef but rather he minced only trimmings and offcuts as permitted. The discarded labels did not support his statement that he minced only trimmings and offcuts.

[23] Finally, Mr Dick's explanation at the 24 September meeting of why he amended the wastage figures was that he took a quick glance at the figures and decided some of the product had been doubled up. He meant that he noticed a large number of entries showing items of the same price, and assumed the same items had been scanned more than once. He agreed that he did not check his assumption about doubling up, and explained to Mr Tasker that he did not print out a replacement report because he did not have time.

[24] Mr Tasker was not satisfied with the answers. Mr Dick was suspended on pay, and a further meeting was sought for 27 September.

[25] During the 27 September meeting Mr Tasker advised Mr Dick that he was not satisfied with the response to the relabeling matter. He pointed out that re-labelled product should have been marked down the previous day, and dumped as waste on 20 September if it was not sold. Mr Dick had no explanation for his failure to act in that way. Overall he told Mr Tasker he repeated his responses of the previous meeting.

[26] Regarding his actions in respect of the wastage record, Mr Dick repeated that he assumed the product had been doubled up.

[27] Mr Dick's support person then raised a number of additional matters in response. He said in particular that: re-grading was the norm; in the past people had been warned for the conduct in question but not dismissed unless they offended again; the practices alleged against Mr Dick were widespread; pressures of time affected Mr Dick's decisions; an appropriate outcome would be a warning and further training rather than dismissal; and Mr Dick would not sell product he would not buy himself. When asked for details of the widespread practices alleged, or of the individuals who had been warned but not dismissed, the support person did not provide any.

[28] There was further discussion during the investigation meeting of the allegedly widespread nature of the practices in which Mr Dick had engaged. For his part Mr Dick said he was trained in that way, and that the practices were already in existence at Westgate when he took over as meat manager there. The detail of who had engaged in the practices and when was contained in the allegations of disparity of treatment, but there was no other evidence beyond Mr Dick's assertions.

[29] The meeting of 27 September was adjourned while the responses were considered.

2. The decision to dismiss

[30] When the meeting resumed Mr Tasker advised that the company believed: the rewrapping and relabeling had occurred as alleged; and Mr Dick had admitted reversing the wastage figures without sighting the product or seeking authorisation. Mr Tasker asked Mr Dick whether he wished to say anything about why dismissal should not be the next step.

[31] Mr Dick spoke of his experience and his many years of service, his clean record, and the satisfactory performance of the meat department he managed.

[32] There was a further adjournment while the company representatives conferred on the disciplinary outcome. When the meeting resumed Mr Tasker advised that the

allegations were considered proved and that Mr Dick would be dismissed with immediate effect. He took into account Mr Dick's length of service and experience, but took the view that the company had 'zero tolerance' towards breaches of the food safety programme and that as an experienced manager Mr Dick should have been following the rules.

[33] The decision was confirmed in a letter dated 28 September 2009.

Was the dismissal justified

[34] The actions underlying the allegations of serious misconduct were admitted, save for the denial of re-grading which Progressive was entitled to reject, and I find Progressive acted fairly and reasonably in regarding Mr Dick's actions as serious misconduct.

[35] The issues raised in respect of the justification for Mr Dick's dismissal concern whether dismissal was, nevertheless, the action a fair and reasonable employer would have taken. Mr Dick says it was not, because:

- (i) there was a practice of rewrapping and relabeling meat, in which Mr Dick had been trained in the interests of reducing waste;
- (ii) Mr Dick was unaware there was a policy of 'zero tolerance' in this respect;
- (iii) there was disparity of treatment in that other employees in similar circumstances had not been dismissed.

1. Was there a workplace practice of rewrapping and relabeling meat

[36] Even if it was true that Mr Dick was trained to rewrap and relabel product as he alleged, there was no allegation that extending the best before date was considered acceptable as part of this practice and Mr Dick's answers consistently begged that question.

[37] Whatever the practices carried out in the earlier part of Mr Dick's career, in more recent years there had been heavy emphasis on food safety culminating in the Focus on Fresh initiative in 2008 and the subsequent refresher. Not only was there

relatively extensive supporting documentation in the form of the Focus on Fresh course materials, but food safety requirements were spelled out clearly in other documentation and there was no suggestion that Mr Dick was unaware of the requirements. All of this was reinforced in the code of conduct.

[38] As the manager of his meat department Mr Dick was responsible for ensuring the requirements were met, and to say he was acting in accordance with his earlier training was not an adequate explanation. Similarly if the alleged practice was occurring in his meat department it was Mr Dick's responsibility to stamp it out, not to engage in it himself.

