

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 87
5368477

BETWEEN TE MAURI HITA
 Applicant

A N D SILVER FERN FARMS
 LIMITED
 Respondent

Member of Authority: T G Tetitaha

Representatives: S Mitchell, Counsel for Applicant
 T P Cleary, Counsel for Respondent

Investigation Meeting: 23 November 2012 at Whangarei

Submissions Received: 27 November 2012 from Applicant
 30 November 2012 from Respondent

Date of Determination: 15 March 2013

DETERMINATION OF THE AUTHORITY

Orders/Determination

- A. Mr Hita was unjustifiably dismissed by Silver Fern Farms.**
- B. Mr Hita's application for permanent reinstatement is refused.**
- C. An order Silver Fern Farms pay lost remuneration of \$6,000.75 including a reduction of 50% for Mr Hita's contributory behaviour pursuant to s128(2) and 124.**
- D. An order Silver Fern Farms pay compensation of \$3,000 including a reduction of 50% for Mr Hita's contributory behaviour pursuant to s123(c)(i) and 124.**

- E. An order pursuant to clause 11, Schedule 2 of the Act for interest on the judgment sum set out in paragraph C only at the rate of 5% per annum calculated from 27 June 2011 until payment.**
- F. Submissions as to costs are to be filed by 3 pm 28 March 2013.**

Employment relationship problem

[1] Te Mauri Hita was employed as a boner at the Silver Fern Farms Limited, meatworks plant in Dargaville. He was dismissed following an incident where he swore at his supervisor, Mr Rick Wiperi.

[2] On 15 June 2011 Mr Wiperi approached Mr Hita about his bones not being cleaned properly. Mr Hita complained about the speed of the chain - it was moving too fast and he could not keep up with the work. Mr Wiperi disagreed.

[3] Mr Wiperi then raised further concerns that Mr Hita was not saving the patella bone. Mr Hita said the reduction in boners meant the patella bone should not be saved. Mr Wiperi disagreed. Mr Hita replied that was "*bullshit*".

[4] Throughout this exchange, Mr Hita continued working, boning hind quarters and disposing of waste. When he threw waste onto the waste belt Mr Wiperi told him to not throw bones "*down there*" meaning the waste belt. Mr Hita told him another employee was in front of the waste chute. Mr Hita then threw meat onto a trim table near another worker. Mr Wiperi told Mr Hita to stop throwing product because it was unsafe.

[5] Mr Hita became upset believing Mr Wiperi was "*in his face*" causing him to fall behind with his work on the chain. He told Mr Wiperi "*well slow the fucking chain down*".

[6] Mr Wiperi warned Mr Hita about his swearing. Mr Hita replied he'd swear if he wanted to. Mr Wiperi told him he needed to settle down. Mr Hita replied "*well, fuck off then*". Mr Wiperi immediately stood Mr Hita down and told him to attend a meeting later. The Union delegate, Warren Clark, was asked to attend. Mr Hita was not given any other information but had an idea the meeting was about the incident. His Union delegate Mr Clarke believed he would be given a warning.

[7] Mr Wiperi then investigated the incident, writing his own notes about it and speaking to workers around at the time. The workers denied hearing or seeing anything. The worker at the trim table said the bone did not hit her but came close.

[8] The meeting later that day was attended by Mr Hita, Mr Clark, Mr Wiperi, Mr Hita's parents, Mr Barry Williams, Mr Laurie Davies (Assistant Plant Manager) and Di (an office secretary).

[9] Mr Wiperi felt "*uncomfortable*" telling Mr Hita at the meeting he does not swear at him. There was a discussion about the speed of the chain and Mr Hita's inability to keep up. Mr Wiperi then states "*we are here because [of] the continuation of comments from [Te Mauri]*". Mr Davies states "*personal conduct is why we are here*" then refers to clause 33(b) of the collective agreement and Mr Hita's personal conduct could result in the loss of his job. Mr Davies referred to two previous warnings for abuse, threatening and intimidating people. Mr Hita apologised for his "*french.*" He was suspended on pay and told to come back the following day for a meeting. This meeting was deferred due to bereavement.¹

[10] Mr Hita was not interviewed, asked for comment nor given any further information about the "*continued behaviour*" or other concerns. No further investigation was undertaken.

[11] The final disciplinary meeting was held on 27 June 2011. Mr Clarke raised disparity of treatment. He referred to 4 other people on site with violent behaviour concerns who were not dismissed. Mr Davies stated they are here because of Mr Hita "*not following [the] instruction of [his] supervisor and intimidation.*" There is no detail of the instruction or the failure to follow it. Other than the previous meetings' discussion, there is no further detail of the alleged intimidation. Mr Hita was told of the decision to terminate his employment.²

[12] On 4 October 2012 Silver Fern Farms produced a record of a first level warning given to Mr Hita on 23 March 2011 for failure to follow reasonable instruction of a supervisor and undated notes of a meeting held at or around 23 March 2011 referring to a warning for tapping of a knife.

¹ Notes meeting 15/06/11

² Notes meeting 27/06/11

[13] The notes record Mr Hita refused to accept the warning given by Mr Davies, then said to him “*outside after work, I’ll be waiting for you*”. Mr Davies believes the comment was intimidation and Mr Hita was suspended on pay pending investigation. No warning or other disciplinary action appears to have been taken.

[14] At hearing Silver Fern Farms produced an envelope on which Mr Hita accepted he wrote the words “*sik pay cunt*”. They say this was evidence of his previous behaviour in 2010. No warning or other disciplinary action appears to have been taken.

[15] There were allegations at hearing about ongoing tensions between Mr Hita and Mr Davies and Mr Dean MacNaught (Plant Manager). Mr Davies no longer works at the Dargaville plant. Messers MacNaught and Wiperi all consider Mr Hita seriously disruptive to the plant operations.

[16] Mr Hita claims he was unjustifiably dismissed. Silver Fern Farms disagrees.

Issues

[17] The following issues arise:

- a) Was Mr Hita unjustifiably dismissed?
- b) If yes, what remedies should be ordered?

Was Mr Hita unjustifiably dismissed?

[18] Mr Hita claims he was unjustifiably dismissed because:

- a) The circumstances did not warrant dismissal e.g. swearing common place and disparity of treatment e.g. other employees misconduct involving assault did not result in dismissal;
- b) The incident occurred when the speed of the chain was too high causing difficulties for employees; and
- c) The process employed leading to the dismissal was defective and these were not minor and led to unfairness e.g. lack of impartiality in investigation and decision making; inadequate information regarding

allegations; no opportunity to comment upon any investigation; lack of consideration of any explanations provided.

[19] Silver Fern Farms disputes the dismissal was unjustified. It states:

- a) Any procedural defects were minor and led to no unfairness;
- b) Any explanation provided by Mr Hita would not have changed the outcome;
- c) The behaviour was conduct which would warrant dismissal as defined by clause 33(b)(iii) Collective Agreement; and
- d) Mr Hita had a history of intimidating behaviour recorded in a warning and obscene notes.

Legal Framework

[20] The fact Mr Hita was dismissed is accepted. Therefore the onus falls upon Silver Fern Farms to justify whether its actions “*were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*”.³

[21] In assessing Silver Fern Farms actions, the Authority must consider whether the employer:⁴

- sufficiently investigated the allegations
- raised the concerns it had with the employee
- gave the employee a reasonable opportunity to respond to the concerns
- genuinely considered the employee’s explanation (if any) in relation to the allegations

[22] A failure to meet any of the s 103A(3) tests is likely to result in a dismissal being found to be unjustified.⁵

³ S103A(2)

⁴ s103A(3)

⁵ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160 at [26]

[23] The Authority must first determine the facts about what the employer did leading to the dismissal, and how the employer did it. Secondly the Authority must determine what a fair and reasonable employer could have done, and how it could have done it, in all the relevant circumstances at the time at which the dismissal occurred. Relevant circumstances include those of the employer, employee and the nature of the employer's enterprise or work. Finally, the Authority must determine whether the employer's actions were what a notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Authority must be objective, ensuring they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.⁶

[24] The Authority must not determine a dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (s103A(5)).

Facts Leading to Dismissal

[25] The facts leading to the dismissal are set out in paragraphs [1] to [16] above. There is a dispute regarding whether Mr Hita's conduct in [2] to [6] was abusive and whether he failed to follow instructions including what the instruction was. There is a dispute whether the process set out in paragraphs [6] to [16] was defective and if those defects were minor and resulted in unfairness.

[26] The only contemporaneous written record of the disciplinary process is contained in notes of the 15 and 27 June 2011 meetings taken by an employee called "Di". Other than the apology tendered by Mr Hita, the witnesses accepted the notes were a correct record of the meetings. Mr Hita received the notes after filing proceedings in the Authority.

Substantive justification of dismissal

[27] The substantive justification for Silver Fern Farm's decision to dismiss was failure to follow a reasonable instruction and being abusive towards his supervisor.⁷

[28] For Mr Hita's behaviour to warrant dismissal under the collective agreement it must be "offensive personal abuse" or "threatening" or "intimidating" behaviour.

⁶ *Angus & McKean v Ports of Auckland Ltd* [2011] NZEmpC 160 at [57] – [59]

⁷ BOE L Davies paragraph 9.

Failure to follow the reasonable instruction of a supervisor would normally incur a warning.⁸

[29] At the time, Mr Wiperi said he felt uncomfortable as he does not swear at Mr Hita. His concerns appear directed at Mr Hita's use of bad language. His evidence Mr Hita lacked respect for him or anyone else in management⁹ inferred he believed the behaviour was not personal but directed towards management as a whole.

[30] There is a distinction between 'bad language' and 'abuse'. Swearing or bad language is not on its own sufficient to always justify summary dismissal.¹⁰ Circumstances where an employee used the word "fuck" with a history of similar behaviour¹¹ or told another employee to "fuck off"¹² were not considered behaviour warranting dismissal.

[31] Swearing in this workplace was not uncommon. There was uncontested evidence plant supervisors swore at employees¹³ although Mr Davies did not believe it was a particular problem.¹⁴

[32] The timing of Mr Wiperi raising his concerns was unfortunate. Mr Hita was working in a chain of meat processors and falling behind. He was stressed and expected to answer direct questions about his standard of work. Given the apparent acceptability of swearing in this workplace, it cannot be unexpected he would reply in this manner. Mr Wiperi's evidence at hearing showed he was clearly annoyed at Mr Hita's attitude especially given he'd helped him with his grievances in April 2011.

[33] This is a case of bad language and appalling attitude. To have Mr Hita speak to Mr Wiperi in the way he did was disrespectful and upsetting - but it was not abusive in the circumstances of this case.

[34] The 15 June meeting referred to previous conduct which was the subject of warnings. There is a warning procedure set out in the collective agreement (clause

⁸ Silver Fern Farms Dargaville Collective Agreement 27 September 2010 to 28 January 2013 clause 33(b)(iii) & (c)(vi).

⁹ BOE R Wiperi paragraph 12.

¹⁰ *Davies v Cityline (NZ) Ltd t/a Stagecoach Auckland* ERA Auckland AA321/06, 17 October 2006 at [28]–[29]

¹¹ See above.

¹² *Morgan v Cotterill Security Fencing and Gates Ltd* ERA Auckland, AA316/08, 2 September 2008

¹³ BOE DW Clarke paragraph 18.

¹⁴ BOE L Davies paragraph 14.

30). Mr Davies evidence of a warning regarding threatening behaviour¹⁵ is not a warning in terms of clause 30(b) of the collective agreement. There was no evidence of disciplinary action including warnings regarding the previous conduct in paragraphs [13] and [14]. The only warning was for failure to follow instruction not personal conduct (see paragraph [12]).

[35] There is a lack of clarity regarding the instruction Mr Hita allegedly failed to follow. Mr Davies produced his diary notes from 27 June 2011 that indicate the instructions were to save the patella bone and to keep the bones clean.¹⁶ There was no evidence these instructions were given to Mr Hita prior to this incident. Mr Wiperi told Mr Hita at the time of the incident his bones were not acceptable. This led to Mr Wiperi discovering the patella bone was not being saved. Mr Hita explained the chain speed was too fast and the loss of a boner meant he was struggling to clean the bones and save the patella bone. He believed the loss of a boner meant they went back to the previous instruction of not saving the patella. Mr Wiperi corrected him. There was no instruction that he failed to follow. This was a performance issue.

[36] Mr Wiperi's evidence was after Mr Hita had recklessly thrown bones towards the waste belt he then "*instructed Mr Hita not to throw bones like that because it was unsafe.*" Mr Hita then threw the bones onto the trim table.¹⁷ This infers he disobeyed a general instruction not to throw bones. This is inconsistent with the 15 June 2011 meeting notes. The notes record Mr Wiperi telling Mr Hita not to throw bones "*down there*" meaning the waste belt, not a general instruction not to throw bones. The notes record Mr Hita explaining why he was throwing the bones onto the waste belt - someone was in the way of the waste chute. He then threw the bones onto the trim table and was told to "*stop throw[ing] product like that because [it was] unsafe.*" There is no evidence he continued to throw product after this instruction. The evidence is inconsistent and does not support a failure to follow reasonable instruction. There was no evidence of any other instruction.

[37] Considering this matter objectively, in all the circumstances a fair and reasonable employer could not have dismissed Mr Hita for failure to follow reasonable instruction and being abusive towards his supervisor.

¹⁵ BOE L Davies paragraph 10.

¹⁶ L Davies Handwritten Diary Notes 27/06/11

¹⁷ BOE R Wiperi paragraph 8.

Investigation of allegations – s103A(3)(a)

[38] The only investigation of the allegations was undertaken by the complainant Mr Wiperi. The investigation was cursory and appeared focused on confirming one version of the incident. Mr Hita was not interviewed at all. Mr Hita's responses to the allegations at the meeting on 15 or 27 June 2011 were not investigated including disparity of treatment. Concerns whether Mr Hita's behaviour was intimidation were raised at the meeting on 15 June 2011 but not investigated.

[39] A person independent of Mr Wiperi would have provided impartiality and more thorough investigation of the allegations, including speaking with Mr Hita. This may also have avoided the problems with substantive justification identified above.

[40] There were resources available to Silver Fern Farms. Another employee or the human resources department could have undertaken the investigation. Taking into account its resources, Silver Fern Farms did not sufficiently investigate the allegations prior to dismissal.

Raised Concerns with Employee – s103A(3)(b)

[41] The failure to follow instruction was not raised with Mr Hita until the meeting on 27 June 2011 - when he was dismissed. There was no detail of what the instruction was and how he failed to follow it.

[42] The meeting on 15 June 2011 raised Mr Hita's previous conduct but did not give any detail. The notes of the 15 and 27 June 2011 meetings do not record the alleged incidences in paragraphs [13] and [14] or the other incidences referred to by witnesses at hearing.

[43] These incidences in paragraphs [13] and [14] are erroneously stated to have been the subject of warnings. No warnings for abuse, threatening and intimidating people were produced in evidence. The only warning issued was for failure to follow instruction.

[44] Only one of three of the employer's concerns was raised prior to dismissal. An employee is entitled to know all the employer's concerns which inform the decision to dismiss prior to termination.

[45] Given the above, Silver Fern Farms failed to raise the concerns it had with Mr Hita prior to dismissal.

Reasonable opportunity to respond to the concerns – s103A(3)(c)

[46] Given the above findings, Mr Hita was not given a reasonable opportunity to respond to Silver Fern Farms concerns.

Genuinely considered the employee's explanation (if any) regarding allegations – s103A(3)(d)

[47] Given the above findings, Silver Fern Farms cannot have genuinely considered Mr Hita's explanation.

Other factors – s103A(4)

[48] The Authority may also consider any other relevant factors (s103(4)). For example, employees in like circumstances should be treated alike unless there are good reasons for different treatment.¹⁸ Disparity of treatment was raised at the meeting on 27 June 2011.

[49] This is a factor a fair and reasonable employer ought to have considered prior to dismissal. Silver Fern Farms did not.

Were the defects minor and did not result in Mr Hita being treated unfairly? s103A(5)

[50] The above defects in the process were not minor and were unfair to Mr Hita. He was not properly informed about all of the employer's concerns and did not have a reasonable opportunity to respond. He was given erroneous information about previous conduct and warnings. The responses Mr Hita and Mr Clarke did make could have materially affected the decision to dismiss. The defects were major and resulted in unfairness to Mr Hita.

[51] The Authority determines the dismissal was unjustified.

¹⁸ *Angus & McKean v Ports of Auckland Ltd* [2011] NZEmpC 160 at [26] & [55]

What remedies should be ordered?

[52] Mr Hita seeks reinstatement, lost wages and compensation for hurt and humiliation.

[53] Silver Fern Farms opposes reinstatement due to Mr Hita's behaviour and its effect upon staff and reduction of any remedies due to contributory behaviour.

Reinstatement

[54] Reinstatement is no longer the primary remedy for an unjustified disadvantage or dismissal,¹⁹ but may still be ordered where it is "*practicable and reasonable*" to do so.²⁰

[55] Whether it is practicable to reinstate involves a balancing of the interests of the parties and the justices of their cases with regard to the past and future.²¹ Practicality is both about whether it can occur and the consequences.²² Reinstatement may not be practicable where there are tensions between employees and the grievant's position had been permanently filled.²³

[56] Mr Wiperi accepted experienced boners like Mr Hita were always required but he had no boner position currently available. There were inexplicable delays in filing proceedings in the Authority. The Statement of Problem was filed on 31 May 2012 - nearly 1 year following dismissal. There was no application for interim reinstatement. It is unsurprising Mr Hita's position was filled as a result.

[57] Mr Wiperi still works at the Dargaville plant. It is likely he will be Mr Hita's supervisor.

[58] Mr Hita accepted he said to Mr Davies "*outside after work, I'll be waiting for you*" but denied it was a threat. This explanation is rejected. To make this statement after arguing then refusing to accept a warning from Mr Davies is a threat. The warning for tapping his knife came after he had been instructed 8 times to stop this behaviour but would not.

¹⁹ *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 at [61]

²⁰ S125(2)

²¹ *Lewis v Howick College Board of Trustees* [2010] NZCA 320, at [2] citing *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA)

²² See above.

²³ *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213 (EmpC) at [78].

[59] Mr Hita confirmed he wrote the word “*sik pay cunt*” on an envelope then gave it to payroll. He also confirmed he sometimes challenged Mr Davies and other workers with a haka and/or pukana.

[60] Both Mr Wiperi and Mr Dean MacNaught (Plant Manager) have concerns his behaviour would continue if reinstated. There is no evidence to show he would not continue this behaviour. There is evidence Mr Hita’s reinstatement would create tension between employees.

[61] Given the unavailability of his position, delays in filing, likelihood of working with the complainant, previous behaviour and the possibility of creating tension amongst the other employees, the Authority determines reinstatement is neither practicable nor reasonable. Reinstatement is declined.

Other remedies

[62] Mr Hita seeks lost remuneration in excess of three months.

[63] The evidence of lost remuneration is sparse. This was seasonal work.²⁴ There is no evidence he would have had continuous paid work through the year. Other than stating he has been “*unable to find a good job*”, there is little other evidence about his difficulties in finding work.

[64] Given the lack of evidence, the Authority determines lost remuneration should be limited to three months totalling \$13,656.75 gross.²⁵ Mr Hita has a duty to mitigate his losses. He had paid work earning \$1,656.00 gross. This shall be deducted from the lost remuneration equating to \$12,000.75.

[65] Mr Hita seeks compensation for hurt and humiliation pursuant to s123(c)(i). The amount of compensation must be *referable ... to the harm done by the employer’s breach*²⁶ and should *not contain any element of punishment*²⁷. Mr Hita’s evidence focuses upon his inability to financially support his family and the unfairness of the dismissal.

²⁴ Silver Fern Farms Dargaville Collective Agreement 27 September 2010 to 28 January 2013 clause 29.

²⁵ Inland Revenue information for Te Mauri Hita showed gross taxable income for period 1/04/11 to 31/07/11 (4 months) of \$18,209.00 averaging \$4,552.25 per month multiplied by three equates to \$13,656.75.

²⁶ *New Zealand Institute of Fashion Technology v Aitken* [2004] 2 ERNZ 340 (EmpC)

²⁷ *STAMS v Denhards Bakeries Co (No 2)* [1991] 3 ERNZ 941 (EmpC)

[66] There is no medical evidence of injury. Mr Hita's dismissal was unexpected – Mr Clarke, his Union delegate believed a warning was appropriate. The abrupt manner of dismissal was due to the unfair process. An award of \$6,000 compensation is appropriate.

[67] The Authority must consider the extent an employee's actions contributed towards the situation that gave rise to the personal grievance and if this requires the reduction of remedies payable.²⁸

[68] Mr Hita's behaviour towards Mr Wiperi directly contributed to the disciplinary process. The behaviour was blameworthy and would have resulted in some disciplinary action. There was evidence of similar past behaviour. Previous cases dealing with this type of conduct have made reductions of 50%.²⁹ This is appropriate in the circumstances.

[69] Accordingly the remedies payable to Mr Hita shall be reduced by 50% in view of his contributing behaviour.

[70] Mr Hita is entitled to interest on the orders under s128(2) at 5 % from the date of termination being 27 June 2011 until payment.

Costs

[71] Costs are reserved. Submissions on costs are to be filed by 3 pm 28 March 2013.

T G Tetitaha
Member of the Employment Relations Authority

²⁸ Section 124.

²⁹ *Davies v Cityline (NZ) Ltd t/a Stagecoach Auckland* ERA Auckland AA321/06, 17 October 2006; *Morgan v Cotterill Security Fencing and Gates Ltd* ERA Auckland, AA316/08, 2 September 2008