

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 483
5404918

BETWEEN TAUVAE FUIFUI
 Applicant

AND PINEPAC GROUP LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: P T Mulitalo, advocate for applicant
 C Eggleston, counsel for respondent

Investigation Meeting: 15 August 2013

Submissions received: 15 August 2013 from applicant
 15 and 22 August 2013 from respondent

Determination: 21 October 2013

DETERMINATION OF THE AUTHORITY

A. Pinepac Group Limited's action in dismissing Mr Fuifui was justified.

Employment relationship problem

[1] Tauvae Fuifui says his former employer, Pinepac Group Limited (Pinepac), dismissed him unjustifiably. The dismissal followed allegations that Mr Fuifui struck a colleague with a wooden stick. Mr Fuifui has withdrawn a further claim for the payment of a meal allowance.

[2] Pinepac employed Mr Fuifui as a saw machine operator, commencing in 1996. For some three years before Mr Fuifui's employment ended Mr Fuifui and a colleague James Vaega, had an arrangement under which Mr Vaega drove Mr Fuifui to and from work. On the morning of Friday 27 August 2010 Mr Vaega did not pick Mr Fuifui up at his home, contrary to their arrangement. When time passed with no sign

of Mr Vaega, Mr Fuifui was forced to find another way of getting to work. As a result he arrived at work about an hour late.

[3] Mr Vaega was already working when Mr Fuifui arrived. Mr Fuifui was angry. As he entered the yard where he and Mr Vaega worked he picked up a kiln-hardened piece of wood referred to as a fillet. The fillet was about 1 metre long, with a 50 x 25 cm cross section – so although it was not a large piece of wood it was solid. Mr Fuifui said he used the fillet to poke Mr Vaega in the stomach, intending by then to be playful although he acknowledged the poke was hard. When Mr Vaega moved away from him Mr Fuifui followed, still being playful. Mr Vaega reacted in the same spirit of playfulness.

[4] A supervisor, John Meleisea, observed the incident. He said he saw Mr Fuifui jab Mr Vaega forcefully in the stomach, causing Mr Vaega to double over. Mr Vaega turned and stumbled across the yard away from Mr Fuifui. Mr Fuifui followed.

[5] Brian Burke, who at the time was employed as Pinepac's health and safety and quality manager, walked across the other end of the yard at about the same time. He did not see Mr Fuifui poke Mr Vaega in the stomach. He did see Mr Vaega doubled over and stumbling towards him, with Mr Fuifui following and still holding the fillet. When he asked Mr Vaega what had happened, Mr Vaega said Mr Fuifui had hit him with the fillet.

[6] Neither Mr Meleisea nor Mr Burke discerned any playfulness in the incident, and Mr Burke described Mr Fuifui's demeanour as angry. Mr Burke attended to Mr Vaega, then convened a meeting in his office with Mr Fuifui. Mr Meleisea was present at the meeting. Mr Fuifui told Mr Burke he had jabbed Mr Vaega in the stomach because Mr Vaega had not picked him up to take him to work. Mr Burke sent Mr Fuifui home while he began an investigation.

[7] Mr Burke spoke to Mr Vaega and another employee who was working with Mr Vaega at the time. Both said Mr Fuifui approached Mr Vaega with a fillet in his hand, and jabbed or rammed the fillet into Mr Vaega's stomach. Mr Vaega 'took off', stumbling, and Mr Fuifui followed.

[8] Mr Burke met again with Mr Fuifui on Monday 30 August. Mr Meleisea was again present. Mr Burke summarised the information available and asked Mr Fuifui if

he had anything to add. Mr Fuifui said he had spoken to Mr Vaega later on 27 August, and Mr Vaega had apologised for not picking Mr Fuifui up.

[9] Mr Burke told Mr Fuifui he could understand Mr Fuifui's upset with Mr Vaega, but that did not justify striking another person with a fillet. The action amounted to assault, and was serious misconduct under Pinepac's House Rules.

[10] According to Mr Burke it was standard practice at Pinepac to seek input from another senior manager before deciding whether to terminate employment. The practice was intended as a check that a fair process was followed, and that no relevant matters were overlooked. The 30 August meeting was therefore adjourned while Mr Burke consulted with a senior manager, resulting in a consensus that dismissal was appropriate. Mr Burke said he took into account Mr Fuifui's long service with Pinepac, but also that Mr Fuifui had admitted to an assault. Moreover the action occurred in a safety sensitive environment. Mr Burke considered the possibility of a warning but considered the incident too serious for that. Dismissal was the only realistic option.

[11] Mr Burke resumed the meeting. He advised Mr Fuifui it was not acceptable to strike another employee with a fillet. Mr Fuifui was dismissed for serious misconduct with immediate effect.

Issues

[12] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000 as it read at the time of Mr Fuifui's dismissal in August 2010.¹ It concerns 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.

[20] The issues are:

- (a) did Pinepac follow a fair and reasonable procedure in making its findings;
- (b) was its finding that Mr Fuifui had assaulted Mr Vaega with the fillet reasonably open to it;

¹ An amended s 103A came into force on 1 April 2011.

- (c) was its conclusion that the behaviour was serious misconduct one a fair and reasonable employer would reach;
- (d) was dismissal the action a fair and reasonable employer would take in the circumstances; and
- (e) if not, what is the appropriate remedy.

Did Pinepac follow a fair and reasonable procedure

[13] Mr Fuifui says a fair and reasonable procedure was not followed because:

- Mr Vaega did not attend the disciplinary meeting;
- he was not advised he could have a support person present at the disciplinary meeting;
- he was not warned of the possibility of dismissal;
- he was not given the opportunity to obtain the assistance of an interpreter;
- he was not aware of and did not have input into the review process; and
- the outcome was predetermined.

Mr Vaega's attendance at the disciplinary meeting

[14] Pinepac was obliged to investigate the 27 August incident. Because Mr Vaega played a critical part in it Pinepac was obliged to obtain his account, and to put the account to Mr Fuifui. It did so. There was no further obligation to have Mr Vaega attend the disciplinary meeting.

[15] Mr Fuifui made much of the fact that Mr Vaega later apologised for failing to pick him up on the morning of 27 August, and a reconciliation occurred over the ensuing weekend. He believed he should have had an opportunity to discuss the incident directly with Mr Vaega during the 27 August meeting, with a view to resolving the matter. However that is not sufficient to address the nature and quality of Mr Fuifui's conduct towards Mr Vaega in the workplace. Pinepac was entitled to take an interest in that conduct, and to expect a particular standard of behaviour. Mr

Vaega's actions explained Mr Fuifui's anger, but did not excuse the way he expressed it and any subsequent apology or reconciliation does not remedy this.

[16] It also appeared that Mr Fuifui believed the absence of a complaint from Mr Vaega was relevant. That is not so. Mr Fuifui's conduct came to Pinepac's attention, and the conduct called for an investigation whether or not Mr Vaega complained.

Assistance from support person

[17] Mr Burke said in evidence that he advised Mr Fuifui on 27 August that the 30 August meeting would be disciplinary and he should bring a support person with him. He raised the matter again at the beginning of the meeting on 30 August.

[18] Mr Fuifui said no reference was made to a support person.

[19] Mr Burke made handwritten diary notes of the meetings of 27 and 30 August. He later summarised the diary notes in typewritten form, recording that the advice about a support person was given both on 27 and 30 August. According to the diary note, at the start of the 30 August meeting Mr Burke asked if Mr Fuifui had a support person and Mr Fuifui said 'no'. According to the typewritten note he asked Mr Fuifui whether he wished to have a support person, to which Mr Fuifui said 'no'. In that respect the typewritten note of what was said on 30 August is inconsistent with the diary note, which is most undesirable.

[20] However it is not necessary to resolve that matter because both sets of notes did at least record that Mr Fuifui was advised on 27 August that he could bring a support person. Further, both the diary note and the typewritten note of the 30 August meeting recorded that the 27 August note was read to Mr Fuifui and he accepted it was correct. Mr Fuifui accepted in evidence that Mr Burke read the meeting note to him, said Mr Burke was reading from his diary, and accepted that he said 'yes' when asked if the record was correct. However when during questioning his attention was drawn to the sentence referring to a support person, he said that sentence was not read out. I find that unlikely and do not accept Mr Fuifui's denial.

[21] I find it likely that Mr Fuifui was advised he could bring a support person. On his evidence, from which he later sought to resile, on 27 August he was aware of

the seriousness of Pinepac's concerns. There was no explanation of why he did not seek support or assistance in those circumstances.

[22] I add that Mr Fuifui sought to challenge the notes on the ground that he did not have an opportunity to check and sign them as accurate. I observe that they were at least read out to him, and he did not challenge their contents at the time. Otherwise it is for the Authority to determine the weight to be given to unsigned notes such as those produced, and I have approached the matter as indicated above.

Warning of the possibility of dismissal

[23] Mr Burke's evidence was also that on 27 August he warned Mr Fuifui of the possibility of dismissal. Mr Fuifui denied receiving any such warning.

[24] The warning was also recorded in both sets of notes for 27 August, and included in the passage which Mr Fuifui confirmed as correct on 30 August. I refer in addition to Mr Fuifui's account of the distress he felt over the intervening weekend, and the acknowledgement (later resiled from) to the effect that he was aware of the seriousness with which Pinepac viewed the matter. I find it likely that this was because the prospect of dismissal had been raised with him.

Assistance from an interpreter

[25] Mr Fuifui is Samoan and English is not his first language. He complained that he did not have the assistance of an interpreter during the disciplinary process.

[26] For his part Mr Burke had held his then-current position for 10 years. He said he had engaged in numerous conversations with Mr Fuifui over this time, and had not experienced language difficulties during the conversations.

[27] Mr Fuifui's concern about the absence of an interpreter was expressed as a generalised one. He did not raise any explanation in the Authority which he would have raised at the time but for a language difficulty. Moreover on his evidence he argued strenuously in support of his position at the meeting of 30 August. He was able to argue in favour of the issue to him of a warning rather than being dismissed, and was able to compare the seriousness of his conduct with that of employees he said

he had reported for smoking cannabis. I do not accept his protestations of an inability to understand the concept of 'serious misconduct' or the house rules. Finally, although an interpreter was present in the Authority Mr Fuifui was often able to answer questions and provide his account of events directly in English.

[28] Finally, but not determinatively, Mr Meleisea speaks Samoan. Although his role during the disciplinary process was passive, he could have assisted if he had been asked to or if he otherwise perceived there was a difficulty.

[29] For these reasons I do not accept that the absence of an interpreter amounted to unfair treatment of Mr Fuifui during the disciplinary process.

Input into review process

[30] The 'review process' referred to is Mr Burke's discussion with a senior manager before he made the decision to dismiss. Pinepac's obligation was to allow Mr Fuifui to address the decision-maker, which it did. There was nothing to suggest Mr Burke did any more than test with a senior manager his own view of events together with the procedure he had followed, or that in reality the decision to dismiss was not his.

[31] For that reason I find the conduct of the 'review process' did not result in unfairness to Mr Fuifui.

Predetermined outcome

[32] Mr Fuifui alleged that the decision to dismiss was predetermined because Pinepac was looking for a reason to get rid of him, and acted as soon as it believed it had found one. He referred to a possible redundancy situation which had been raised with him two years earlier, and said Pinepac wanted to dismiss him rather than incurring the cost of making him redundant. He also referred to what I find was an innocuous query from Mr Meleisea regarding how he operated his saw machine.

[33] There were no reasonable grounds for the allegation that Pinepac was simply looking for a reason to dismiss Mr Fuifui, there was no link with the earlier discussion about a redundancy situation and there was no current redundancy situation. There

was no evidence to support the allegation of predetermination, and I find there was no predetermination.

Was the finding of assault reasonably open to Pinepac

[34] Almost all of the elements of the incident were admitted, and there were several witnesses to it. The only material difference between the parties' accounts was whether the incident was playful or whether Mr Fuifui was angry and intimidating. I add that even if the incident was playful, Mr Burke viewed such behaviour as unacceptable from a workplace safety perspective.

[35] I conclude that Pinepac's finding that Mr Fuifui had assaulted Mr Vaega by jabbing him with the fillet were reasonably open to it.

Was the finding that the behaviour was serious misconduct reasonably open to it

[36] Pinepac's House Rules identified both assault and breach of health and safety requirements as matters that could constitute serious misconduct. It was reasonably open to Pinepac to conclude that Mr Fuifui's conduct met both of these.

[37] Mr Fuifui sought to minimise the seriousness of the conduct by saying he was being playful. However during Pinepac's investigation Mr Fuifui said he was trying to scare Mr Vaega because Mr Vaega had not picked him up for work. He said in evidence that both he and Mr Vaega were laughing, but I do not accept that was the case. Elsewhere in evidence he effectively acknowledged he had been angry when Mr Meleisea and Mr Burke spoke to him in the yard, but attributed any anger to aspects of his questioning by Mr Meleisea and Mr Burke. I find it likely that Mr Fuifui was angry throughout because Mr Vaega had not picked him up.

[38] As for Pinepac's investigation of that point Mr Burke himself had observed Mr Fuifui's demeanour, as well as Mr Meleisea, Mr Vaega and the other employee. None of them considered it playful.

[39] It was reasonable for Mr Burke to form the view he did of the seriousness of the conduct.

Was dismissal the action a fair and reasonable employer would take

[40] Mr Fuifui said dismissal was not the action a fair and reasonable employer would take because:

- Pinepac did not adequately take into account his length of service;
- Pinepac did not take into account his reconciliation with Mr Vaega;
- there was disparity of treatment in that he had reported employees for smoking cannabis on-site but those employees were not dismissed.

[41] The first of these points in particular was taken into account. Mr Burke was entitled to consider it was outweighed by the seriousness of the conduct. I have already commented on the second.

[42] Regarding the alleged disparity of treatment, Mr Burke said he had dismissed two employees for smoking cannabis. Mr Fuifui named two individuals who were not dismissed, and the response was that there was not enough evidence against them. One of the individuals has been tested for the presence of drugs, and the result was negative. I find the lack of sufficient evidence against those individuals at the relevant time to be an adequate explanation of any disparity, and there is no reason to suggest the smoking of cannabis is not also regarded as serious misconduct.

[43] I conclude that dismissal was the action a fair and reasonable employer would take. The dismissal was therefore justified.

Costs

[44] Costs are reserved. The parties are invited to reach agreement on the matter. If either party seeks an order from the Authority the party shall have 28 days from the date of this determination in which to file and serve a written statement of what is sought and why. The other party shall have a further 14 days from the receipt of the statement in which to file and serve a written reply.

R A Monaghan

Member of the Employment Relations Authority