

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Gary Fowlds (Applicant)
AND Lane Walker Rudkin Manufacturing Limited (Respondent)
REPRESENTATIVES David Fleming, Counsel for Applicant
Neil McPhail, Advocate for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 14 September 2004
DATE OF DETERMINATION 18 May 2005

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

[1] The applicant claims he was unjustifiably summarily dismissed for serious misconduct from his employment with the respondent. He had been employed by the company for some 18 years. Mr Fowlds says his dismissal was not substantively justified and that the respondent's process was seriously flawed. He seeks \$20,000.00 compensation, lost remuneration and costs.

[2] The respondent denies the applicant's allegations and hence declines the remedies he seeks.

What Caused the Problem

[3] On 14 May 2003 the applicant and another employee became embroiled in a heated exchange over whether a particular fabric was to be marked with V or slit notches. There is considerable disagreement between the parties as to who witnessed the incident, what was actually said and the physical aspects of the exchange between Mr Fowlds and Mr Millington. These conflicts of evidence were not satisfactorily resolved in the Authority's investigation meeting.

[4] The respondent arranged a meeting at 3:45pm on the day in question and that meeting was attended by the applicant, Jack Taylor, the senior site delegate, Sharon Dawson, the apparel manager and Richard Reeves, the HR manager. Ms Dawson's notes are sparse and record the allegation of abusive language being put to the applicant and that he was suspended on pay pending further investigation and a further meeting with Mr Yee, the general manager.

[5] The following day at 11:00am a formal disciplinary meeting was held which involved the same personnel with Mr Yee joining the company representatives. Mr Reeves took hand written notes at this meeting. Prior to this meeting, the company undertook an investigative interview with Mr Millington and also with Mr Nick Wyse, the cutting supervisor.

The Issues

[6] The Authority needs to determine the following issues:

- what actually occurred on 14 May 2003 in the cutting room; and
- who witnessed the interaction between the applicant and Mr John Millington; and
- was the inquiry conducted by the respondent full and fair; and
- did the respondent put the applicant all the relevant material; and
- was the respondent on the evidence before it justified in summarily dismissing the applicant; and
- in the event that the summarily dismissal was not justified, to what extent did the applicant contribute to the circumstances which gave rise to the dismissal; and
- if remedies are due to the applicant should his dismissal be found to be unjustified, how are remedies to be affected by his conduct; and
- the allegation that the applicant refused to obey a lawful and reasonable instruction from his superior.

The Investigation meeting

[7] At the investigation meeting I heard from witnesses to various segments of the actual incident and from those involved in the company's inquiry into that incident.

[8] I accept that each told it as they saw it and I thank them for their openness and frank responses to questions.

[9] I was particularly attentive to the evidence of Shane McMaster and Jack Taylor. They were direct in their evidence and yet ready to make concessions if they were unsure or believed they may have read a given aspect of the situation incorrectly.

[10] Mr McMaster says in his evidence that he was "standing only six feet away and heard exactly what went on between John and Gary." Significantly, his evidence that "when Sharon Dawson came out of the marker prep room she looked directly at me and we had eye contact. Sharon Dawson must have known that I had witnessed the whole incident but she did not come and ask me what happened. No one else from the company asked what happened either."

[11] Another significant aspect of the evidence was that given by Sharon Dawson. At paragraph 15 of her brief of sworn evidence Ms Dawson says, "Statements were collected from John Millington and Nick Wyse and we also spoke to Jack Taylor. There were no other people to interview as there were no other people in the immediate vicinity." When I questioned Ms Dawson about "immediate vicinity" she replied, "not around the cutter".

[12] Ms Dawson stated that John Millington was not suspended as was the applicant "because it was not his behaviour that concerned us". I accept that view, but on the basis that Ms Dawson only emerged from the office part way through the altercation and did not hear the opening stanza from Mr Millington.

[13] Having heard only Mr Fowlds's response, it is natural that she considered the applicant was the aggressor. Mr McMaster's evidence indicates that in this incident it was Mr Millington who was the aggressive party initially. The applicant's response fell far short of a courteous reply. To put it squarely, on the basis of the evidence I heard, the applicant's personal abuse of Mr Millington bordered on the vile.

[14] In the course of the investigation meeting I reviewed notes taken by Ms Dawson and Mr Reeves. They are not particularly helpful because they lack detail which could have assisted had it been provided.