2. Was there a 'zero tolerance' policy of which Mr Dick was unaware

[39] Mr Tasker said he used the phrase 'zero tolerance' to underline the seriousness with which Mr Dick's conduct was being viewed. His use of the phrase did not mean he or Progressive was taking the view that that the mere occurrence of the conduct was a sufficient ground for dismissal regardless of any explanation. Mr Tasker sought and obtained explanations which, with good reason, he found unacceptable.

[40] Otherwise, references to 'zero' tolerance were references to 'Destination ZERO' in the code of conduct.

[41] I conclude there was no 'zero tolerance' policy of the kind Mr Dick was suggesting.

3. Was there disparity of treatment

[42] The legal test applicable to the place of allegations of disparity of treatment in a claim of unjustified dismissal is set out in *Chief Executive Officer Department of Inland Revenue v Buchanan (No 2)*³. The test poses three questions, namely, -

- is there disparity of treatment?
- if so, is there an adequate explanation?
- if not, is the dismissal justified notwithstanding the disparity?

³ [2005] ERNZ 767 (CA); leave to appeal declined in [2006] NZSC 37; [2006] ERNZ 512

[43] Further to the third question, even without an explanation the existence of disparity does not necessarily render a dismissal unjustified. All of the circumstances must be taken into account.⁴

[44] Mr Dick's allegations of disparity concerned:

- the assistant manager, T, who was subjected to a disciplinary procedure at the same time as Mr Dick but was neither warned nor dismissed;
- GN, who allegedly received a warning for conduct comparable with Mr Dick's before being dismissed for a subsequent similar offence;
- GC, who had allegedly received only a warning for conduct comparable with Mr Dick's; and
- F, who had allegedly engaged in relabeling and was not disciplined.

[45] T underwent a similar disciplinary process to the one followed with Mr Dick. According to the company's record, at a meeting on 28 September he was advised of the allegation that he was rewrapping and relabeling product with an extended best before date. He declined to answer without being provided with details, except that he said he had rewrapped and relabelled product but did not change the best before date. When asked if an old practice of rewrapping and relabeling had been in place and was continued when Mr Dick became manager, he sought an adjournment, then said the old system was in place when Mr Dick arrived. Finally, when he was advised of the allegation that beef which had reached its best before date was being minced and given a new best before date he said he declined to answer because he did not wish to save his job at Mr Dick's expense.

[46] The record of T's account tended to support in a generalised way the allegation that a practice of rewrapping and relabeling was in existence in the meat department at Westgate. However that does not affect my conclusion on whether the matter amounted to an acceptable explanation in Mr Dick's case.

[47] For his part Mr Tasker said T was not disciplined because there was no evidence against him beyond the generalised allegations which were denied. The

⁴ *Samu v Air New Zealand Limited* [1995] ERNZ 636

record supports that conclusion, and it was reasonable. Further, Mr Tasker was entitled to conclude that as the manager Mr Dick was more culpable.

[48] Both GN and GC were managers who were dismissed in 2007 and 2008 respectively for breaches of food safety. There was no record that, at any time in the preceding five years of their employment⁵, either of them had received a disciplinary warning for the same or similar conduct. Mr Dick's assertions that both told him they had received warnings were hearsay as to the truth of the statements, and lacking in any other detail of the warnings at all. I do not accept the assertions. At best they reflect conversations which did not convey accurate information at the time, have been recalled inaccurately, or both.

[49] Finally, F had placed a new label over the top of an old one in a way that was contrary to company policy. Progressive accepted she had done so accidentally, and concluded that for reasons including the training available to her, her personal circumstances, and the hours she had been working, she should not be dismissed.

[50] With reference to the tests in *Buchanan* I conclude that conduct on the part of GN and GC which was comparable with Mr Dick's conduct also attracted the same disciplinary outcome and there was no disparity. Any arguable disparity in the cases of T and F was explained adequately.

4. Conclusion

[51] For the above reasons I do not accept there was a lack of justification on any of the grounds Mr Dick raised, and conclude overall that Progressive acted fairly and reasonably when deciding on and implementing the dismissal.

[52] Accordingly I find the dismissal was justified.

Costs

[53] Costs are reserved.

⁵ Because of the vagueness of the associated allegations I did not require the production of the respective personnel files for any longer period.

[54] The parties are invited to resolve the matter. If they are unable to do so any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority