

- In his written evidence Mr Dryland states that his car was old and would not start. In his oral evidence at the investigation meeting he told me he had run out of petrol.
- In his written evidence Mr Dryland states that when his car would not start he rang his supervisor, Mr Raj Kung. He told me in his oral evidence that this was between 3pm and 5pm. Mr Dryland then told me that Mr Kung rang him first and then he [Mr Dryland] rang him after that and told Mr Kung he couldn't get back to work. After questioning in this area, Mr Dryland acknowledged that Mr Kung rang him and then Mr Dryland rang Mr Kung back much later at or around 7pm.
- While denying using specific words towards his employer, at the investigation meeting, and in answer to a number of questions, Mr Dryland could not recall what was said and was equivocal about what he replied back to Mr Kung.

[5] I found Mr Kung's evidence to have been the more credible overall. As a result of my findings on credibility where there are disputes between the parties that impact on my findings in this matter, it is the evidence of the Mr Kung that I prefer.

Was the dismissal justified?

[6] It was common ground that on 23 August 2008 Mr Dryland did the morning milking and left the farm with the permission of Mr Kung. He was expected back in time for the afternoon's milking. When he did not turn up Mr Kung contacted Mr Dryland and enquired as to his whereabouts. Mr Dryland's car had run out of petrol and he was unable to return to work.

[7] At about 7pm that evening Mr Dryland rang Mr Kung and enquired as to whether he still had a job. Mr Dryland says he did this because he knew he had missed a milking, and had mucked his employer around by not turning up. Mr Kung assured Mr Dryland his job was still available to him, but that he wanted to have a talk with him when he came in the next morning.

[8] It was common ground that about a week earlier Mr Dryland had become upset at his rate of pay. He raised this with his employer and that matter was eventually resolved with the assistance of the Department of Labour. I find that the issue relating

to his pay was still firmly in Mr Dryland's mind when he was spoken to the following day on 24 August 2008.

[9] After the morning's milking on 24 August 2008, Mr Kung and Mr Dryland met in the milk room. Mr Kung was unhappy with Mr Dryland's attitude towards his work and raised this with him. At the investigation meeting Mr Dryland confirmed that he was doing the job he felt he was getting paid for. Mr Dryland told me that when he found out he wasn't getting paid as much as he thought, he did an ample job but not \$500 a week worth of job.

[10] Mr Kung says he asked Mr Dryland if he was still serious about working for him. Mr Kung says Mr Dryland told him he didn't want to work for that "...shit money."

[11] Mr Kung says he then asked Mr Dryland that if that was the case why he was wasting his time, to which Mr Dryland responded: "I know what you f***ken Indian c***ts are like". Mr Kung is Indian by birth. He told me he felt shamed and embarrassed by the words used by Mr Dryland and reacted by immediately telling Mr Dryland to remove himself from the premises. Mr Dryland asked whether he would be required to work out any notice, and was told no.

[12] Mr Dryland was dismissed summarily for using objectionable and racist language. At the investigation meeting Mr Dryland told me that he would often swear to his colleagues but that he would not swear at Mr Kung. I find that the way Mr Dryland spoke to Mr Kung was repudiatory conduct of the kind a fair and reasonable employer would consider to constitute serious misconduct. However, the dismissal was carried out in the absence of any notion of procedural fairness.

[13] I have considered whether this situation was one of those rare occasions where an employer is entitled to act without further enquiry¹. I have concluded that it is not. The *Amaltal* case involved really atrocious behaviour on the part of employees which was so graphic as to avoid the necessity for the employer to follow the usual rules.

[14] While the language was considered by Mr Kung as obscene and racist, KBL was required to follow the requirements of procedural fairness before deciding to dismiss

¹ *Amaltal Fishing Co Ltd v Morunga*, unreported, Goddard, CJ, 23 August 2002, WC 31/02.

Mr Dryland. In *Amaltal* his honor clarified the need to follow procedural fairness obligations when he stated²:

It is a serious mistake to regard following the requirements of procedural justice prior to dismissing employees as niceties. It is not a matter of good manners or etiquette; it is a requirement of the law of the land from which neither the appellant nor the [respondent] is exempt...

[15] I find Mr Dryland was unjustifiably dismissed and he is entitled to a consideration of remedies.

Remedies

[16] I have no doubt that by the time of his dismissal Mr Dryland had become a challenging employee and was not working at the standard of performance expected of him. He told me as much at the investigation meeting.

[17] I have found Mr Kung was correct to conclude that Mr Dryland's offensive comments to him amounted to serious misconduct. Had Mr Kung then followed a fair and reasonable process there is a high likelihood Mr Dryland would have been dismissed. In these circumstances I decline to make an award for lost remuneration to Mr Dryland.³

[18] I am satisfied that it is just to reduce the remedies available as a result of Mr Dryland's conduct. Mr Dryland is entitled to an award for contribution to his costs but no other remedy. This will acknowledge Mr Dryland has established to my satisfaction a personal grievance based on a claim that he was dismissed unjustifiably without rewarding him for significant blameworthy conduct.

Costs

[19] Costs are reserved.

Vicki Campbell
Member of Employment Relations Authority

² Supra at p.32.

³ *Waitakere City Council v Ioane* [2004] 2 ERNZ 194; *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315.