IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 375/09
5125583

	BETWEEN	ANTHONY GIBBONS Applicant
	AND	QUALITY MARSHALLING (MOUNT MAUNGANUI) LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	Hazel Armstrong for Applicant Mark Beech for Respondent
Investigation Meeting:	8 June 2009 at Tauranga
Submissions Received:	1 and 8 July 2009 from Applicant 3 July 2009 from Respondent
Determination:	29 October 2009

DETERMINATION OF THE AUTHORITY

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[1] Mr Anthony Gibbons was employed by Quality Marshalling (Mt Maunganui) Limited ("QM") for approximately five years as a loader driver and acting supervisor. Mr Gibbons was covered by the terms of a Collective Employment Agreement which expired in March 2007.

[2] Following investigations into two health and safety incidents and allegations of insubordination and racial abuse Mr Gibbons was first suspended from his employment and then dismissed without notice for serious misconduct. Mr Gibbons claims the suspension was an unjustified action by the respondent causing him disadvantage, and that the dismissal was also unjustified. Mr Gibbons seeks various remedies including reinstatement.

[3] QM denies Mr Gibbons was unjustifiably disadvantaged or unjustifiably dismissed. It says Mr Gibbons was insubordinate to his manager and was verbally and racially abusive toward another employee.

Initial Incidents

[4] QM's process for identifying incidents which cause injury or near misses requires an employee to provide an initial report on their timesheet that an incident has occurred. That information is then assessed by a management representative to decide whether the incident was sufficiently serious to merit the completion of an Incident Report.

[5] On 12 and 13 April 2008 two incidents occurred on site. In the first incident Mr Gibbons had waded into the water and retrieved a log which had fallen from a loader into the ocean. His actions resulted in him nicking his toes on the barnacles under the water. He completed an incident report because of the injury he sustained.

[6] The second incident involved the breaking of a side window on a high stacker. Mr Gibbons swung the slew lever too hard and the grapple swung and broke the window. He completed an incident report as this incident constituted a near miss because Mr Gibbons could have been injured.

[7] Mr Gibbons attended a meeting on 22 April where both incidents were discussed and the Investigation Report forms were completed and signed off by Mr Gardner. With respect to the log incident, the action agreed on was that Mr Gibbons was not to go into the tide to retrieve logs, but to contact the company which would be responsible for retrieving the logs. With respect to the broken window, the agreed action was that side protection guards would be installed by QM and workers were to slow down when feeling pressured.

[8] At that same meeting there was discussion with Mr Gibbons with regard to how he was coping as a supervisor. Mr Gibbons was acting up as a supervisor in the absence of the usual supervisor. Following the discussion, I am satisfied it is more likely than not, Mr Gibbons agreed to be stood down from his acting supervisory role.

I am supported in my conclusions by Mr Gibbons' oral evidence where he said in answer to questions by counsel that he didn't know why he agreed to be stood down from the supervisor role. I have taken from this that there was an agreement.

[9] Both Mr Gibbons and Mr Spanswick were of the opinion that at the conclusion of the 22 April meeting the two earlier incidents had been dealt with and finalized with no further discussion necessary.

[10] After the meeting had concluded, Mr Gibbons had a rethink on the supervisory duties and on his behalf Mr Spanswick requested a meeting to discuss the reduction of Mr Gibbons' role. This meeting took place on 28 April and ended with Mr Gibbons' suspension.

Disadvantage grievance

[11] Mr Gibbons claims he was disadvantaged as a result of being suspended on 28 April. QM says the suspension was necessary to allow an investigation to be undertaken into serious misconduct allegations.

[12] I am required to examine QM's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act ("the Act"). The section states:

> For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was 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 or action occurred.

