

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 67
5308711

BETWEEN STANLEY TUTAHI FISHER
 Applicant

A N D EXPRESS COURIERS LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Rex Hancock, Advocate for Applicant
 Linda Ryder, Counsel for Respondent

Investigation Meeting: 10 November 2010 at Christchurch

Submissions Received: At the investigation meeting

Date of Determination: 18 May 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Stanley Fisher, claims he was unjustifiably dismissed from the respondent's employ on 9 June 2009.

[2] The respondent, Express Couriers Limited, accepts that it dismissed Mr Fisher but contends that its actions were justified.

[3] The fact Express Couriers accepts that it dismissed Mr Fisher, means it also accepts the onus of justifying the dismissal.

Background

[4] Express Couriers provides courier services through 21 branches nationwide. One of those branches, and the one in which Mr Fisher was employed, is in Christchurch. The Christchurch branch employs some 140 staff, along with a further

72 contractors who undertake deliveries. Staff work a shift system covering 24 hours a day Monday to Saturday inclusive.

[5] Mr Fisher was engaged as a parcels officer. He worked in freight handling and his duties involved the accepting of parcels, sorting them and forwarding them to the next stage of the delivery process.

[6] At the time of the events that led to his dismissal, Mr Fisher was engaged on the afternoon shift.

[7] Express Couriers has an arrangement whereby it occasionally allows trainees with an organisation called the Mainland Driving School an opportunity to gain work experience by watching and assisting various staff. One such trainee was C. C was to work and observe the respondent's business for a week commencing Monday 10 May 2010. C's main interest was to obtain a heavy trade licence and, as a result, she spent the first three days of her attachment accompanying courier drivers whilst they were performing their deliveries.

[8] On Thursday, she was to work with the freight handling team at the respondent's Christchurch depot while on Friday, her final day, she was to return and work in another part of the business.

[9] Having reported to the Christchurch depot on the Thursday, C was introduced to Mr Fisher and thereafter spent the next six hours working with him. She did not come to work the following day.

[10] On the following Wednesday, 19 May 2010, Express Couriers was advised that Mainland Driving School had received a complaint from C alleging that she had been sexually harassed while working at the depot the previous Thursday.

[11] On being advised of the complaint, Express Couriers' Christchurch branch manager, Mr John Roche, contacted Mainland Driving School. He arranged a meeting with C which occurred later that day. Mr Roche was accompanied by Mr Michael Foster, a human resource consultant employed by the respondent. Also present was the general manager of Mainland Driving School and the school's business development manager.

[12] Both Mr Roche and Mr Foster describe C as extremely upset and agitated. She provided them with a written complaint and spoke to it. The complaint outlined a number of comments that C felt were inappropriate and canvassed a couple of instances where it was alleged that Mr Fisher had touched her.

[13] Express Couriers considers sexual harassment a form of discrimination that contravenes both its policy of equal employment opportunity and the requirement that staff maintain a high standard of conduct in the workplace. It encourages employees who consider they have been subjected to sexual harassment to make a complaint and requires managers who receive such complaints to ensure that a fair and thorough investigation occurs. In accordance with that policy, Mr Roche embarked upon an investigation of C's complaint forthwith.

[14] The following day, Mr Fisher was given a letter advising him of the complaint. The letter contained advice that the company considered the matter to be serious and asked Mr Fisher to attend a meeting on Tuesday 25 May where, it was stated, the allegations would be put to him and he would be asked to provide an explanation. The letter goes on to draw his attention to the appropriate policies and clauses in the collective employment agreement and advises that should the allegation be proven then disciplinary action may follow, and that could result in Mr Fisher's dismissal. The letter notes that Mr Fisher had already received a final warning for making inappropriate comments of a sexual nature to a temporary agency employee, though it should be recognised that this event occurred almost three years earlier. The letter closes with a recommendation that Mr Fisher obtain the services of a representative and advises that he should not, in any circumstances, make contact with the complainant.

[15] Mr Roche then asked Mr Williamson, the operations manager, to conduct some initial inquiries of various staff who may have witnessed the alleged events. Mr Williamson approached seven staff over the next couple of days. Five of those advised that they had neither seen nor heard anything which would have been of concern to them. A sixth stated that whilst he could not recall the actual words used and did not believe that Mr Fisher had *crossed the line*, he did consider the discussion to be *over the top*. He went on to say that he felt Mr Fisher was communicating things that he would definitely not communicate to someone he had never met, never mind a young female on their first day. The seventh employee was able to shed some light on

a claim by C that she had gone out and moved her car during a work break so that it was closer to the building as she was afraid that Mr Fisher might approach her again after work. The employee confirmed that the car had been moved but claims that that occurred at her instigation and as a result of a comment she made that stemmed from her general concern about the safety of female staff.

[16] The respondent's depot has some 27 closed circuit TV cameras and Mr Roche embarked upon a process of having Thursday's footage examined to see if it could shed any light on what occurred. He spent some hours in the company of another employee, Karen, looking at the footage before Karen offered to view the footage on her own and prepare a package of images that she felt may assist the inquiry. As it transpired, that took Karen about two days, but a package of footage was finally put together and this was given to Mr Fisher prior to the arranged meeting. He was also given a copy of C's written complaint.

[17] Messrs Roche, Foster and Williamson also viewed the footage that Karen had collated to see whether or not it identified other staff who should be interviewed. As a result, Mr Roche interviewed a number of staff but the outcome was not dissimilar to that experienced by Mr Williamson: most staff had neither seen nor heard anything that would be of concern to them, but that was perhaps not surprising given that this is a noisy environment and the bulk of staff wear ear protection whilst at work.

[18] The arranged investigation meeting occurred as planned at 3pm on 26 May. Representing the company were Messrs Roche and Foster while Mr Fisher was accompanied by Mr John Kerr, a professional union organiser, and Mr Colin Wise, a union delegate. Mr Roche explained the purpose of the meeting before reading out C's statement of complaint. He then asked for an explanation and Mr Fisher commented on eight specific allegations. Mr Fisher withdrew an initial denial of all accusations and admitted a number that related to various comments C had alleged he made but denied the other four allegations which included those relating to his having touched C. The various staff interviews were also discussed and the union was offered copies of the notes that were taken. This offer was declined, largely because the interviews had not gleaned any information the union considered damaging to Mr Fisher.

[19] The union then raised various arguments and contentions that required further investigation and asked the company to make further inquiries. That occurred and resulted in a further meeting which was held on 1 June 2010.

[20] Discussed at the second meeting were the outcome of the additional inquiries conducted by the company, information gleaned by inquiries made by the union and issues that may require yet further investigation. During that meeting, there also occurred an unfortunate event where Mr Roche, whilst viewing some of the CCTV footage, made a comment mimicking what he felt C may have been feeling at a certain point in time. This has subsequently been portrayed as an example that the employer had predetermined the outcome but, at the time, Mr Foster intervened immediately saying that that was inappropriate and would not be taken into account. He went on to say that the investigation would be conducted in a proper and fair manner.

[21] There then followed, on 3 June, a third meeting at which the company's additional and subsequent investigations were discussed. It was at this meeting that Mr Fisher expressed the view that he just wished the company would conclude the investigation and give a decision.

[22] The fourth and final meeting occurred on 9 June with the company opening by summarising the investigation process. The company concluded by stating:

Here we have a woman, who was new to our business, people and depot, who had only worked in the depot for hours before this alleged incident occurred. She has made an allegation against Stan which is accurate. We have taken into account Stan's previous warning for sexual harassment. From this instant he knows what sexual harassment is. He knows that it is unacceptable in the workplace. He knows what the outcome is likely to be if he had an allegation of sexual harassment against him proven for a second time. He knows that we have a sexual harassment policy at Courier Post. We have taken into account the questions raised by the EPMU and the representations made on Stan's behalf. We have also considered that this is a second time that the allegation of sexual harassment has been made against Stan, and an interesting observation is both complaints have been made by non permanent employees at Courier Post. We have also taken into account Stan's employment record. We have an obligation to provide a workplace free from harassment be it bullying, racial discrimination, religious discrimination or sexual harassment. Based on our investigation following [C]'s allegation, we believe that you did touch [C]'s bottom and touched her inappropriately. Given this, as your employer, we can no longer have trust and confidence in you going forward.

[23] Mr Fisher and his representatives were then advised that as a result of the foregoing, the company was considering dismissal and they were asked to give reasons as to why that should not occur.

[24] An adjournment then occurred during which a without prejudice discussion took place. Unfortunately this discussion did not resolve the issue and the formal process continued after a break of some 20 minutes. The union raised some arguments in mitigation and alleged that the company had predetermined the outcome by *building a case*. The company denied that accusation before advising that the arguments offered in mitigation were insufficient. Dismissal was then effected.

Determination

[25] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal ... occurred.

[26] In *Air New Zealand Ltd v V* [2009] ERNZ 185, the full Employment Court, at para [37], observed that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances. It is not a question of what the Authority or the Court might apply.

[27] Traditionally the objective review has been performed by considering the employers actions from both a substantive and a procedural perspective. Whilst it is clear that issues of substance and process overlap and that there is no such thing as a firm delineation, separation still provides a useful means of analysis.

[28] The prime thrust of Mr Fisher's case, as presented at the investigation meeting, was *I did not do it and it was therefore inappropriate for Express Couriers to discipline me* or sentiments to that effect.

[29] Added to this was a procedural challenge though a number of the points raised in support of this are, in reality, aimed at undermining the substantive finding and a reiteration of the *I didn't do it* approach. Mr Fisher contends that:

- a. The investigation was deficient in that it failed to question various witnesses and otherwise performed an incomplete investigation;
- b. That the investigators relied upon an improper editing of the CCTV which, in his submission, removed footage which *could have clearly shown* [my] *innocence*;
- c. The outcome was predetermined. Here Mr Fisher emphasised Mr Roches comment at the meeting of 1 June (see 20 above) and a claim that Mr Wise was told he was not permitted to conduct his own investigation.

[30] As said earlier, the real thrust of Mr Fisher's case was *I did not do it*. That approach misses the point. I am not charged with determining whether or not Mr Fisher did harass C – I am being asked to decide whether or not Express Couriers could reasonably conclude, on the balance of probability and after conducting a proper investigation, that he committed the acts complained of.

[31] I am of the view they can.

[32] Mr Fisher accepted that the concerns were serious in nature and, if established as valid, would have warranted his dismissal. He initially denied the allegations but subsequently admitted a number of the specifics relating to comments he was alleged to have made. He went so far as to concede that sharing the information he did, and making some of the comments he made, was inappropriate and a bad decision.

[33] The more serious allegations, namely the two of unnecessary and inappropriate physical contact, were consistently denied but it is in respect to these that Express Couriers relies upon the CCTV footage. I have had the opportunity of viewing that footage and, having done so, conclude that the footage supports the conclusions reached. There is one incident where Mr Fisher moves between two points via a route that was both indirect and cramped and during the passage of which he touched C in what may be considered an inappropriate manner. It was definitely a contact she considered unnecessary and inappropriate and about which she specifically complained. Footage in respect to the second allegation of physical contact, whilst not absolutely conclusive, is, in my view, capable of suggesting to those investigating that the actions complained of also occurred.

[34] In summary, Mr Fisher initially faced eight allegations, all of which he denied. A number of those denials were belied by his own admission and at least one of the more serious allegations undermined by the CCTV footage.

[35] I conclude that Express Couriers could, in the above circumstance, conclude that C's allegation had, on the balance of probability, substance.

[36] That leaves the procedural challenges. The argument that Express Couriers failed to question material witnesses and conducted an incomplete investigation is, in my view, flawed. Indeed, the evidence shows a detailed investigation and a process under which Express Couriers followed each and every lead suggested by Mr Fisher. Even if that conclusion is misguided, and I do not think it is, I note that the investigation was drawn to a conclusion at Mr Fisher's insistence (see 21 above). If, therefore, the investigation was incomplete, it was due to Express Couriers adhering to Mr Fisher's wishes and that can not now be visited upon them.

[37] A second aspect of this allegation that must also be considered is that Mr Fisher was, at November's investigation meeting, offering explanations that he contends support his denial that he offended as alleged. The problem he has here is that he willingly admitted that a number of these explanations or assertions were not put to Express Couriers at the time of their investigation. Express Couriers can only act on information available at the time of the decision and these belated explanations are, for the purposes of the matters I must determine, irrelevant.

[38] The suggestion that the outcome was predetermined is also belied by the evidence. The evidence showed a detailed and considered approach with only one blemish – Mr Roach's ill-judged comment. In this respect I note Mr Foster's immediate intervention and that the evidence shows the inquiry continued with all potential leads being fully investigated.

[39] The allegation that the footage was inappropriately edited also fails given that it shows all relevant incidents. I suspect this claim is tied to a series of explanations tendered at the investigation meeting about the time at which various alleged incidents occurred but this approach also fails for two reasons. First, a number of the propositions being tendered were amidst the 'new' explanations not available to Express Couriers at the time the decision was made and, second, they were undermined by the fact the footage recorded the times at which it was recorded.

[40] The allegation that Mr Wise was not permitted to investigate is also tenuous. Most witnesses saw, or more correctly heard, little. That was not, given the environment, unexpected. Here, and perhaps by way of summary of the procedural challenges, it is best to refer to Mr Wise's own evidence. Mr Wise is an experienced union delegate versed in the requirements of his office and how to assist members in difficulty. He was also a witness called by Mr Fisher. He accepted, in response to questions from Ms Ryder, that the investigation was thorough and fair; that Express Couriers followed all avenues proffered in Mr Fisher's defence and kept Mr Fisher and his representatives fully informed of any information gleaned.

[41] Given the above, I conclude that the decision to dismiss Mr Fisher was one open to Express Couriers given their conduct in investigating the matter and the information available at the time the decision was made. Mr Fisher's application is declined.

Costs

[42] I reserve the issue of costs. I ask that the parties try to resolve the issue but failing that, and in the event Express Couriers wishes to seek costs, it should serve a copy of its application on Mr Fisher. He is to file any response within 14 days of the application

M B Loftus
Member of the Employment Relations Authority