

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 307  
5415553

BETWEEN CRAIG FLYNN  
Applicant

A N D FONTERRA BRANDS (NEW  
ZEALAND) LIMITED  
Respondent

Member of Authority: T G Tetitaha

Representatives: H White, Counsel for Applicant  
S J Turner and S J Clark, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 11 July 2013 from Respondent  
17 July 2013 from Applicant

Date of Determination: 19 July 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The witness statement of E Holliday is inadmissible.**
- B. The witness statement of H E Taufua is admitted.**
- C. The witness statement of L M Flynn is admitted with the exception of paragraph 8, which is inadmissible.**

**Employment relationship problem**

[1] The respondent seeks to exclude parts of the applicant's evidence. These are:

- (a) The whole of the witness statement filed by Eric Holliday;
- (b) Paragraphs 4 to 32 of the witness statement of H Taufua; and

(c) Paragraphs 1 to 4 and 8 of the witness statement of L Flynn.

[2] The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not (s.160(2)). The touchstone for admitting evidence is relevance.

[3] Although the Evidence Act 2006 does not expressly apply to the Authority, its principles will affect and guide the exercise of its discretion to admit evidence.<sup>1</sup> The Authority is not entitled to ignore the rules of evidence and is likely to apply them if, in doing so, they support the role of the Authority set out in s.157 of the Act.<sup>2</sup>

### **Witness statement of E Holliday**

[4] The respondent submits Mr Holliday's evidence is inadmissible because it is opinion not expert evidence, is not relevant under s103A and the evidence does not enable the Authority to dispose of the matter according to substantial merits and equities of the case.

[5] Mr Holliday's evidence is proposed as expert opinion evidence. He provides evidence of his qualifications in health and safety. No issue is taken with his qualifications.

[6] Section 25 Evidence Act 2006 sets out rules for admitting expert evidence. Expert opinion evidence offered in a proceeding is admissible if the fact finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is a consequence of the determination of the proceeding.<sup>3</sup> The Authority may decline to accept evidence that it considers will not assist the investigation.<sup>4</sup>

[7] An opinion by an expert is not inadmissible simply because it is about an ultimate issue to be determined in the proceeding or a matter of common knowledge<sup>5</sup>. However, determination of this case is still a matter exclusively for the Authority.

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<sup>1</sup> *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14]

<sup>2</sup> *Vollmer v The Wood Life Care (2007) Ltd* [2012] NZERA Christchurch 257.

<sup>3</sup> Section 25(1) Evidence Act 2000

<sup>4</sup> *Burns v. Chief Executive, Legal Services Agency* ERA Wellington WA22/04, 27 February 2004

<sup>5</sup> Section 25(2) Evidence Act 2006

[8] Having read the brief, it is not substantially helpful in determining the facts before the Authority regarding this workplace. Mr Holliday gives, at best, generic evidence about health and safety. It does not include any in depth analysis of this workplace, its health and safety practices and/or policies or the evidence of any deponent. The opinion does not set out the references he relies upon for his opinion or the material before him in its preparation.

[9] To admit this evidence would substantially increase the costs and time required to resolve this and a related matter. The substantial merits and equities of this case do not warrant the admittance of this evidence.

### **Witness statement of H Taufua**

[10] The respondent submits Mr Taufua's statement is irrelevant because it sets out Mr Taufua's personal account of events (paragraphs 4 to 9), his account of views of the investigation Mr Flynn was not involved in (paragraphs 10 to 17), personal remorse (paragraph 18), personal opinion about disparity of treatment (paragraph 19) and the outcome of his disciplinary investigation (paragraphs 20 to 22) and his explanation for his conduct (paragraphs 23 to 32).

[11] It is common ground that Mr Taufua was involved in the making of at least one of the videos with Mr Flynn. Accordingly, his account of his involvement in these events is relevant to the determination of the issues before the Authority. One of the reasons for Mr Flynn's dismissal includes the failure to prevent and report the unsafe actions of others. One of those 'others' is Mr Taufua. An explanation of his conduct and Mr Flynn's liability for it is relevant to a fact to be determined by the Authority. Some of the matters traversed in his investigation are the same or similar to those in Mr Flynn's. His expressed remorse is of less relevance but is not inadmissible. The Authority is capable of dealing with this evidence appropriately.

[12] The substantial merits and equities of this case warrant the admittance of this evidence. Accordingly, the evidence of Mr Taufua is admitted in its entirety.

### **Evidence of L M Flynn**

[13] The respondent submits that the witness statement of L M Flynn contains direct personal opinion evidence which is irrelevant.

[14] Mr Lance Flynn is a team leader with 40 years employment and experience managing hazards in this workplace.<sup>6</sup> He has direct knowledge of the health and safety issues within this workplace. Accordingly, he has relevant evidence touching upon a factual determination to be made by the Authority.

[15] However, paragraph 8 refers to an investigation he was not a party to. That evidence is hearsay based upon what he was told by his son, the applicant. Section 18 Evidence Act 2006 provides for the admissibility of hearsay evidence if the statement is reliable and the maker of the statement is unavailable or alternatively undue expense or delay. There is direct evidence from his son, Mr Flynn and the investigators involved. It is unnecessary to have Mr LM Flynn give evidence on the merits of the investigation. To admit this evidence would simply increase the costs and time required to resolve this and a related matter.

[16] The substantial merits and equities of this case do not warrant the admittance of this part of the evidence. Accordingly paragraph 8 of the brief of L M Flynn is inadmissible.

### **Costs**

[17] Costs are reserved.

T G Tetitaha  
Member of the Employment Relations Authority

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<sup>6</sup> Applicant submissions para 30.