[13] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether QM's actions disadvantaged Mr Gibbons in his employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.[1]

[1] *Mason v Health Waikato* [1998] 1 ERNZ 84

[14] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If QM establishes justification for its disadvantageous actions, there is no grievance.[2]

[15] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction with their circumstances.[3]

[16] The reason for Mr Gibbons' suspension is recorded in the minutes of the 28 April meeting as being:

> Basically Tony's action and nonsense behaviour are not up to scratch and we will suspend you for 2 weeks on full pay to investigate the problem

[17] After an objection to the decision to suspend Mr Gibbons was raised, Mr Emmens advised the meeting that there was also another complaint which required investigating. This was the first notification Mr Gibbons had received that he may be subject to a formal process with regard to his conduct.

[18] The meeting on 28 April was called by Mr Spanswick. The purpose for the meeting was not disciplinary in nature, but was to discuss the agreement that Mr Gibbons be stood down from his supervisory duties. Instead Mr Gibbons was advised that his behaviour was outside the boundaries and QM needed to investigate.

[19] I have had the benefit of the notes taken from the 28 April meeting, and I am at a loss to conclude what it is about Mr Gibbon's behaviour that needed investigating. At the point in time that Mr Gibbons was suspended there was no mention of any specific allegations of serious misconduct. It was not until after the decision was made to suspend Mr Gibbons, that he was given very general notice that QM had received some complaint letters. Despite requesting copies of the letters at that meeting Mr Gibbons was not provided with them.

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[2] *McCosh v National Bank*, unreported, AC49/04, 13 September 2004
[3] *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

[20] Mr Spanswick requested that he be involved in the investigation process. This was declined by QM but he was told that he would have access to the people and details of the allegations after Thursday 1 May.

[21] QM's disciplinary procedure provides for suspension in situations where there has been a serious incident where company property or people's safety may be threatened.

[22] It was submitted on behalf of QM that Mr Gibbons had agreed to leave the workplace for two weeks so that the allegations could be properly investigated. I am satisfied on the balance of probabilities, that what Mr Gibbons agreed to was, not the suspension, but the rate that he would be paid during the suspension.

[23] I find Mr Gibbons has suffered a disadvantage in his employment with respect to his suspension. I have concluded also, that the suspension was unjustified. The fact that Mr Spanswick could not have access to any written complaints until more than three days after the meeting indicates that QM was not in receipt of all the complaints and therefore was not in a position to determine whether the complaints could amount to serious misconduct or could put any person's safety at risk.

[24] An employer acting fairly and reasonably in the circumstances of this case would have waited to have the full allegations in front of it before then inviting Mr Gibbons to a meeting at which time full information as to the allegations could be provided together with an opportunity to discuss the suspension.

Mr Gibbons' dismissal

[25] As with the disadvantage grievance I am required to consider the actions of QM and how it acted with regard to the dismissal pursuant to section 103A of the Act.

[26] Despite the assurances given to Mr Spanswick on 28 April, it was not until 14 May that Mr Gibbons was advised that the allegations mentioned at the 28 April meeting included allegations of:

1. Work place bullying;
2. Verbal abuse; and
3. That Mr Gibbons was involved in making racial taunts.

[27] On 1 May QM unilaterally altered its agreement with Mr Spanswick that he would have access to the people making the complaints about Mr Gibbons. In a letter dated 1 May, and with no further explanation, Mr Emmens advised Mr Spanswick that in QM's view the complainants' identities must be kept in confidence.

[28] Despite several requests for the disclosure of the complaint letters and specific information relating to the complaints, it was not until 21 May (immediately prior to a further meeting with Mr Gibbons) and only after some pressure was applied by Counsel on Mr Gibbons' behalf, that QM provided Mr Gibbons with a written outline of the allegations. All details which could lead to the identity of the complainants was blacked out.

[29] For the sake of completeness I have set out the circumstances of each complaint below.

Insubordination

[30] On 15 April 2008 Mr Gibbons had an exchange with his manager Mr John Gardner who was attempting to arrange for Mr Gibbons to complete the follow-up forms from the two incident reports he had completed. During this exchange Mr Gibbons used expletives to punctuate his point. Mr Gardner complained that Mr Gibbons language and conduct was insubordinate and offensive.

[31] Mr Gibbons accepts he swore in his exchange with Mr Gardner but denies directing any abuse towards him. Mr Gibbons says that robust language is commonplace in the work environment.

[32] QM says that Mr Gardner attempted to speak with Mr Gibbons about the incident reports and that Mr Gibbons' response to that request was abusive in both the language used and his general conduct in delivering his response. Mr Gibbons says he simply expressed his view that he would not complete the forms until he had representation and that he had to shout so as to be heard and he was in a hurry to get to the ship so that he could do his job.

Racial Comments

[33] Mr Gardner had received complaints from a number of staff that Mr Gibbons would refer to a particular Samoan employee by the name of "coconut". It was alleged

that Mr Gibbons referred to the employee as being "…a dumb coconut…" and "…a useless coconut who will never be anything but a f…king yardie…"

[34] The complainants advised Mr Gardner that it was not uncommon for these phrases to be used repeatedly in the workplace and over QM's RT system. At least two complainants advised Mr Gardner that when Mr Gibbons was on the RT they would keep the volume turned down so as to avoid hearing his comments.

[35] Mr Gibbons denies using the term "…coconut…"offensively and says that he used the name in jest. He says it is common place in the workplace for people to be called by nick names rather than their given names.

[36] Mr Gibbons says that he used the phrase when he was in a meeting with Mr Spanswick, prior to the 22 April meeting. Mr Spanswick and Mr Gibbons both told me that Mr Spanswick told Mr Gibbons that calling someone "…coconut…" was not appropriate and that Mr Gibbons should apologise. Mr Gibbons says he did apologise and says the employee was "…rapped that I had apologised". This evidence doesn't accord with the evidence provided by Mr Spanswick who says the employee acknowledged when asked if Mr Gibbons had apologised "…sort of, in Tony's way". It seems to me this is hardly the response of someone who was rapt with the apology.

Disciplinary process

[37] On 14 May 2008 a letter was sent to Mr Gibbons outlining the allegations to be discussed in a disciplinary meeting to be held that same day. The letter advised Mr Gibbons that an investigation into the original incidents which were discussed in the two April meetings had been completed and QM was in a position to advise the outcome of the investigation.

[38] I find this is the first notification Mr Gibbons had that the incidents already discussed in the April meetings were now disciplinary in nature. Certainly at the time Mr Gibbons was responding to questions about the incidents he was not aware that he could be subject to disciplinary action.

[39] With regard to the allegations of workplace bullying, Mr Gibbons was provided with an example of the conduct complained of and is the conduct which I have set out in paragraph [34].

[40] The allegations were further clarified in a letter dated 15 May when Mr Gibbons was advised that the conduct complained of included Mr Gibbons calling the employee "…a dumb coconut…" and "…dumb Samoan" together with swearing at the employee concerned. It was alleged that the employee found the statements to be offensive and disparaging as did those who complained of overhearing the comments.

[41] The 14 May meeting was postponed until 19 May, however, on receipt of the two letters of 14 and 15 May, Mr Gibbons through counsel, requested and was granted a postponement of the 19 May meeting until such time as Mr Gibbons had received copies of the complaints together with the material gathered or created during QM's investigation.

[42] On 21 May and in response to Mr Gibbons request to be provided with the documents relating to the investigations, he was advised that disciplinary action was being considered in relation to the incidents which were the subject of the meetings in April. The letter written on behalf of QM states that Mr Gibbons was squarely on notice that the outcome of the investigation may result in disciplinary action including dismissal.

[43] While I accept that on 28 April Mr Gibbons was told the investigation was ongoing, I, like Mr Spanswick and Mr Gibbons, formed the view that the ongoing investigation related only to the new allegations and not the issues dealt with on 22 April.

[44] It is clear from the minutes of the meeting held on 22 April that the meeting was for the purpose of discussing the incident reports and nothing more. At the end of the meeting Mr Emmens confirmed that there was no need to address issues at a further meeting and both Mr Spanswick and Mr Gibbons agreed that there was no need for a further meeting. Further the letter dated 14 May confirms that it was the new allegations that resulted in the suspension.

[45] The letter of 21 May reiterated the complaints with regard to Mr Gibbons' use of inappropriate language both with regard to the allegations of racially offensive language and Mr Gibbons conduct towards his manager on 15 April. A new meeting

date was set for 3.00pm that day. It was at this meeting that Mr Gibbons was provided, for the first time, with copies of the written complaints. It was agreed to adjourn the meeting and reconvene on Friday 23 May 2008.

[46] The meeting planned for 23 May went ahead. At that meeting Mr Gibbons requested that he be given an opportunity to respond to all the allegations in writing. This was agreed to and his responses were provided on 27 May 2008.

[47] After receiving Mr Gibbons' written response QM determined Mr Gibbons conduct toward his manager on 15 April and the use of inappropriate nick names in a derogatory way constituted serious misconduct. This conclusion was set out for Mr Gibbons in a letter in which he was also invited to attend a further meeting on 30 May to discuss the conclusions reached by the company.

[48] The meeting on 30 May went ahead during which Mr Gibbons was provided with a final opportunity to address the conclusions reached by QM. Rather than take that opportunity Mr Gibbons and Mr Spanswick chose to leave the meeting. Mr Gibbons was advised the following day that his employment was terminated as a result of a finding that his conduct constituted serious misconduct.

[49] The decision by QM that Mr Gibbons conduct in swearing at his manager and his refusal to complete incident reports without a union representative was conduct capable of being regarded as serious misconduct. The swearing was specifically directed at Mr Gardner and was capable of being considered insubordination. Insubordination is reflected in the QM rules document as constituting very serious misconduct, the penalty for which is dismissal.

[50] The use of the term "coconut" was not a nickname, as Mr Gibbons sought to have the Authority believe, but was racially offensive and denigrating to the employee to whom it was directed. That others, as well as the employee to whom the words directed, were also subjected to listening to these comments via the company RT system exacerbates the seriousness of them. QM was entitled to treat Mr Gibbons conduct as serious misconduct.

[51] I have considered the process used by QM in the way it conducted its investigation and reached its conclusions. I find that while it was not ideal, QM did provide Mr Gibbons with the information necessary for him to provide his explanations to the complaints and was provided with a full opportunity to do so. Mr Gibbons was represented throughout the process by his Union Organiser who is very experienced in these matters and he was made aware well before any decision was made, that dismissal was a potential outcome. I find that the essential elements of procedural fairness were present and that while QM did not follow its own guidelines to the letter, the lack of adherence was not such that it would render an otherwise justified dismissal to be unjustified.

[52] I find the way QM acted in dismissing Mr Gibbons was what a fair and reasonable employer would have done in all the circumstances. Mr Gibbons' claim that he was unjustifiably dismissed therefore fails.

Remedies

[53] I found Mr Gibbons has established to my satisfaction that he has a valid personal grievance for disadvantage with regard to his suspension on 28 April. He is therefore entitled to a consideration of remedies for that grievance.

[54] Mr Gibbons was in receipt of full pay for the duration of his suspension and has therefore suffered no lost wages. Mr Gibbons has provided very little evidence regarding the effect of the suspension on him. Further, on 5 May 2008 Mr Gibbons wrote to QM raising a personal grievance with regard to his suspension. This letter was reproduced and attached to QM's notice boards in the tea room and other public areas, with Mr Gibbons full knowledge. Any hurt or humiliation suffered as a result of that notice being published must fall at Mr Gibbons feet.

[55] Given the lack of evidence and taking into account his contribution to the actions giving rise to his personal grievance Mr Gibbons is entitled to compensation at the lower end of the scale.

Quality Marshalling (Mt Maunganui) Limited is ordered to pay to Mr Gibbons the sum of $1,000 pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.

Costs

[56] Costs are reserved. Given that both parties were partially successful I am of a mind to let costs lie where they fall. However, I encourage the parties to resolve that question between them. If they fail to reach agreement on the matter they may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority