

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Anthony Gregory Housham (Applicant)
AND Juken New Zealand Limited (Respondent)
REPRESENTATIVES David Fleming, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 24 July 2006
DATE OF DETERMINATION 6 September 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] The applicant Mr Anthony Gregory Housham ("Mr Housham") says he was unjustifiably dismissed from his employment with Juken New Zealand Limited ("Juken"). Juken says the dismissal was justifiable for the reasons set out in a letter dated 26 April 2006: -

...

Confirmation of Instant Dismissal

This letter is to confirm that on 26 April 2006 I informed you that your employment with this Company would cease on the above date as a result of dismissal following a Disciplinary Meeting on 26 April.

On Saturday 22 April 2006 while working at the Northland Mill Site you engaged in a situation of physical violence by pushing/striking another person on Company premises. The matter was thoroughly investigated on 24 April.

The results of this investigation were outlined at the Disciplinary Meeting at which the conclusion was reached, after taking into account your explanation, that your actions amounted to serious misconduct under the Company's Code Of Conduct. In particular you were considered to have breached that part of the Code which states that the following is prohibited:

Arranging for or engaging in acts of physical violence against any person on the company's premises or at company arranged or sponsored events (Note: Includes fighting even if provoked).

Your final pay will be calculated and forwarded to your bank account on the 27 April following the return of company property as advised.

*Yours sincerely
Vince Burgess
Assistant Mill Manager*

[2] Mr Housham, through his union, lodged an application in the Authority on 14 June 2006 asking the Authority to investigate and resolve the problem in his favour by orders for his reinstatement, reimbursement and compensation.

[3] The parties were unable to resolve the problem by the use of mediation.

The legal principles

[4] The Authority scrutinises Juken's decision to terminate Mr Housham's employment in accordance with the statutory test of justification set out at section 103 of the *Employment Relations Act 2000* ("the Act").

[5] The application of the statutory test has recently been clarified by the Employment Court. The relevant question is how would a fair and reasonable employer have acted in all the circumstances of the case. These circumstances include not just the employer's reaction to the misconduct, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and employer. An employer does not have to prove the incident which it characterised as serious misconduct happened. It is not required to conduct a trial or even a judicial process. Natural justice requires that the employee is given a proper opportunity to comment on the allegations.

[6] The Authority reviews Juken's decision to ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious misconduct¹. The statutory test obliges the Authority to separate out the employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances².

The circumstances

[7] Mr Housham ("Podge") has been employed by Juken at its Northland Mill since 26 February 2001. At the time he was dismissed he worked as a pallet maker. The terms of Mr Housham's employment were set out in a collective employment agreement between Juken and his union.

[8] At about 10.30 am on Saturday 22 April 2006, Mr Housham and another worker Mr Anaru Nathan ("Mr Nathan") were involved in a physical altercation on site. Immediately after the incident, both Mr Housham and Mr Nathan completed written statements.

¹ *Air New Zealand -v- Hudson*, unreported, AC30/06, 30 May 2006, Shaw J

[9] Mr Housham wrote: -

While emptying the pallet area wood box in the black rubbish bin, Anaru came up to me and said "look you lazy cunt empty the box at the hogger". I looked stopped what I was doing and said donot call me a lazy cunt if you know what I am doing. I carried on emptying the box when Anaru threw a glove at my head I stopped and he was still yelling at me and hit me again in the glasses he was trying to climb on the fork, I was telling him that there was nails steel straps in the bin and cannot go in the hogger he was not listening and walked away. I hopped off the fork to look for my glasses could not find them, went to office and seen Kura. Robert Porter came over he find my glasses.

[10] Mr Nathan wrote: -

I was around the shiftleaders office to brake up old pallets. I went inside to grab my tape measure & went back outside and then podge dumping his rubbish in the bin that I use to throw all my broken slats in. so I approach podge & told him not to be a lazy bastard & then walked away & passed the hoist just as I was walking pass he seen me and carried on reversing. I moved a bit faster just as I almost got passed he nipped me with the hoist & then I approached him again he still carried on the hoist I threw the gloves to catch his attention he got pissed off then we started yelling at each other he turned around I was still yelling I got right up in front of him then out of the blue he threw a punch I threw one back we start tuffling around the hoist he grabbed the snips took a strike ripped my thum I stood back I went inside seen the first person with a RC & called up Kura asked was he at smoko then told her what happened.

