

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**5163105
AA 353/10**

BETWEEN HENRY FAUMUINA
 Applicant

AND GEORGE WESTON FOODS
 (NEW ZEALAND) LIMITED
 Respondent

Member of Authority: Dzintra King

Representatives: Olinda Woodroffe, Counsel for Applicant
 Jane Latimer, Counsel for Respondent

Investigation Meeting: 9 June 2010

Determination: 9 August 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Henry Faumuina, says that he has been unjustifiably dismissed by the respondent, Purity Foods, a division of George Weston Foods (NZ) Ltd (“Purity Foods” or “the company”). The respondent says the dismissal was justified.

[2] Mr Faumuina was an employee of the company from February 1986 to 11 June 2007. His employment was terminated for disobeying a lawful and reasonable order.

[3] Mr Craig Sweetman was the production manager at Purity Foods. On 5 June 2007 he was advised by a cleaner that Mr Faumuina was storing cockroaches in his locker. He called Mr Faumuina to his office. He told Mr Faumuina he understood that Mr Faumuina may have been storing cockroaches and asked whether it was true. Mr Faumuina acknowledged that he was storing cockroaches in his locker.

Mr Sweetman asked him why he was doing that. Mr Faumuina replied that he was collecting them as evidence for his partner's case. Mr Faumuina's partner, Ms Claire Filipo, also worked for Purity Foods and she was bringing a personal grievance against the company after having received a warning which she was unhappy about. Mr Sweetman said that Ms Filipo's warning had nothing to do with cockroaches but that she had been observed hosing down a dry area designated as such because of the risk of electrocution. This was a breach of company rules.

[4] Mr Sweetman explained to Mr Faumuina that the storage of dead insects was a violation of the company's health and safety policy and also a health risk to other workers and the public. He asked Mr Faumuina to dispose of the insects immediately. Mr Faumuina refused. Mr Sweetman again asked him to remove the insects from his locker stating that he needed to understand that he was being given a legal and reasonable instruction and if he failed to carry out this instruction, Mr Sweetman would view it as serious.

[5] Mr Sweetman made notes after this meeting in preparation for the disciplinary meeting. In those notes he refers to continued misconduct. The continued misconduct being referred to is a continuation of the behaviour that resulted in Mr Faumuina receiving a previous written warning on 9 February 2007. That warning had to do with Mr Faumuina taking leave despite not having been given approval to do that. That warning stated:

In future I expect you to follow all GWS procedures and lawful instructions given to you by your supervisors.

[6] That warning was to remain active for a period of six months.

[7] Mr Faumuina acknowledged that Mr Sweetman regarded his refusal as very serious. However, he reiterated he was not going to remove the cockroaches from his locker. At that stage, Mr Faumuina had refused twice to follow Mr Sweetman's instruction. Mr Sweetman found his behaviour to be deliberately difficult and wilful. They then took a break. The purpose of the break was so that Mr Sweetman could prepare a letter for Mr Faumuina calling him to a disciplinary meeting. The letter reads:

Following our discussion this afternoon I am now giving you 24 hours notice of a disciplinary hearing. The hearing will take place at 1600 06-06-07 in the Purity Foods meeting room. You are entitled to

have a support person or representative present with you at this hearing.

The allegation against you is for continued misconduct where you have failed to follow a lawful and reasonable instruction given to you by your manager. You are now suspended on pay pending the outcome of the above hearing.

[8] Upon being given the letter, Mr Faumuina advised Mr Sweetman that he would remove the cockroaches from his locker. Mr Sweetman told him it was too late for that. By that stage, Mr Faumuina had refused on two occasions to remove the cockroaches.

6 June Meeting

[9] Mr Faumuina attended the meeting with his support person but without a representative. The support person was Ms Maria Ah Loe. Mr Sweetman asked whether he understood that an outcome of the meeting could be instant dismissal. Mr Faumuina said he understood that. He was then asked if he was comfortable proceeding with a support person present or whether he would prefer a representative. Mr Faumuina confirmed that he wished to proceed with his support person present. Mr Sweetman then went through notes he had made and Mr Faumuina agreed with everything that had been stated. I have seen a copy of these notes and Mr Sweetman has written “yes” or “confirmed” at the end of each point that he raised with Mr Faumuina.

[10] The company’s National Health and Safety and Employment Relations Manager, Mr Vladislav Purgaric, attended the 6 June meeting with Mr Sweetman. The notes record that Mr Faumuina said he had taken the cockroaches for Ms Filipo’s Court case. He had given it to his lawyer. His lawyer had told him to collect the cockroaches. He had been collecting them for two weeks. They were alive at the time they were caught. He had caught them using gloves. They were stored in his locker with the ends of the gloves tied up.

[11] Mr Faumuina was asked who he had notified about the cockroaches. He said he had notified two people. Mr Sweetman said that following a pest sighting, the process was to report it to his supervisor or the technical team. All sightings were then logged by the company. Mr Sweetman said he had records of actions that had been initiated by the company following sightings of pest activity. Asked why he had

not done this, Mr Faumuina said he had. However, Mr Sweetman later checked and found that there had been no reporting made to his supervisor.

[12] Mr Sweetman said that when he asked Mr Faumuina to throw out the cockroaches that he was keeping in his locker, he asked him whether he thought it was a reasonable request; and if not, why not. He also asked why Mr Faumuina had not followed instructions. Mr Faumuina replied that he was doing what he thought was right and he knew he was right.

[13] Mr Faumuina was asked what he would do if Mr Sweetman asked him to remove the cockroaches again: would he obey instructions from now on. Mr Faumuina's response was "*no, I would refuse again*". Mr Sweetman asked him whether he understood that his behaviour was disobedient and unacceptable. Mr Faumuina acknowledged that. He was then asked again whether he would comply with this request if he was in a similar situation again. Mr Faumuina said he would do whatever he liked and that he would not comply if he did not want to.

[14] His support person said he had been asked whether he would apologise. She said Mr Sweetman said that if Mr Faumuina apologised he would be given another chance to return to work, but Mr Faumuina refused to apologise. Mr Sweetman said he was disappointed that Mr Faumuina, on more than one occasion and given the opportunity to show remorse, said that he would do the same thing again.

[15] At the end of the meeting, Mr Purgaric, advised Mr Faumuina that he would remain stood down from his duties on full pay pending a decision regarding the outcome. Mr Faumuina advised that he would contact Ms Woodroffe who Mr Sweetman knew was Ms Filippo's lawyer.

Subsequent Events

[16] Mr Sweetman spoke to Mr Faumuina on Thursday 7 June and asked him to come back for a follow-up disciplinary meeting on Friday, 8 June at 4pm. He agreed. Ms Woodroffe left Mr Sweetman a voice message in the afternoon. He called her back. She asked Mr Sweetman why he had asked Mr Faumuina to throw the cockroaches out. He said they were a health risk. Ms Woodroffe said that she was going to get the health authorities onto his company. Ms Woodroffe also asked why Mr Faumuina had been dismissed on the spot. Mr Sweetman stated that he had not dismissed anyone. She then stated she had advised Mr Faumuina not to attend the

meeting on 8 June. Mr Sweetman asked her if she knew that Mr Faumuina had been at a disciplinary meeting the day before. She acknowledged that she did.

[17] He then asked Mr Purgaric to write to Ms Woodroffe confirming that the meeting would take place at 4pm on 8 June and that it would advise Mr Faumuina of the outcome of the disciplinary investigation. The letter was faxed at 11.33am to Ms Woodroffe. The company did not get a response and Mr Faumuina did not show up for the meeting at 4pm.

[18] Instead, Mr Faumuina and Ms Woodroffe appeared on television alleging there was a cockroach problem at the company. The Bakers' and Pastrycooks' Union stated that the company had excellent hygiene standards.

[19] Mr Faumuina was advised in writing of the outcome of the disciplinary process which was that he was dismissed for failure to follow a lawful and reasonable instruction.

The Applicant's Submissions

[20] Ms Woodroffe submitted that Mr Faumuina's actions did not amount to serious misconduct. She also submitted that the instruction given to Mr Faumuina was not a reasonable instruction in the circumstances. The rationale for this position was that on previous occasions when Mr Faumuina had reported sightings of cockroaches he had been ignored. The issue of whether the instruction was reasonable could not be considered in a vacuum and had to be considered with regard to the background and the context in which the instructions were given. Ms Woodroffe contended that what Mr Faumuina was intending to do was to draw the employer's attention to the cockroach problem.

[21] The problem with this argument is that it does not accord with what Mr Faumuina told Mr Sweetman in the disciplinary meeting nor does it accord with what is in the Statement of Problem. The Statement of Problem reads:

The applicant placed dead cockroaches that he found in the factory and within his place of work in his locker. His partner who was also employed by the respondent, had been previously accused of lying about seeing cockroaches and maggots. The applicant wanted evidence to aid the investigative process and to show the employer that his partner had not been lying.

[22] Ms Woodroffe submitted that Mr Faumuina refused to follow Mr Sweetman's instructions because it was an instruction which required him to be dishonest and be party to the cover-up of an unhygienic workplace and food manufacturing factory. He was not motivated to refuse by a desire to usurp the authority of the employer, but the employer's instruction was an unreasonable one.

[23] Ms Woodroffe said that Mr Faumuina's attempt to mitigate his earlier refusal by agreeing to remove the cockroaches was unfairly not taken into consideration when Mr Faumuina was dismissed. In itself, this argument might have substance were it not for what subsequently occurred. When the disciplinary meeting took place, Mr Faumuina was given the opportunity on more than one occasion to apologise and say what he would do if the same situation arose again. He refused to apologise and reiterated that he would carry out the same action. This constitutes an endorsement of the initial stance not to remove the cockroaches.

Decision

[24] Section 103A requires the Authority to consider, on an objective basis, whether the employer's actions and how the employer acted were what a fair and reasonable employer would do in all the circumstances at the time the dismissal or action occurred.

[25] Mr Faumuina's failure to turn up at the meeting on 8 June deprived him of the opportunity to have any input into whether or not he should be dismissed.

[26] Ms Woodroffe also contended that Mr Faumuina had the right to be clearly informed at the outset on 5 June of the clear terms of the instructions and why it was important for Mr Faumuina to promptly follow the instructions. The instructions and the reasons for them were not clarified verbally or in writing.

[27] I am satisfied that Mr Sweetman was very clear that Mr Faumuina was to remove the cockroaches from the workplace because they were a health and safety risk and it was not appropriate to have cockroaches stored, particularly in a food processing workplace. The instruction given by Mr Sweetman to Mr Faumuina was lawful and reasonable. Mr Faumuina disobeyed that instruction twice. Mr Faumuina was given the opportunity to rectify the situation but simply reiterated that he would repeat his previous behaviour. There was no question that Mr Faumuina understood

what he was being required to do. There was no miscommunication. There was a deliberate and wilful refusal to carry out the instruction that was given to him.

[28] In *New Zealand Printing etc IUOW v. Clark & Matheson Ltd* [1984] ACJ 283 at p.286, the Court stated:

Open and deliberate defiance to obey a lawful and reasonable instruction given by a person in authority clearly amounts to misconduct to a degree which may, in our view justify instant dismissal.

[29] In *New Zealand Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35 at p.592, the Court stated:

What is meant by wilful disobedience is an intentional or deliberate act of disobedience.

[30] The dismissal process was fair and reasonable. Mr Faumuina received a lawful and reasonable direction from Mr Sweetman. He disobeyed that on two occasions. Mr Faumuina was given an opportunity to explain and mitigate his earlier disobedience. Mr Faumuina wilfully refused and at the disciplinary meeting showed no remorse and said he would refuse again.

[31] The dismissal was justified.

Costs

[32] If the parties are unable to resolve the issue of costs the respondent is to file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority