IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2013] NZERA Wellington 35
5372231

	BETWEEN	STEPHAN HOVELL Applicant
	AND	SILVER FERN FARMS LIMITED Respondent

Member of Authority:	G J Wood
Representatives:	Bruce Stewart for the Applicant Tim Cleary, for the Respondent
Investigation Meeting:	28 February 2013 at Wanganui
Submissions Received:	28 February 2013
Determination:	26 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The respondent, Silver Fern Farms Limited (Silver Fern), is one of New Zealand's largest meat processors, with a staff of several thousand. The applicant, Mr Stephan Hovell, was employed as a meat worker at Silver Fern's Hawera plant. He worked as a meat trimmer on the nightshift. He had also recently been elected to a union delegate's position.

[2] In late February 2012 Silver Fern's Hawera Plant Manager, Mr Ash McKay, received from his nightshift plant supervisor that one of Mr Hovell's co-workers had complained about his behaviour towards her the previous evening. The nightshift supervisor read out the worker's complaint, which he had got her to write down. It stated that she had been instructed to train another worker, and that that worker was to do those cuts only. Her complaint was about Mr Hovell's reaction to her declining to

share Mr Hovell's work with the two of them, because the other worker was in training. She asked him if a supervisor had authorised this and his response allegedly was that *I don't have to listen to him I'm the boss*.

[3] When the complainant started to call out to the supervisor he allegedly told her that she was not to listen to him at all because he was the boss. Matters then degenerated into an argument on this topic with the complainant, but not Mr Hovell, swearing.

[4] When the supervisor came over she stated that Mr Hovell told the supervisor to leave as it had nothing to do with him, and that as he left Mr Hovell again told her that she was not to talk to the supervisor but to listen to him, to which she responded by swearing and yelling at him. However, she claimed that she then stopped doing that and turned away from Mr Hovell, who then allegedly said that he was going to *get me sacked because I am a nark*.

[5] The nightshift supervisor took the complaints seriously because it appeared from her body language that the complainant was genuinely scared of losing her job and because she mentioned this over and over again to him, despite his assurances that Mr Hovell as a union delegate had no such powers and that such powers were held only by management.

[6] Mr McKay told the nightshift supervisor that this complaint had to be taken seriously and that he was to investigate and obtain written statements from Mr Hovell and other workers in the vicinity at the time.

[7] I accept that the nightshift supervisor approached all the staff that were in the vicinity at the time (with the exception of the departmental supervisor's partner) but that many of them either refused to talk to him or claimed to have seen nothing.

[8] Mr Hovell, accompanied by the union President, did provide a statement, which was taken by the nightshift supervisor. He was told that the core of the complaint was that he was *trying to offload work which had not been authorised by supervisors, telling the employee not to listen to supervisors only to listen to him, calling her a nark and threatening to get her sacked*. Mr Hovell denied the accusations and said it was all untrue.

[9] Mr Hovell was informed that he would be suspended on full pay until the investigation had taken place. Another meeting was set for the next day.

[10] Statements from other staff included one witness who had seen Mr Hovell *get in her face* despite being told to go away. The boning room supervisor stated that when he approached the pair Mr Hovell *told me to go away it had nothing to do with me*, and that it was none of his business. He also noticed Mr Hovell leaning across the table into the complainant's face. He also noticed that the pair continued to squabble, but did not feel it necessary to intervene.

[11] At the meeting the next day, Mr Hovell was again represented by the union President, amongst other union officials. Mr Hovell was informed, following a question as to what he had allegedly done wrong, that under the parties' collective employment agreement the allegation against him was one of serious misconduct under Schedule I, clause 8, Personal Behaviour, which states:

> *All employees are expected to conduct themselves in a socially acceptable manner. Specifically threats, abuse or physical violence is not permitted.*
> *Provocation will not be accepted as an excuse.*
> *"Unsafe behaviour", practical joking, water fighting and skylarking are unacceptable.*
> ***For serious breaches of this rule an employee will be liable to dismissal without notice**.*

[12] At that meeting Mr Hovell was informed that Silver Fern wished to carry on its investigation and then meet with him on 13 February.

[13] At some point before the meeting the union President had been given all the written statements by Silver Fern. Unfortunately, for whatever reason, Mr Hovell did not see those statements before the disciplinary meeting on 13 February.

[14] At the meeting on 13 February Mr Hovell was represented by a different union official. He confirmed that he was happy with the representative. Mr McKay ran the meeting. He had not interviewed any of the workers who gave statements directly before the disciplinary meeting.

[15] Before the issue of the written statements was discussed, Mr Hovell was reminded of an incident where he had allegedly tried to override a supervisor's instructions. Mr Hovell stated that he only did what was required of him.

[16] Mr Hovell was asked if he had read all the witness statements but he said that he had never seen them. However at no point during the disciplinary process did he ask for time to read the statements. In explanation to the complaint, Mr Hovell stated that he was not trying to intimidate someone who was actually a friend of his, and that he did not really finish what he had to say. In particular, he stated:

> *It was to do with how when she works here you know the company are giving you jobs but there's also union rules which we all, and I'm learning because I'm only new at this and she sort of said* oh you're only a union delegate*, and I said, and I can see I'm really talking with an age difference here. But she just wasn't going to listen you know. And I thought well okay so I turned away and I said its not like that you know, you can go to the office and the union can still give you a dressing down as well. This is not threatening I was trying to explain something but I didn't even get to finish….*

[17] Mr Hovell denied telling her not to listen to the supervisor or making any comments to her about narking.

[18] Mr McKay had taken the opportunity to observe a video of the incident which lasted 4 or 5 minutes. Mr Hovell had known of the existence of this video, but saw no necessity to view it himself despite being given the opportunity to do so. Mr Hovell's response over the length of the incident was that he was repeating himself to try and help the complainant.

[19] There was some discussion about the final warning that was current for Mr Hovell verbally abusing another worker. That warning, like the other two before it, had not been challenged by the raising of a personal grievance. Mr Hovell gave an explanation for his behaviour on that occasion and stated that he did not accept the warning even though he had signed it.

[20] Mr McKay summed up the first part of the meeting by stating that *these statements don't read good for you continuing your working life here*.

[21] On the resumption of the meeting Mr Hovell informed Silver Fern that this was an awful situation and that he had never intimidated anyone. Mr Hovell explained that his comments to the supervisor about him going away were made because he was discussing the role of the union with the complainant. Mr McKay stated that he understood that the union President had spoken to him only about a week ago about the parameters of his role. Mr Hovell seemed to accept that, stating

yes, well different situations arise and you know a new person can make more than one mistake if a different situation occurs, but you know there's no way I was trying to intimidate anyone.

[22] He noted that he had never faced any criminal charges for assault, unlike the complainant. He denied stating that he told the complainant that she did not have to listen to the supervisor because he was the boss. He knew that on the floor the supervisor was the boss. He did, however, accept that *perhaps I did overstep the line but it wasn't meant to be in a threatening way ….*

[23] Mr McKay then gave an indication that *I at this stage believed that they are correct and if I've got to make my decision based on these statements then I'll be terminating your employment*. He was asked to have a look at the video if he wished to, but Mr Hovell responded that he trusted what Mr McKay had to say about it.

[24] An adjournment was then called so that Mr McKay could consider his decision and Mr Hovell could propose anything that might save his job.

[25] When they resumed, Mr Hovell was asked if he had anything more to say, which he did not. Mr McKay then made it clear that he was dealing with the one current incident. His findings were that Mr Hovell tried to override the supervisor's decision to suit himself and that he used stand over tactics with the complainant such as telling her that if she didn't listen to him then he could get her sacked. Mr McKay stated that he had no alternative but to dismiss Mr Hovell as Silver Fern could not have people within the team thinking they had the right to override instructions from management and break rules to suit themselves. He asked Mr Hovell to clear out his locker and wished him good luck.

[26] Mr Hovell raised a personal grievance claiming reinstatement for unjustified dismissal. The matter remains unresolved despite mediation and further discussions between the parties. It therefore falls to the authority to make a determination.

The law

[27] In *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 the Full Court dealt with the application of s.103A in practise. It held at para [57]ff:

> *[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's*

> *dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.*
>
> *[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon the specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections 3, 4 and 5 must be applied to this exercise.*
>
> *[59] Finally, in determining justification under new s103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that 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 Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for that of a fair and reasonable employer in all the circumstances.*

Determination

[28] The union President and/or other senior union officials were involved throughout the disciplinary process. I do not accept the claims raised on Mr Hovell's behalf that the union was not representing him. It may not have represented him to his satisfaction, particularly as he did not receive a copy of the written statements made against him. However none of that was Silver Fern's concern. At no point did Mr Hovell claim that the union no longer represented him and at no point during the disciplinary process did he ask for time to read the statements. In any event, I am satisfied that he knew what the complaint was about as he was informed of it by the nightshift plant supervisor in some detail and he knew it related to threatening behaviour.

[29] There is no merit in the complaint that Mr Hovell was ambushed when the complaint was raised with him. This is because Mr Hovell was represented by plant union officials and was not required to make a statement at that point. It would be wrong to require employers to be held to the standard of procedural fairness required

of disciplinary meetings when just finding out whether there was any merit to a complaint, particularly where the employee complained of was not required to make a formal response. The same principle applies to the preliminary meeting held the next day.

[30] The submission that Mr Hovell was not given notice of the allegation about threatening the complainant with dismissal was incorrect, because it was raised in the meeting of 8 February and was contained in the complainant's written complaint.

[31] I accept that Mr McKay properly dealt with the dismissal in two parts – liability then penalty. The first was thus whether he concluded that serious misconduct had occurred or not. There he found against Mr Hovell, then went on to consider whether dismissal should occur. In doing so he took account of Mr Hovell's disciplinary and performance record, but did not rely on it to find serious misconduct. He was entitled to take into account the fact that Mr Hovell was currently on a third and final warning because that was the factual situation. The Authority is also entitled to take that into account because none of the warnings had been disputed by way of the raising of a personal grievance. If Mr Hovell had wished to dispute these warnings, he had 90 days in which to do so but he did not do so. Mr Stewart may well be correct in his submission that the warnings were not justifiable because they were not signed by the plant manager as required under the collective employment agreement. However they were current and unchallenged at the time and Silver Fern Farms was therefore entitled to take account of them.

[32] I also note that the company has as its sole discretion the ability to implement a suspension for up to six months without pay as an alternative to dismissal. There was no evidence that this had ever been sought by Mr Hovell, and Mr McKay clearly saw dismissal as his only option. Given that this is an issue at the company's discretion, it is not a matter for the Authority to intervene.

[33] I do not accept that Mr McKay had predetermined the matter, even although, as discussed below, he should have interviewed witnesses other than Mr Hovell personally. Mr McKay was very clear in the disciplinary meeting that things were not looking good for Mr Hovell, but that was an example of an employer being responsive and communicative. Having given Mr Hovell a reasonable opportunity to respond to the allegations, there was no predetermination.

[34] However, I conclude that Silver Fern did not sufficiently investigate the allegations against Mr Hovell, because it did not at any time personally interview those from whom it had taken written statements, apart from Mr Hovell. These were serious charges (threats and intimidation) and the evidence Silver Fern was required to gather needed to be as convincing as the allegations were grave. Mr Hovell's explanation as to his intention not to intimidate or threaten the complainant meant that she (and perhaps the others) should have been interviewed personally by the decision maker Mr McKay, to ascertain whether they believed that threatening or intimidating behaviour by Mr Hovell was a reasonable inference to draw. Similarly, Mr Hovell denied threatening to get the complainant the sack and his denial should have also been raised personally with the complainant. Silver Fern's failure to do so was not minor or technical, but a fundamental part of the procedure that any fair and reasonable employer would have undertaken in the circumstances at the time. Thus Silver Fern's failure to interview witnesses personally after Mr Hovell had disputed its version of events was something that was simply not open to a fair and reasonable employer, given the severity of the claims against him involving serious misconduct. It meant that the evidence against Mr Hovell could not be as convincing as the charge was grave, namely threats and intimidation. These errors were not minor and did result in Mr Hovell being treated unfairly. It therefore follows that his dismissal was unjustified.

Remedies

[35] Mr Hovell seeks reinstatement. Reinstatement may only be provided if it is practicable and reasonable to do so. All of Silver Fern Farms' witnesses, including his former managers, claimed that it would not be practicable or reasonable to do so. I accept their evidence on the basis that Mr Hovell still can not understand what he has done wrong at work, and initially claimed in evidence that he would do nothing differently if he was reinstated. Where an employee has been dismissed following an altercation with a fellow employee, the least one would have expected without prompting was an undertaking not to repeat such behaviour, which was not forthcoming from Mr Hovell until follow up questioning. In any event here can be no certainty that despite his best intentions Mr Hovell would avoid any future miscommunication with other staff.

[36] Furthermore, I do not accept, having seen the video and heard from the witnesses, that Mr Hovell's behaviour was acceptable in a workplace where most people routinely carry knives. It was clear that he thought the dispute with the complainant should not involve the supervisor when, in his mind, it related to comments about union business. However, the dispute was not about union business at its commencement, but rather who should do what work on the line. The complainant was quite right to refuse to do work for Mr Hovell, or her trainee, because the trainee had specifically been placed on that work and that work alone for measurement purposes. No doubt this was not explained fully enough to Mr Hovell, but the fact remained that he would not leave the matter alone even after the supervisor had intervened.

[37] In addition, I accept, on the balance of probabilities, that he then went on to say that the union could cause the complainant to lose her job and that she genuinely believed that at the time. This was threatening behaviour. Even although it had no basis in fact, and Mr Hovell knew that, the complainant was upset and could not have been expected to know that definitively at the time.

[38] Combined with Mr Hovell's demonstrated inability to follow company policies in regard to arranging things to suit himself on the line, despite supervisors' instructions, his arguing with fellow employees and his failing to follow safety procedures, I am not satisfied that it would be reasonable or practicable to reinstate him.

[39] These are also the grounds for contribution as required to be assessed under s.124 of the Act. In my assessment, the behaviour of Mr Hovell on the day in particular was inexcusable. He only has himself to blame for that behaviour despite the crude responses from the complainant, because the complainant should never have been put in that situation by him. Furthermore, after that, it was he who threatened the complainant with losing her job. Balanced against Silver Fern Farms' failings in its investigation, I conclude that Mr Hovell was 75% responsible for his own dismissal and remedies are to be reduced accordingly.

[40] Mr Hovell has failed to find another job. I do not accept that he has looked sufficiently for work in the year since his dismissal. He has limited his search for work to the meat trade, whether retail or processing, whereas I am sure that he could find work in other areas should he have sought it. Furthermore, he has not

approached every employer in the region. For example, Mr Hovell, who worked in Hawera, relocated to Palmerston North, but did not search for work in the Wanganui area. Furthermore, there was little prospect that Mr Hovell's employment with Silver Fern would have lasted more than three months in any event. He was already on an unchallenged final warning, and there had been two matters that had attracted Silver Fern Farms' attention thereafter, one of which led to his dismissal. This is not the employment record of somebody who could be expected to be employed longer than three months more at Silver Fern.

[41] Taking into account Mr Hovell's 75% reduction for contribution, I conclude that Mr Hovell, who earned on average around $1,400 gross a week, is entitled to $4,550 as reimbursement for lost remuneration in the three months (13 weeks, being one quarter of a year) after his dismissal.

[42] Mr Hovell seeks compensation for humiliation, loss of dignity and injury to feelings of $20,000. His evidence in support of this claim was limited. He gave evidence that he needed to be re-employed in the meat industry to re-establish his work skills and that if he could not be re-employed in the meat industry, his future looked bleak. I do accept that he has been greatly upset by his dismissal, but there was no supporting evidence and I conclude that an appropriate sum for compensation is $6,000, reduced by 75% to $1,500.

[43] I therefore order the respondent, Silver Fern Farms Limited, to pay to the applicant, Mr Stephan Hovell, the sums of $4,550 gross in lost remuneration and $1,500 in compensation under s.123(1)(c)(i) of the Act.

Costs

[44] Costs are reserved.

G J Wood
Member of the Employment Relations Authority