IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2014] NZERA Christchurch 82
5442837

	BETWEEN	IAN GABITES Applicant
	A N D	CARTER HOLT HARVEY LIMITED Respondent

Member of Authority:	Helen Doyle
Representatives:	Gerard Praat, Counsel for Applicant Daniel Erickson, Counsel for Respondent
Investigation Meeting:	15 April 2014 in Nelson
Submissions Received:	On the day
Date of Determination:	23 May 2014

DETERMINATION OF THE AUTHORITY

A **Mr Gabites was unjustifiably dismissed.**

B **Carter Holt Harvey Limited is to reimburse Mr Gabites a sum equal to three months lost wages less earnings received and contribution ordered under s 123 (1) (b) of the Employment Relations Act 2000. Leave is reserved to return to the Authority if there are difficulties in calculating that amount.**

C **Carter Holt Harvey Limited is to pay Mr Gabites the sum of $5,600 without deduction being compensation under s. 123 (1) (c) (i) of the Employment Relations Act 2000**

D Costs are reserved. If agreement cannot be reached a timetable for submissions has been set.

Employment relationship problem

[1] Ian Gabites was employed by a division of Carter Holt Harvey Limited; Carter Holt Harvey Wood Products New Zealand, from 1 June 2010 as a forklift operator at the Lower Queen Street site in Richmond near Nelson. Mr Gabites had worked for the previous operators of the business at the site since 2008 as both a forklift operator and a truck driver. I shall refer to Carter Holt Harvey Limited in the determination as CHH.

[2] On 26 November 2013 Mr Gabites told his supervisor/leading hand Rodger Talbot to *go fuck yourself* when asked if he had completed a job that he was required to do.

[3] After attending two disciplinary meetings on 2 and 6 December 2013 Mr Gabites was summarily dismissed for serious misconduct described by CHH in a letter dated 6 December 2013 confirming his dismissal as *using threatening language towards your acting supervisor*.

[4] Mr Gabites says that he was unjustifiably dismissed because the language used was not threatening and his behaviour in the context of the exchange was not serious misconduct. Initially Mr Gabites wanted to be reinstated to his previous position but that remedy is no longer sought and he has obtained other employment. Mr Gabites seeks lost wages, compensation and a contribution towards his costs.

[5] CHH do not accept that Mr Gabites was unjustifiably dismissed and do not accept that he is entitled to any remedy.

The issues

[6] The issues to be determined are:

(i) Was Mr Gabites' dismissal justified?

(ii) If Mr Gabites' dismissal was not justified, what remedies is he entitled to and are there issues of contribution or mitigation?

Was Mr Gabites' dismissal justified?

Individual Employment Agreement

[7] Mr Gabites was party to an individual employment agreement with CHH. The individual employment agreement provided in clause 12 that the policies, guidelines and procedures of CHH form part of the terms of employment.

Policies and procedures

[8] Policies and procedures are contained in the employee handbook and the CHH code of conduct. One of the policies in the employee handbook addresses conduct requirements and provides descriptions of certain standards of behaviour categorising them under serious misconduct and misconduct.

Test of Justification

[9] Section 103A of the Employment Relations Act 2000 (the Act) provides a statutory test for justification. The Authority is required to objectively determine whether CHH's decision to dismiss and how it acted in reaching that decision was what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. The Authority must consider elements of procedural fairness under s. 103A (3) (a) to (d) of the Act. It may in addition to the factors described in subsection (3) consider other factors it thinks appropriate and must not determine a dismissal to be unjustifiable solely because the defects in the process followed were minor and did not result in the employee being treated unfairly.

Investigation and disciplinary process

[10] Mr Gabites was invited to a meeting on 2 December 2013 described as a formal investigation meeting in a letter dated 28 November 2013 from Nigel Cuthill who is employed by CHH as its Site Manager for Nelson Sawmill.

[11] The letter advised Mr Gabites that Mr Cuthill had received a complaint from Mr Talbot regarding threatening language towards him. A copy of two written statements from Mr Talbot, and another witness to the exchange, Adrian Boyd were attached to the letter. Mr Gabites was advised in the letter that Mr Cuthill would be present with Peter Matthews who is employed by CHH as the Treatment Site Supervisor for the sawmill. Mr Matthews had some oversight of Mr Gabites.

[12] The letter set out that the purpose of the meeting was to seek Mr Gabites response to the allegation of *using threatening language.* The letter stated that CHH had formed an initial view that the alleged behaviour may amount to serious misconduct and the employees handbook was provided with the definitions of serious misconduct referred to. Mr Gabites was advised that the outcome of the meeting may be a formal disciplinary meeting which may result in dismissal.

[13] Mr Praat submits that there was an element of pre-determination that the language was threatening apparent in the letter written by Mr Cuthill because of the words *a copy of the threatening language is enclosed for your information from Rodger Talbot and another witness, Adrian Broad.* Later in the same letter though the purpose of the meeting was described as seeking Mr Gabites' response to the allegation of *using threatening language.* It is more appropriate to consider whether there was a closed mind approach in the context of the overall process rather than focus on the letter in isolation.

2 December 2013 meeting

[14] Mr Gabites attended the meeting on 2 December 2013 by himself although he had been invited to bring a representative. He said in his evidence he was happy to attend the meeting on his own because if someone was upset which he said was not the intention then it was fair that he be warned not to use the language again.

[15] Mr Cuthill and Mr Matthews attended the meeting for CHH. Mr Cuthill sensibly confirmed with Mr Gabites at the start of the meeting whether he was happy to attend without representation. The allegation Mr Gabites was facing was clear. There can be no unfairness in either of those respects.

[16] Mr Cuthill took notes during the meeting. Mr Gabites accepted when asked by the Authority and Mr Erickson about the notes taken by Mr Cuthill that he had made some of the statements in them. Mr Gabites accepted that he had used the words *go fuck yourself* to Mr Talbot and that it was not acceptable behaviour but said *he guessed it was meant in fun*. Mr Gabites agreed that he knew he had to check the delivery note as part of his job but wanted to have *smoko* first. He advised Mr Cuthill that he was always going to check the delivery note after *smoko.* He said that the language was normal where he worked and that they all spoke to each other like that. He said that he was sorry but that *he wasn't going to punch Roger.* He did not

disagree that use of threatening language was described as serious misconduct in the handbook when this was shown to him

[17] Mr Gabites took issue with the notes in one main respect. That is whether he agreed that the language used was threatening at the meeting on 2 December 2013. In his evidence he said that he did not and in answer to a question from Mr Erickson that he could not recall. The notes record Mr Cuthill asked the following question *Does telling someone to go Fuck themself when asked to do their job threatening language.* The notes record Mr Gabites responded *yes I accept it is threatening language.* Further the notes record after Mr Gabites said that he wasn't going to punch Mr Talbot that [Mr Gabites] *again accepted how Roger felt it was threatening conduct.*

[18] I accept in all likelihood Mr Gabites answered the first question as set out in [17] above and accepted it was threatening language. In relation to the second reference to threatening language in the notes for reasons I will shortly outline I do not find there was any discussion at the meeting on 2 December about how Mr Talbot felt. I find it less likely in those circumstances Mr Gabites used those exact words.

[19] A fair and reasonable employer could not have reached a conclusion from Mr Talbot's written complaint alone that the words used were threatening language without further investigation. That is because all Mr Talbot's complaint says about the words spoken was *then he swore at me. F--k off.* He did not say in his written complaint that he felt the language was threatening. The witness to the exchange Adrian Boyd also did not say anything in his written statement that would suggest the language or the way the words were said was threatening to Mr Talbot.

[20] Mr Cuthill gave evidence about further investigation undertaken. After Mr Cuthill and Mr Matthews received the written statements they had a discussion with Mr Talbot. This occurred before the 2 December 2013 meeting. Mr Cuthill said that Mr Talbot confirmed he had found the exchange threatening. Mr Matthews said in his evidence that Mr Talbot advised he felt threatened by Mr Gabites *mannerisms/raised voice and words*. Mr Cuthill and Mr Matthews confirmed there was no issue raised by Mr Talbot about closeness during the exchange. Mr Cuthill said that he concluded from his discussion with Mr Talbot that Mr Gabites tone was aggressive. After the discussion with Mr Talbot Mr Cuthill spoke to the human resources department at CHH and the allegation was framed as the use of threatening language in the letter of 28 November 2013.

[21] I asked Mr Cuthill whether he recalled telling Mr Gabites at the 2 December meeting what Mr Talbot had felt about the exchange. The notes do not record any discussion of that nature. Mr Cuthill could not recall. Mr Matthews when questioned I find was clearer in his recollection that there was no discussion about how Mr Talbot felt about what was said to him during the meeting on 2 December 2013. I find it more likely than not that there was no discussion with Mr Gabites about what Mr Talbot had told Mr Cuthill and Mr Matthews in addition to his written complaint.

[22] There was nothing in writing about the discussion Mr Cuthill and Mr Matthews had with Mr Talbot before the meeting on 2 December 2013. When Mr Talbot gave evidence I asked him what he recalled about the discussion with Mr Cuthill and Mr Matthews after his written complaint. He said that he did feel it was *a bit threatening* when Mr Gabites said the words as he was angry. He then went on to say *more angry* [than threatening]. Mr Talbot said in answer to a question from the Authority that he did not feel unsafe during the exchange with Mr Gabites. He could not recall in answer to a question from Mr Erickson whether he used the word aggressive in his conversation with Mr Cuthill and Mr Matthews but he did remember using the word loud. He agreed when questioned by Mr Praat that Mr Gabites did use colourful language from time to time and he was not cautioned in doing so.

[23] While Mr Cuthill asked Mr Gabites a question about the words he used and whether they amounted to threatening language he did not advise Mr Gabites of the reasons Mr Talbot felt the language was threatening. That was required to properly put the question into context and in its absence Mr Gabites could not fairly and reasonably answer the question. Mr Cuthill said he also placed some weight on the statement that Mr Gabites said he wasn't going to punch Mr Talbot to support Mr Gabites was agitated during his outburst. What Mr Gabites meant by that statement was never clarified with him and that was unfair. Further what was said in the discussion between Mr Cuthill, Mr Matthews and Mr Talbot was information relevant to the continuation of Mr Gabites employment, and in accordance with good faith obligations particularly those in s. 4 (1A) (c) of the Act should have been disclosed to him to comment on. The failure to do so was a breach of those obligations.

[24] Mr Cuthill said that after the meeting on 2 December 2013 he went away and discussed with Peter Matthews what kind of language was used in the workplace and whether or not he had heard anyone speak to other employees like Mr Gabites had

with Mr Talbot. In his written evidence Mr Matthews said he had never heard any other employees talk like that in the workplace. He explained in his oral evidence though that he had heard Mr Gabites use exactly the same words *go fuck yourself* some five or so months previously to another employee. Mr Gabites did not dispute that occured.

[25] Mr Matthews said that he had spoken to Mr Gabites about his language on that occasion and told him it was unacceptable however the matter had not been escalated to a disciplinary process. Mr Matthews could not be sure if he had told Mr Cuthill about that but thought he had done so between the first and second meetings held with Mr Gabites. If it was mentioned by Mr Matthews this was not raised with Mr Gabites at the next meeting in the process.

[26] Mr Cuthill also asked Mr Talbot whether he had witnessed similar language in the workplace and he said he had not. Mr Cuthill concluded that the use of that type was not normal.

[27] Mr Cuthill then wrote a further letter to Mr Gabites dated 2 December 2013 advising of a disciplinary meeting on 4 December 2013. The letter advised Mr Gabites that CHH had concluded its investigations and Mr Cuthill was satisfied that Mr Gabites did breach the code of conduct in the employee handbook. Mr Cuthill wrote that he had formed a preliminary view both that Mr Gabites' behaviour may be a matter of serious misconduct and that he should be dismissed. Mr Cuthill set out in forming this view he had considered that Mr Gabites confirmed he did use threatening language when his acting supervisor asked him to check the delivery note and he understood that he had to check the delivery note as part of his role. Mr Gabites was reminded that EAP was available to him for his support.

[28] Mr Gabites said that he was very surprised by this preliminary outcome and instructed Mr Praat to represent him at the disciplinary meeting. The disciplinary meeting took place on 6 December and not 4 December 2013.

6 December meeting

[29] Mr Praat attended this meeting with Mr Gabites. Mr Cuthill attended with Mr Matthews. The meeting commenced at 9.00am. Mr Cuthill again took notes. Mr Praat did not accept that Mr Gabites used threatening language. Mr Praat referred to the conduct being the use of abusive language to another person which is described as

misconduct in the employee handbook. Mr Praat referred to the test in s. 103A of the Act and said that a reasonable employer could not dismiss Mr Gabites. He referred to Mr Gabites behaviour as normal in the work place and that they were *all mates*. Mr Cuthill explained that he had spoken to both Mr Matthews and Mr Talbot and it was not normal in the workplace to speak that way.

[30] The meeting adjourned at 9.15am for a period of 30 minutes at the end of which Mr Gabites was summarily dismissed.

Conclusion about procedural fairness

[31] There were procedural flaws in this process that caused unfairness. I am not satisfied that CHH fully raised concerns with Mr Gabites as required in s. 103A (3)(b) of the Act before he was dismissed including why the language was considered threatening. The words in the written statements from Mr Talbot and Mr Boyd without further information do not easily and naturally fit a description of threatening language. The failure to disclose information arising from further investigation as to why the language was considered threatening was also in breach of the obligations of good faith. An exacerbating feature considered against the failure to provide that information was that CHH placed considerable weight on Mr Gabites accepting that it was threatening language. Further it reached an adverse conclusion when Mr Gabites said he was not going to punch Mr Talbot but did not put that to him for comment. Whilst a conclusion was in all likelihood available that other employees did not use that sort of language particularly to a supervisor Mr Matthews knew that Mr Gabites had used the same language to another employee and although told it was unacceptable had not been given a disciplinary consequence. That was never put to Mr Gabites for comment even though his explanation was that the type of exchange/behaviour was normal.

[32] In breach of s. 103A(3)(c) of the Act Mr Gabites for the reasons set out above did not have a reasonable opportunity to respond to whether the language was threatening or not. Mr Praat at the disciplinary meeting on 6 December 2013 explained that the language was not threatening and serious misconduct but abusive language which was categorised as misconduct. I am not satisfied that explanation generated any information from CHH as to why the allegation on which a preliminary view had been reached was using threatening language to enable Mr Gabites whilst represented to properly respond to it.

[33] I could not be satisfied that there was genuine consideration about whether the language was more appropriately categorised as abusive instead of threatening under s.103A (3) (d) of the Act. Reliance was placed on the fact that Mr Gabites had accepted that the language was or could be threatening. This was, objectively assessed, when the overall process is considered a closed mind approach by CHH to any possibility other than that the language used was threatening and therefore serious misconduct.

[34] CHH has not met the procedural tests in s. 103(A) (3) for the reasons set out above. The procedural errors were not minor and they did result in considerable unfairness to Mr Gabites.

Substantive justification

[35] The substantive reason for the finding of serious misconduct was that Mr Gabites used threatening language towards his supervisor, Mr Talbot. Threatening language is described in the same bullet point in the employee handbook as intimidating behaviour and other behaviour that could be perceived as bullying.

[36] The language used was not denied by Mr Gabites and it was unacceptable. There were two exacerbating features in what was said in that Mr Talbot was in a supervisory role and he was asking Mr Gabites to do work that he was required to do.

[37] Mr Gabites agreed that his language was threatening but that was as the result I find of a very flawed process. The main information that seems to have been relied on by CHH to conclude the language was threatening was the tone of voice and the way the words were said. Mr Cuthill said in his evidence that he considered Mr Talbot still distressed on 2 December 2013 about the exchange. Mr Talbot clarified when questioned by the Authority that he was a bit annoyed at the way Mr Gabites talked to him rather than still distressed at that time. Mr Talbot could not recall using the word aggressive to Mr Cuthill and Mr Matthews but in all likelihood used the word loud to describe the tone. He said that he did not feel unsafe when the words were said. There was no suggestion of undue closeness during the exchange or that the words were said in a menacing way. It was not as Mr Praat submits an example of words that may cause an apprehension of imminent harm to a person such as *F--- off or I will hit you*.

[38] I accept that a fair and reasonable employer could have concluded that Mr Gabites conduct amounted to misconduct. I do not find that a fair and reasonable employer could reasonably conclude the words used were threatening language.

Could a fair and reasonable employer have summarily dismissed Mr Gabites

[39] The CHH employee handbook described abusive language as misconduct and this is how the conduct objectively assessed is more suitably described. An employee could expect that CHH would treat any breaches of rules in accordance with its own policies. Mr Gabites had not been given any warnings from CHH. He had previously used the same language, although not to a supervisor, and was overheard by Mr Matthews doing so without disciplinary consequence. He had used, although not in the same way, colourful language at CHH without it being brought to his attention in a formal way that it was unacceptable to do so.

[40] I agree with Mr Praat's submission that Mr Gabites went from an informal discussion with Mr Matthews that the language was unacceptable to summary dismissal for the same language. Mr Gabites apologised for his conduct and realised that if he had upset Mr Talbot he should be warned. He continued after the meeting on 2 December 2014 to work with Mr Talbot without incident. Mr Matthews monitored the situation with Mr Talbot and there was no reported difficulty. I find that a fair and reasonable employer could and should have given Mr Gabites a written warning to make it quite clear to him that the language was unacceptable and the consequence to his employment if it was used again. I do not find that a fair and reasonable employer could have dismissed Mr Gabites for his conduct in all the circumstances.

[41] Mr Gabites has a personal grievance that he was unjustifiably dismissed. He is entitled to remedies.

Remedies

Lost wages

[42] Mr Gabites seeks three months lost wages. He gave evidence about his efforts to obtain employment. He enrolled with four temping agencies and undertook menial work such as weed whacking and working on a recycling truck. I am satisfied that adequate steps were taken to mitigate loss. Subject to any findings about contribution

Mr Gabites is entitled to reimbursement of three months wages less any earnings received within that period.

[43] I asked Mr Gabites to provide information about earnings since dismissal from the IRD but to the best of my knowledge that has not occurred. Mr Erickson agreed to provide detail of Mr Gabites income but I do not seem to have received that. Counsel are to attempt in the first instance to reach agreement about lost wages failing which either party may return to the Authority for an order.

Compensation

[44] Mr Gabites explained that he was the main earner in the family and felt humiliated at being unemployed. He said that he became irritable and depressed and was not sleeping. He said that he had enjoyed his job at CHH and did not want to leave it. Mr Gabites wife, Pauline, confirmed in her evidence that Mr Gabites after his dismissal was stressed and anxious coming up to Christmas and that he was not sleeping. She said that he was very humiliated when he returned from WINZ.

[45] Mr Gabites did suffer humiliation and loss of dignity as a result of the dismissal. An appropriate award I find subject to findings about contribution is the sum of $7000.

Contribution

[46] The Authority must consider the extent to which Mr Gabites actions contributed to the siltation that gave rise to the personal grievance and if the actions so require reduce remedies that would otherwise have been awarded accordingly.

[47] The conduct was admitted. The language was unacceptable and disrespectful to Mr Talbot who had recently been promoted to supervisor/ leading hand. Mr Talbot was simply asking Mr Gabites to undertake part of his role. Although Mr Gabites wanted to have a hot drink before he did the job he did not need to and should not have said what he did. Mr Erickson says that there should be a reduction of at least 50% for contribution. I take into account that I have found the conduct should not have resulted in Mr Gabites losing his job. I find there should be a reduction to remedies of 20%.

Orders

[48] Carter Holt Harvey Limited is to reimburse Ian Gabites for lost wages for a period of three months from 6 December 2013 being the date of his dismissal under s 123 (1) (b) of the Employment Relations Act 2000. Any earnings received during this period are to be deducted from this sum as is the contribution of 20%. Leave is reserved for either party to return to the Authority if there is difficulty in calculating lost wages.

[49] Carter Holt Harvey Limited is to pay to Ian Gabites compensation taking contribution into account in the sum of $5,600 without deduction under s 123 (1)(c)(i) of the Employment Relations Act 2000.

Costs

[50] I reserve the issue of costs. They may be able to be agreed failing which Mr Praat is to lodge and serve submissions as to costs by 4 June 2014 and Mr Erickson is to lodge and serve submissions in reply by 18 June 2014.

Helen Doyle
Member of the Employment Relations Authority