

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 361
5370166

BETWEEN

CARL FINDLAY
Applicant

A N D

PORTS OF AUCKLAND
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Mitchell, Counsel for Applicant
Richard McIlraith and Kylie Dunn, Counsel for
Respondent

Investigation meeting: 20 September 2012 at Auckland

Date of Determination: 12 October 2012

DETERMINATION OF THE AUTHORITY

A. The issuing of a written warning by POAL was justified.

Employment relationship problem

[1] Carl Findlay claims that he has a personal grievance pursuant to s103(1)(b) of the Employment Relations Act (the Act). Mr Findlay alleges that his employment was affected to his disadvantage by the unjustifiable action of his employer, Ports of Auckland Limited (POAL), in issuing him with a final written warning on 8 February 2012.

[2] Mr Findlay seeks distress compensation in respect of his personal grievance claim.

[3] POAL denies its action in issuing Mr Findlay with a final written warning on 24 February 2012 was unjustifiable. POAL says the warning was justified on the grounds of serious misconduct following a fair and reasonable process.

[4] The main facts in this matter are not in dispute. Mr Findlay was requested by another POAL employee, Mr Tamati Davie to retrieve a letter he had put in an envelope addressed to Jonathan Hulme, Manager – Stevedoring at POAL and slipped under Mr Hulme’s office door.

[5] Following an investigation, POAL determined that Mr Findlay, without authority, had removed the letter from Mr Hulme’s office and that this action constituted serious misconduct. POAL issued a final written warning which expired six months later on 7 August 2012.

Issues

[6] The issues for determination by the Authority are whether Mr Findlay’s actions in removing the letter amounted to unauthorised removal of company property. If Mr Findlay did remove company property without authority, was it conduct for which a written warning could be issued?

Was Mr Findlay’s removal of the letter from Mr Hulme’s office unauthorised removal of company property?

[7] Mr Findlay is employed by POAL as a stevedore and has been employed by POAL for approximately 11 years. Mr Findlay reports to Mr Hulme and also has a reporting relationship with Ian Kitching, the Shift Manager. Mr Findlay is a member of the Maritime Union of New Zealand (MUNZ) and is the Vice President of the Auckland Branch. Mr Findlay’s employment is subject to a collective agreement between POAL and MUNZ dated 1 July 2009 to 30 September 2011 (the collective agreement).

[8] Clause 4.2 of the collective agreement provides:

4.2 CODE OF EMPLOYMENT

Issues of employee misconduct will be dealt with in a fair manner. This will include a warning system. The company will only give a warning after a full investigation and a finding that the warning is justified and necessary. A Union Official will be involved in the operation of the formal warning system. The Union Official will be notified in good

time prior to the meeting with the employee so as to allow the worker to be represented if he or she so desires.

4.2.1 *Warning System*

(a) *First Offence*

An oral warning which will be recorded in the employee's personal file and will stand for a period of six months.

(b) *Second Offence*

A written warning will be issued by the manager or supervisor and a further offence of any kind may result in dismissal.

(c) *Third Offence*

The employee will be liable to dismissal with notice...

4.2.3 *If any offence is considered serious enough a written warning may be issued without prior application of an oral warning.*

4.2.6 *Warnings will stand for six months.*

4.2.7 *The following are examples of conduct that may constitute serious misconduct and may warrant instant dismissal:*

...

(e) *Unauthorised possession of company property or that of any other person.*

[9] In January 2012, Mr Hulme was undertaking an investigation on behalf of POAL into the actions of Mr Davie, a stevedore employed at POAL. The issue concerned the alleged disclosure by Mr Davie to MUNZ of confidential information belonging to POAL. Grant Williams, another stevedore employed by POAL was also under investigation. Both Mr Davie and Mr Williams are MUNZ members.

[10] As part of this investigation Mr Hulme couriered a letter to Mr Davie on 24 January 2012 seeking a response to a series of questions by 27 January 2012.

[11] Following receipt of the couriered letter on 24 January 2012, Mr Davie spoke with Mr Hulme about when he was going to provide a response to his questions. As a result of this discussion, Mr Davie and Mr Findlay became aware that Mr Hulme would not be at POAL on 27 January 2012. Mr Findlay knew Mr Hulme was not in his office on 27 January 2012.

[12] Mr Davie prepared his response, put it in an envelope addressed to Mr Hulme and slipped it under Mr Hulme's locked office door on the morning of 27 January 2012. At the end of his shift following a discussion with Mr Findlay and Mr Williams, Mr Davie asked Mr Findlay to retrieve the letter. Mr Findlay retrieved the letter.

[13] It was Mr Findlay's action in retrieving the letter from Mr Hulme's office that led to the issuing by POAL of a written warning.

[14] The evidence of Mr Davie and Mr Findlay about what happened on the day Mr Davie put the letter under Mr Hulme's door and in what sequence was contradictory and inconsistent. There were discrepancies about whether Mr Findlay saw Mr Davie's written response to Mr Hulme's questions before Mr Davie put the envelope under Mr Hulme's door. There were conflicts about when Mr Findlay became aware the letter had been left by Mr Davie under Mr Hulme's door. There were conflicts about whether Mr Davie met with both Mr Findlay and Mr Williams about his written reply, there were conflicts about when Mr Davie asked Mr Findlay to retrieve the letter from Mr Hulme's office, there were conflicts about whether Mr Davie telephoned Mr Findlay or asked him in person to retrieve the letter.

[15] These conflicts were not just between Mr Davie's and Mr Findlay's evidence but in respect of their own evidence in statements prepared for the purpose of Mr Findlay's disciplinary meeting with POAL in February, witness statements prepared for the Authority's investigation meeting and evidence given during the course of the investigation meeting.

[16] It is my finding that on 27 January 2012, after putting his written response to Mr Hulme's questions under Mr Hulme's door Mr Davie told Mr Findlay what he had done. Mr Findlay sought legal advice from MUNZ's lawyer which was to get the letter back. At the end of their shift Mr Findlay, Mr Davie and Mr Williams met to discuss the situation and the legal advice Mr Findlay had received. Mr Davie decided he wanted the letter back that day in order to add some information to it. As he was the Vice President of MUNZ and had a working relationship with Mr Hulme, Mr Davie asked Mr Findlay if he would retrieve the letter.

[17] These facts are significant in that they demonstrate that there was discussion and a plan by Mr Findlay, Mr Davie and Mr Williams about Mr Davie's response to

an investigation that was being carried out by Mr Hulme. They also demonstrate that, rather than taking steps to contact Mr Hulme, Mr Findlay was to retrieve the letter from Mr Hulme's office knowing Mr Hulme was not at POAL on the day.

[18] Mr Findlay went to retrieve the letter. Mr Findlay knew that Mr Hulme was not at POAL that day but it was important to get the letter back that day. Mr Findlay approached Mr Kitching, the Shift Supervisor. Mr Findlay told Mr Kitching he needed to retrieve a letter from Mr Hulme's office and asked him to unlock the office. Unknown to Mr Findlay, Mr Kitching wished to keep out of it and so put on a charade that he had a key which would open the office, when in fact he did not have one. When the office door was not able to be unlocked, Mr Findlay requested a ruler so that he could get the letter that way. Mr Kitching gave Mr Findlay a short ruler knowing that he would be unable to retrieve the letter with it. Mr Findlay was unaware that Mr Kitching rather than assisting him, was hoping that not being able to unlock Mr Hulme's door and not having a long enough ruler would deter Mr Findlay from getting the letter.

[19] Mr Findlay was not deterred and asked Viv Flynn, one of the allocators for a longer ruler and with that ruler was able to retrieve the letter. Mr Findlay was observed retrieving the letter by Wendy Glynn, POAL's Human Resources Manager, and Pete Blanch, POAL's Health and Safety Manager, from Pete Blanch's office located directly opposite Mr Hulme's office. Ms Glynn confronted Mr Findlay and asked him to give her the letter. Her request was refused. Ms Glynn informed Mr Findlay that his actions in removing the letter were not appropriate and that he should ring and inform Mr Hulme of what he had done. Shortly after taking the letter, Mr Findlay obtained Mr Hulme's mobile phone number and left a voice message telling him that he had retrieved Mr Davie's letter from his office.