[11] A senior team leader Mr Brian Cosford ("Mr Cosford") took Mr Housham to the hospital. Mr Housham was informed by line manager Mr Melvin Adams ("Mr Adams") that normal procedures would have to be followed and he could not return to work until the matter had been dealt with. That was a suspension.

Meeting Monday 24 April 2006

[12] At 9.15 am on Monday 24 April 2006, Mr Housham and his representative Mr George Popata, attended a meeting with the assistant mill manager Mr Vince Burgess ("Mr Burgess), Mr Cosford and Mr Adams. Mr Cosford took notes of this meeting.

[13] In this meeting Mr Housham explained that Mr Nathan had said to him "*empty it at the hogger you lazy cunt*". Mr Housham said he ignored Mr Nathan and carried on emptying the bin. He said Mr Nathan then threw a glove at him hitting him on the shoulder, and as he was reversing, Mr Nathan came up very close to his face and continued to abuse him. Then the notes of meeting record Mr Housham admitting he had pushed Mr Nathan away and Mr Nathan then swung at him. Mr Housham said there was then a tussle during which time he was trying to defend himself. He said Mr Nathan at some point looked up at him and then returned inside. Mr Housham said he was bleeding badly and couldn't find his glasses. At that point he went to look for the shift supervisor Ms Kura Walters ("Ms Walters"). He said that when he found her, she attended to his injuries and asked him to fill out a report.

² *Pero Tamarua -v- Toll Tranzlink Limited*, unreported, WC11/06, 11 July 2006, Shaw J

[14] During the meeting Mr Nathan's statement was put to Mr Housham for his comment. Mr Housham maintained his version of events. Mr Burgess also carried out a re-enactment of the incident at Mr Housham's direction.

[15] Mr Housham says that references in the notes to concessions by him that he had "pushed" Mr Nathan are inaccurate. He says the words he used at the meeting were "*putting his arm up to defend myself*". I do not accept that evidence. Nor does Mr Popata because he tells the Authority Mr Housham did indeed use the word "push" at this meeting. Juken's witnesses also say that. As well, Mr Housham's own statement of problem states the same. I find therefore, Mr Housham admitted that he had pushed Mr Nathan.

[16] Mr Burgess informed Mr Housham there would be a further meeting on Wednesday 26 April 2006 at 1.00 pm at which time it was proposed Juken would advise the action it would take in relation to the incident. Mr Burgess informed Mr Housham the meeting was disciplinary in nature and that the matter was very serious in that it may affect his ongoing employment.

Meeting Wednesday 26 April 2006

[17] Mr Housham attended the disciplinary meeting with Mr Popata on 26 April 2006. Present for Juken were Mr Burgess, Mr Adams and Mr Campbell Crooks ("Mr Crooks") who took notes. Mr Housham accepts Mr Crooks' notes are accurate. Mr Burgess confirmed these facts with Mr Housham: -

*An incident had occurred on 22 April 2006 involving Anthony and Anaru;
Anthony had taken off-cut bin from pallet making area outside to put in the big rubbish bin (whereas this normally goes in the hogger area);
Anaru appeared on the scene and disagreed with Antony's conduct;
Anaru claimed Anthony tried to run him over and that Anaru threw his gloves at Anthony hitting him in the back of the neck area;
Anthony claimed that he ignored Anaru and Anaru abused him;
Anthony claimed that Anaru came to the side of the fork hoist and continued to abuse him;
Anaru claimed that Anthony threw a punch which hit him on the forehead whereas Anthony claims that he pushed Anaru in the chest;
Anthony claimed that Anaru then climbed onto the side of the fork hoist and started to fight with him.
Anaru claims that he was struck by Anthony with tin snips which Anthony denied, saying that they were in his pocket.*

[18] Mr Housham denied trying to reverse into Mr Nathan with the fork hoist and that he had used tin snips as a weapon. It is recorded that Mr Housham admitted pushing Mr Nathan.

[19] The meeting adjourned to allow Juken to consider matters. Mr Burgess gives this evidence of his deliberation: -

I concluded that Anaru had, in the course of their work, believed Anthony used a bin as a rubbish tip that Anaru was about to use for another task. He then made a comment to Anthony about him being lazy (there was a conflict between them as to the actual words), and Anthony was displeased by this but carried on with what he was doing. This resulted in Anaru throwing his gloves at Anthony (he said to attract Anthony's attention), and approaching the forklift. He was then standing on the ground next to the forklift when Anthony made an aggressive motion towards Anaru - according to Anthony, it was a push in the chest but according to Anaru it was a punch to the forehead. While I could not be certain what type of movement it was, I was completely satisfied that Anthony had involved himself physically in the situation rather than removing himself. The situation then escalated, and a tussle ensued.

[20] Mr Burgess says that in his mind, Mr Housham's push or punch was not a defensive move, but was rather a provocative physical movement. Mr Burgess did not accept that Mr Housham was the victim of an unprovoked attack and was merely defending himself. Instead, Mr Burgess concluded Mr Housham was equally culpable and may have provoked the incident. He concluded that Mr Housham had engaged in physical violence in breach of Juken's Code of Conduct.

[21] Juken has a zero tolerance policy in relation to such behaviour. This policy is consistently enforced because there is potentially dangerous equipment all over the site. Mr Burgess concluded the proper course of action was to terminate Mr Housham's employment. Mr Housham was advised of his dismissal at 2.35 pm.

[22] Mr Nathan was engaged by a contractor on site. He was barred from Juken's site as a result of the incident with Mr Housham.

The merits

[23] Mr Burgess did not make a finding as to whether Mr Housham had punched or pushed Mr Nathan. Mr Burgess was satisfied that Mr Housham had involved himself physically in the situation rather than removing himself. In terms of Juken's code of conduct, that was behaviour characterised as serious misconduct.

[24] Mr Housham essentially maintained that he acted not as the aggressor, but rather was the victim of an unprovoked attack. Mr Burgess did not accept that and concluded Mr Housham was equally culpable and may have provoked the incident. Mr Burgess' re-enactment caused him to conclude it was unlikely Mr Housham could have pushed Mr Nathan in the chest. However, he found that it was possible for Mr Housham to have made contact with Mr Nathan's head. I do not understand Mr Housham to take any issue with this assessment.

[25] Mr Housham now maintains that he acted in self-defence because Mr Nathan had thrown a glove at him. I do not accept that argument. Firstly, he did not advance that position during

the disciplinary process. Secondly, it cannot be correct because in the disciplinary meeting on 26 April 2006, he confirmed that he had in fact ignored Mr Nathan when the glove was thrown at him.

[26] Mr Housham also now criticises Mr Burgess' re-enactment. He did not, however, raise any issue about it at the time he was directing Mr Burgess.

[27] After its disciplinary process, Juken concluded Mr Housham had engaged in physical violence in the workplace against another person. I am satisfied that it carried out a full and fair investigation which disclosed that conduct.

[28] I must now separate out the employer's decision to dismiss and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these circumstances.

[29] I take into account Mr Housham's service of some 5-6 years with Juken, and also that he suffered a disadvantage in his employment³. I also take into account Juken's policy in relation to workplace violence and its very proper concern for the health and safety of its employees working with machinery and equipment. I also consider relevant, a fair and reasonable employer would take into account the limited job opportunities in the far north area and Mr Housham's utility to other workers at Juken as an active union member.

[30] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, I conclude that Juken's decision to dismiss Mr Housham was what a fair and reasonable employer would have done.

Determination

[31] Accordingly, I conclude Mr Housham was not unjustifiably dismissed. I find that Mr Housham does not have a personal grievance arising out of his dismissal. The employment relationship problem does not require the resolution sought by Mr Housham and there will be no formal orders.

³ See the Authority's determination in AA283/06

Costs

[32] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms Swarbrick is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Fleming is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority