Determination Number: AA 146/06
File Number: AEA 435/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN	Bernie Himona (First Applicant)
AND	Waikohu Paora (Second Applicant)
AND	Carter Holt Harvey Limited (Respondent)
REPRESENTATIVES	Greg Lloyd, for Applicant Peter Kiely, for Respondent
MEMBER OF AUTHORITY	Vicki Campbell
INVESTIGATION MEETING	14 December 2005
SUBMISSIONS RECEIVED	23 December 2005
DATE OF DETERMINATION	8 May 2006

DETERMINATION OF THE AUTHORITY

[1] Firstly I take this opportunity to apologise to the parties for the delay in providing them with a determination of this matter. Unfortunately personal and work priorities have intervened and not allowed an earlier determination to be completed.

Employment relationship problem

[2] Mr Bernie Himona and Mr Waikohu Paora each worked for Carter Holt Harvey Limited (CHH) for 15 and 27 years respectively as Pulp Mill Operators in the respondent's waste paper department at Whakatane.

[3] The respondent's Whakatane Plant recycles cardboard and paper. The material to be recycled is loaded onto a conveyor belt which takes the material up a sharp incline into a rotating pulper. Material is dropped into a large churn where it is converted into liquid sludge.

[4] The conveyor-belt is made out of fabric with wooden slats which are intended to prevent paper slipping and blocking the conveyor-belt. A kill-switch is mounted above the horizontal section of the conveyor-belt and there are other switches which can be used to turn off the conveyor and isolation locks that can be used to prevent anyone restarting the conveyor.

[5] I have had the benefit of a site visit to CHH's Whakatane site and am satisfied that if a person fell into the large churn while it was in operation, they would not survive. The churn is a smooth stainless steel bowl with chutes in the bottom which lead to agitators. The churn spins very quickly and if a person was to fall into the churn they would be forced into the agitator chutes by the force of the spinning churn. This would occur very rapidly.

[6] On 31 August 2004, the applicants experienced difficulties with loose material blocking the conveyor. Attempts to fix the problem failed and both applicants climbed up and stood on the conveyor to try and rectify the problem from the live belt. The applicants were seen by Mr Ian Martin, the shift engineer, who instructed them to get off.

[7] Once off the conveyor, the problems with the conveyor jamming continued. Mr Himona climbed back on the moving belt, was instructed once again, by Mr Martin to get off. Unfortunately the problems continued and both men again got up on the live conveyor. This was also witnessed by Mr Martin, who then reported the incident.

[8] Following a disciplinary process both applicants were dismissed for serious misconduct. The applicants say the dismissal was unjustified because what they did was long-standing and well established practice which was known to their employer and even though there was an official policy which prohibited the practice, the practice had continued unabated since the policy had been implemented.

[9] In reply CHH denies the dismissals were unjustified.

[10] The issues for determination are whether:

- the employer carried out a full and fair investigation into the misconduct; and
- the decision to dismiss one that was open to a fair and reasonable employer?

Did the employer carry out a full and fair investigation

[11] Fairness and reasonableness requires that an employee is given an understandable account of the allegations of misconduct with sufficient particulars and enough time to provide the employee with a real as opposed to a nominal opportunity to refute the allegations or mitigate the conduct. The Court has also set out the minimum requirements of procedural fairness to be applied by an employer in an investigation into serious misconduct:

a. notice to the employee of the specific allegation of misconduct and of the likely consequence if the allegation is established;
b. a real as opposed to a nominal opportunity for the employee to attempt to refute the allegation or explain or mitigate his or her conduct; and
c. an unbiased consideration of the employee's explanation, free from predetermination and uninfluenced by irrelevant considerations.

(*NZ (with exceptions) Food Processing etc IUOW v Unilever NZ* [1990] 1 NZILR 35).

Policies

[12] CHH's work rules provides for dismissal as a penalty in the event of serious breaches of safety policies.

[13] CHH also has a written policy relating to isolation and confined space entry which prohibits staff from standing on energized plant or equipment unless it has first been isolated. The policy provides for disciplinary action including dismissal for non compliance with the stated procedures for isolating equipment.

[14] It is not disputed that the conveyor belt and pulper are significant hazards. It was also common ground that the applicants climbed onto the moving conveyor without following the isolation procedures.

[15] Mr Martin told the applicants to get off the belt, after which Mr Himona climbed back onto the belt. Mr Himona was, again, told to get off the belt, which he did, but then after more jamming of the belt both applicants again climbed back onto the moving conveyor. After seeing Mr Himona and Mr Paora on the conveyor again, Mr Martin arranged for the conveyor to be isolated and reported the incident to Mr Alan Baguley the team leader on Mr Himona and Mr Paora's shift. Mr Baguley reported the incident to Mr Grant Luscombe, the pulp and power business unit manager.

The investigation

[16] Mr Luscombe met with Mr Martin who described what he had seen. Following this meeting, Mr Luscombe then approached Mr Himona and Mr Paora and reported what Mr Martin had reported to him. Both workers were told that the matter was being treated very seriously. Mr Himona and Mr Paora were advised an investigation would be undertaken and they should seek assistance due to the seriousness of the situation. Both men were suspended.

[17] On 1 September 2004 both applicants were required to attend a meeting to explain what had occurred the previous day. The applicants were represented by Mr Tom Williams and Mr Warren Nathan, Union delegates on site. At the commencement of the meeting Mr Luscombe outlined the key matters for investigation and advised that dismissal was a possibility.

[18] During the meetings with each of the men, Mr Paora and Mr Himona never disputed that they were on the moving conveyor. File notes were made of the discussions in each of the meetings with the two employees.

[19] Both Mr Himona and Mr Paora, during the disciplinary process and at the investigation maintained that what they did was acceptable as it was common practice. Mr Martin told me at the investigation meeting that he had never seen it happen previously or since. Mr Luscombe, told me that he had never seen any employees standing on a moving conveyor, nor had he heard of any employees doing so.

[20] The notes of the meeting with Mr Paora show that he believed the only way to unjam the belt was to climb onto it. He admitted he had climbed up onto the belt and jumped up and down on it while it was going. From my site inspection it is clear that in order for Mr Martin to see Mr Paora jumping up and down on the belt Mr Paora would have to have been at the top of the incline and within a very short distance of the churn.

[21] The notes of the meeting with Mr Himona show that Mr Himona knew that what he did was wrong, and confirmed that he was clear on the policy regarding isolations.

[22] During the disciplinary meetings on 1 September, Mr Himona and Mr Paora told Mr Luscombe that Mr Eddie Kohunui, another operator at the plant, had been watching them while they were on the conveyor belt and so they felt they were safe.

[23] Mr Luscombe then met with Mr Kohunui to seek his explanations. The notes from that interview show Mr Martin did raise a concern with him about Mr Himona being on the belt after he had been told to get off it the second time. Mr Kohunui turned the conveyor off at that point and went and saw Mr Himona on the belt. The notes of the meeting also show that Mr Kohunui told Mr Luscombe that Mr Himona and Mr Paora were "…never on [the] belt when I was there".

[24] On 3 September 2004 a further meeting took place. Neither applicant was present at the beginning of this meeting and I am satisfied that this was as a result of a request by the union delegates that an initial meeting occur without Mr Himona and Mr Paora being in attendance. It was not disputed that it was quite common place for union delegates to try and secure a "deal" on the part of members who were facing disciplinary action. That is precisely what happened in this matter as confirmed by the notes taken at the meeting.

[25] The union delegates and the company agreed that Mr Kohunui would receive a written warning for six months for his role in the breach of the policy. The notes indicate that the company representatives at the meeting viewed the breach of policy very

seriously indeed and it was viewed seriously by the union delegates who acknowledged they spent a lot of time discussing health and safety issues with their members.

[26] On behalf of Mr Himona and Mr Paora the union delegates raised again the fact that climbing on a moving belt was common practice. This was not accepted by Mr Luscombe who himself, had worked on the conveyor belts during his employment at CHH and had never witnessed workers climbing on a moving belt. Mr Luscombe also spoke with Mr Baguley who confirmed that he was not aware that getting onto a moving belt was common practice.

[27] I am satisfied CHH carried out a full and fair investigation and gave due consideration to the explanations provided by Mr Himona, Mr Paora and the submissions made on their behalf by the union delegates representing them.

Was the decision to dismiss one that was open to a fair and reasonable employer

[28] In order to justify a dismissal the Court of Appeal in *Man O'War Farm Limited v Bree*, CA, 169/02, 31 July 2003, para 30 has stated:

> … an employer must have reasonable grounds for believing and must honestly believe that there has been misconduct by the employee of sufficient gravity to warrant dismissal. An employer must also carry out the dismissal in a manner that is procedurally fair. The minimum requirements of procedural fairness are that the employer has properly investigated the allegations, given the employee an opportunity to be heard and considered (with an open mind) that explanation before making the decision to dismiss (Mazengarb's Employment Law (6ed, 2003) para 103.57).

[29] It is not the role of the Authority to substitute its decision to dismiss or not, for that of CHH. Rather, the role of the Authority is to determine whether the decision to dismiss Mr Himona and Mr Paora was a fair and reasonable one in the circumstances.

[30] In *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal at paragraphs [31] and [32] said that

> The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response

> open to a fair and reasonable employer, we prefer to use this in terms of "could" rather than "would" used in the formulation used in the second *BP Oil case* [1992] ERNZ 483 (CA) at 487.
>
> The burden on the employer is not that of proving to the Court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

[31] In *Oram* the Court of Appeal held that if a fair and reasonable employer is able to view the conduct disclosed by its investigation as deeply impairing of the basic trust and confidence essential to the employment relationship, it is hardly necessary for the employer to consider whether in all the circumstances the employee ought to be dismissed, since dismissal will be within a range of disciplinary measures available to the employer for it to choose from.

[32] I am satisfied that the actions of Mr Himona and Mr Paora, even in the absence of the company's policies, were extremely dangerous. Both men had been told to get off the belt (Mr Himona twice), but ignored this instruction. Instead relying on Mr Kohunui to be able to switch off the belt if either of them got into any difficulty. I am not satisfied, having inspected the site, that Mr Kohunui could have acted quickly enough to assist the men if they had got into difficulty.

[33] On the evidence available to the Authority, I find that Carter Holt Harvey Limited was fairly and reasonably entitled to view the actions of Mr Himona and Mr Paora on 31 August 2004 as constituting serious misconduct warranting dismissal and that the dismissal was justified. It follows that I must find that neither Mr Himona nor Mr Paora have a personal grievance and hence the remedies being sought from the Authority can not be granted.

Costs

[34] Costs are reserved. The parties are encouraged to discuss and resolve the matter of costs between them. In the event that they are unable to do so they may lodge and serve memorandum in the Authority for consideration.

Vicki Campbell
Member
Employment Relations Authority