[20] At 10.30am on 28 January 2012, Mr Hulme sent Mr Findlay a text indicating he considered Mr Findlay's actions in removing the letter from his locked office to be theft and demanding its immediate return. The letter was not returned to Mr Hulme. Mr Findlay sent Mr Hulme a text at 4.11pm saying that Mr Davie wished to add to the letter and to pass it by MUNZ's lawyer.

[21] Mr Hulme claims that the letter from Mr Davie which was addressed to him in a sealed envelope and left in his locked office was his property and that Mr Findlay's actions in removing the letter meant that Mr Findlay was in

unauthorised possession of company property. Further, Mr Hulme says by removing Mr Davie's letter, Mr Findlay was interfering with the investigation he was conducting into whether Mr Davie had disclosed POAL's confidential information to MUNZ.

[22] Mr Findlay says he was given permission by his Shift Manager, Mr Kitching to retrieve the letter. Mr Kitching's actions in attempting to unlock Mr Hulme's office and then in giving him a ruler to retrieve the letter amounted to authorisation by POAL to retrieve the letter.

[23] Following a disciplinary process, POAL determined that Mr Findlay's actions constituted the unauthorised removal of POAL's property and was an interference with Mr Hulme's investigation into Mr Davie's alleged conduct. POAL determined this action constituted serious misconduct and issued Mr Findlay with a final written warning which expired on 7 August 2012.

[24] Mr Findlay says the written warning was unjustified and he has suffered considerable distress as a result.

[25] It is for POAL to establish that the warning was justified pursuant to s103A of the Employment Relations Act 2000 (the Act). Section 103 A(2) states:

103A Test of justification

- (1) *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 applying the test in subsection (2).*
- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[26] Section 103A was considered by a full court of the Employment Court in *Angus v Ports of Auckland* [2011] NZEmpC 160. Both Mr Mitchell and Mr Mcraith referred me to passages from the decision regarding the test of justification in s103A.

[27] The test requires the Authority in this matter, to determine whether on an objective basis a final written warning was within the range of responses open to a fair and reasonable employer. If the warning was within the range then it will be justified.

[28] Mr Findlay has admitted retrieving Mr Davie's letter from Mr Hulme's office but says he was authorised by POAL through Mr Kitching, his shift supervisor to do so. Therefore, there was no unauthorised removal or possession of the letter by Mr Findlay. POAL denies Mr Kitching's conduct could be regarded as authorising Mr Findlay to remove the letter, but even if it was Ms Glynn asked for the letter back as did Mr Hulme, so any authority given was revoked shortly afterwards.

[29] A key factor in this matter is the manner in which Mr Findlay retrieved the letter. Even though it was Mr Hulme to whom Mr Findlay reported and dealt with in respect of matters concerning MUNZ, he made no attempt to telephone, text or email him to ask for his permission to retrieve the letter. Mr Findlay could have explained to Mr Hulme that Mr Davie wished to have his letter back in order to provide further information, he could have asked Mr Hulme to disregard the letter or could have made it clear Mr Davie wished MUNZ's lawyer to consider the letter before Mr Hulme read it. Mr Findlay did none of those things.

[30] Rather, he approached Mr Kitching and asked him to unlock Mr Hulme's office and when that was not successful asked for a ruler to reach under the door and obtain the letter. Mr Kitching was not involved in POAL's investigation into Mr Davie's actions and was not fully aware of the circumstances for Mr Davie's letter being in Mr Hulme's office.

[31] It was clear at the investigation meeting that Mr Kitching wished to avoid conflict. Rather than standing up to Mr Findlay and telling him he was not entitled to go into Mr Hulme's office without Mr Hulme's permission, he took steps which Mr Findlay interpreted as assisting him to retrieve the letter, but which in fact were to deter him obtaining the letter. This was unhelpful and Mr Kitching conceded this at the investigation meeting. After obtaining the letter from Mr Hulme's office, Mr Findlay rang Mr Hulme to tell him what he had done. Mr Findlay knew he needed Mr Hulme's permission because it was by that stage Mr Hulme's letter.

[32] Mr Mitchell in his closing submissions argued that the meaning of "authorise" is:

To authorise possession, is to give approval or permission for that possession. If I authorise you to use my car, it entitles you to do so.

[33] On that basis, Mr Mitchell argued that Mr Kitching, a senior representative of POAL authorised Mr Findlay's removal of the letter. Mr Kitching is not a senior representative of POAL, he is the shift manager, in charge of stevedoring operations for the shift. The letter was not Mr Kitching's letter, and it was no longer Mr Davie's letter, it was Mr Hulme's letter, as part of an investigation being carried out for POAL. Mr Davie had written the letter to Mr Hulme, had put it in an envelope addressed to Mr Hulme and had put it under Mr Hulme's locked office door because Mr Hulme was not at POAL. Both Mr Findlay and Mr Davie knew that. Mr Kitching was not involved in Mr Hulme's investigation which was the subject of Mr Davie's letter and did not have the authority of POAL or Mr Hulme to grant permission to Mr Findlay to retrieve the letter.

[34] Even if I am not correct in making this finding, immediately upon retrieving the letter, POAL's Human Resources Manager, Ms Glynn asked for the letter to be returned, as it was not appropriate that it be removed by him from Mr Hulme's office. Mr Hulme sent a text to Mr Findlay the next morning demanding the letter be returned. Mr Findlay failed to do so, he took the letter to Mr Davie the following afternoon. Mr Findlay would have been under no illusion after removing the letter that he did not have POAL's authority to keep it. I find that Mr Findlay removed and was in possession of POAL's property without authority.

[35] POAL determined Mr Findlay's conduct in removing the letter amounted to serious misconduct which in the circumstances seems harsh. It was certainly open to POAL to determine that Mr Findlay's behaviour amounted to misconduct and was in breach of POAL's code of conduct. However, serious misconduct is behaviour which strikes at the heart of the employment relationship. Mr Findlay's behaviour did not fall into that category.

[36] Mr Findlay retrieved a letter from Mr Hulme's office on behalf of Mr Davie, a MUNZ member. The letter retrieved was part of an investigation being carried out by POAL and which also involved another MUNZ member Mr Williams. These circumstances are important and should be viewed in the context of MUNZ being involved in the matter on behalf of its members. This was not a case of Mr Findlay removing POAL product or property for his own personal gain which is the type of situation the clause in the POAL code would normally be concerned with.

[37] The test in s103A of the Act is concerned with the employer's action. On an objective basis was POAL's action in issuing a warning justifiable in the circumstances? POAL determined Mr Findlay's conduct to be serious misconduct which I have found to be erroneous. Mr Findlay's conduct amounted to misconduct. Under clause 4.2 of the code POAL is able to issue a written warning if an offence is considered serious enough, without prior application of an oral warning. I find that Mr Findlay's misconduct was serious enough for POAL to issue a written warning. Under the warning system set out in clause 4.2.1 of the Code, if a written warning is issued, a further offence of any kind may result in dismissal. In other words, the written warning is a final warning. This is what POAL did, it issued Mr Findlay with a written warning and labelled it a "final warning".

[38] Section 103A(3) of the Act requires consideration by the Authority of a number of factors in determining whether a dismissal has been implemented in a procedurally fair manner. Factors include whether the employer:

- Sufficiently investigated the allegations, having regard to available resources;
- Raised its concerns with the employee before dismissal;
- Gave the employee a reasonable opportunity to respond to the employer's concerns before dismissal; and
- Genuinely considered the employee's explanation before dismissal.

[39] These principles apply to a warning also. It is my finding that in issuing Mr Findlay with a written warning POAL did act in a procedurally fair manner as specified in s103 A(3).

[40] Accordingly, I find the written warning issued by POAL to be justified.

Costs

[41] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days from the date of this determination.

Anna Fitzgibbon

Member of the Employment Relations Authority