[15] Evidence was given at the meeting, and it is evidence which I accept, that the applicant had had a somewhat chequered history during his employment with the respondent. The matters in question appear on the evidence to have been satisfactorily resolved prior to the present problem arising between the parties.

Discussion and Analysis

[16] It is difficult to be clear about the altercation between the applicant and Mr Millington given the conflict of their evidence. Ms Dawson's and Mr Wyse's evidence is not conclusive simply because neither heard nor observed the whole interaction. For that reason, I prefer the evidence of Mr McMaster, who although not working in close proximity says he was "six feet away". His evidence is significant because he observed the total episode while others observed only part, and at that, only the response from the applicant.

[17] It surprises me that the company did not involve Mr McMaster, a supervisor, into its investigation. It could have accepted or rejected his evidence as it saw fit on its own view of the facts. To not have interviewed him, particularly given his evidence to the Authority that he had earlier been asked by the respondent to record incidents of the applicant's unacceptable behaviour, is simply inexplicable. It is a significant flaw in the respondent's procedure.

[18] Another significant concern I have is that the totality of Mr Millington's allegations were not put to the applicant in the course of the inquiry. There is what I would call a passivity in the respondent's attitude to the inquiry. To put it differently, the respondent omitted to actively pursue information preferring to rely on others coming forward with their evidence. That expectation can not excuse any errors in the inquiry process as the respondent is required to be active in its approach to the collection of relevant evidence.

Determination

[19] I find on the balance of probabilities that Mr Fowlds was unjustifiably summarily dismissed. I find so on the basis that the respondent failed to fully investigate the allegations before coming to its decision.

[20] Prior to issuing this determination I have taken considerable time considering the submissions of each party's representative. I thank both Mr Fleming and Mr McPhail for those submissions and the case law to which they referred me.

[21] Turning to the issues the Authority was asked to resolve I am unable on the evidence to determine exactly what occurred between the applicant and Mr Millington on the day in question.

[22] I find that Mr McMaster witnessed the interaction between the applicant and Mr Millington, but was not required to give his evidence in the respondent's inquiry on the matter.

[23] I find the respondent's inquiry was not full and therefore, not fair.

[24] I find that the respondent did not put to the applicant all the relevant information it had at the time and in particular the full allegation made by Mr Millington. Given these findings the respondent was not entitled to summarily dismiss the applicant.

[25] Turning to the allegation that the applicant refused to obey a lawful instruction from a superior, the evidence made it clear that Mr Millington did not hold a title that would convey to me his superiority or authority over Mr Fowlds. In this matter I am reliant on the evidence of Mr Taylor who says "I am an experienced cutter and in all the years that I was cutting I have never known there to be a head cutter. Normally two cutters will work together in pairs. There is no boss and both cutters share the duties. I have never heard the term *head cutter* until this incident occurred." Accordingly, I find the applicant did not refuse to obey a lawful instruction.

Remedies

[26] Having made these findings I am tasked with addressing the remedies due to the applicant.

[27] On behalf of Mr Fowlds, Mr Fleming detailed his member's claim seeking a total of \$5,715.60 gross after deductions for mitigation of loss. I accept that claim as valid.

[28] I decline to extend the applicant's claim for loss remuneration beyond 13 weeks.

[29] I need also to address the applicant's claim for \$20,000.00 for compensation for hurt and humiliation resulting from his dismissal. I had to weigh his length of service against his contribution to the circumstances which gave rise to his dismissal as required by section 124 of the Employment Relations Act 2000. Had the applicant not contributed to his dismissal I would have awarded him the sum of \$10,000.00 under this head of his claim.

[30] I have considered very seriously Mr McPhail's submission that the applicant's behaviour warrants a 100% deduction. I find that proposition unacceptable in this particular case. Having considered, and to be honest reconsidered the issues, I think it equitable to deduct 60% of the remedies due to the applicant's contribution.

[31] Accordingly, I order the respondent to pay the applicant the sum of \$2,286.24 gross for lost remuneration, and the sum of \$4,000.00 without deduction for hurt and humiliation.

Costs

[32] Costs are reserved. The parties are to attempt to resolve costs between themselves. Should that not be possible, Mr Fleming has 28 days from the date of issue of this determination to lodge and serve his memorandum. Mr McPhail is to lodge and serve his response within 14 days thereafter.

Paul Montgomery
Member of Employment Relations Authority