

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 33  
5553506

BETWEEN            HALLAM NGARUPA KUPA  
Applicant

AND                 SILVER FERN FARMS BEEF  
LIMITED  
Respondent

Member of Authority:     Trish MacKinnon

Representatives:         Simon Mitchell, Counsel for Applicant  
Tim Cleary, Counsel for Respondent

Investigation Meeting:    17 November 2015 at Hastings

Submissions Received:    3 and 17 November 2015, from the Applicant  
6 and 17 November, from the Respondent

Determination:            15 March 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Kupa was employed as a meat processing worker at the Pacific meat processing plant in Hastings for approximately 16 years until he was dismissed on 14 April 2015. He claims his dismissal was unjustifiable and he seeks reinstatement and financial remedies. Mr Kupa was dismissed for failing to wear a piece of personal protection equipment (PPE) and for failing to abide by a reasonable instruction to wear it. The PPE was a hard hat, known as a bump hat, which Mr Kupa says he removed because it was hot and the glass was steamed. He does not accept that "*any direction to wear the hard hat was reasonable in the circumstances*".

[2] Silver Fern Farms Beef Limited (SFFB), which operates the Pacific meat processing plant in Hastings, denies Mr Kupa's dismissal was unjustifiable. It says

Mr Kupa's deliberate failure to wear his PPE breached his employment agreement. That, and his failure to follow a lawful and reasonable instruction, was serious misconduct that justified dismissal.

[3] Mr Kupa's application was originally filed against Silver Fern Farms Limited. In the course of the Authority's investigation, it was established that Silver Fern Farms Beef Limited, which is a fully owned subsidiary company of Silver Fern Farms Limited, had taken over the operation of the Pacific plant in late 2014. Both parties acknowledged that Silver Fern Farms Beef Limited was Mr Kupa's employer at the time of his dismissal. Accordingly, I made an order to change the name of the respondent to reflect the correct identity of the employer at the relevant time.

### **Relevant background**

[4] Mr Kupa worked as a neck boner in the primary butchery department at SFFB's Pacific plant which slaughters and processes beef. At the beginning of the 2014/15 season, SFFB introduced bump hats at the Pacific plant. This was part of an initiative across the Silver Fern Farms group of companies to minimise head injuries.

[5] During the summer of 2014/2015 discussions were held between the New Zealand Meat Workers Union (the Union) and managers at the Pacific plant over ways of managing heat issues with the bump hats. Mr Kupa was not happy with the headwear and made that view known. Pacific management considered that heat issues were not insurmountable. They put notices up in the plant stating that all PPE gear, including bump hats, must be worn unless instructed otherwise. This was stated as a health and safety requirement. Employees were advised to talk to their supervisors if they were struggling with the heat.

[6] On 11 March 2015 the Union promulgated advice that all employees must start their jobs with the correct PPE. It also stated that "*if at any time you feel light headed, fatigued etc approach your supervisor or team leader and engage into meaningful discussions about removing your PPE and ensure that it is recorded in the medical register by your supervisor or team leader before making any rash decisions*".

[7] The Union's advice referred to work being undertaken on the air conditioning. It ended by citing s.19 of the Health & Safety in Employment Act 1992 (HSE Act),

which specifies the duties of employees with regard to their own safety, and that of others, in the workplace.

[8] On 25 March 2015 Frank Elliott, the Assistant Plant Manager at the Pacific plant, suspended Mr Kupa from his employment over an allegation that he was not wearing his bump hat and, when instructed by his supervisor to wear it, he refused.

[9] Mr Elliott and a manager from Silver Fern Farms Ltd, Gary Williams, carried out an investigation over the next three weeks. The Union represented Mr Kupa throughout this process. Mr Kupa was dismissed during a disciplinary meeting that was convened after the investigation ended.

### **The Collective Agreement**

[10] Mr Kupa's employment was covered by the Silver Fern Farms Limited Pacific Collective Agreement 2013 – 2016 (the Collective Agreement). SFFB asserts Mr Kupa breached two provisions of clause 30 of the Collective Agreement, which sets out a "*guide to personal conduct*". These were:

- Clause 30 (e)(iv) : deliberately failing to wear PPE.
- Clause 30 (f)(v): failing to follow a reasonable instruction.

[11] Clause 30 (e) provides "*Examples of misconduct, which would normally warrant dismissal*" and includes at (iv):

A deliberate refusal to comply with the recognised safety and health standards of the employer. While recognising the health and safety standards of the employer, this also recognises and does not take away the right of an employee to refuse work on grounds of safety and health.

[12] Clause 30 (f) provides "*..examples of misconduct, which would normally incur a warning in respect of an offence if the supervisor decides that formal disciplinary action is required*" and includes at (v):

Failure to follow the reasonable instruction of a supervisor or other authorized agent of the employer.

**Issues**

[13] The issues for determination are:

- a. whether Mr Kupa's dismissal was justifiable; and, if not,
- b. whether he should be reinstated.

**Relevant law**

[14] Whether or not a dismissal is justifiable is to be determined on an objective basis by applying the test specified in s.103A of the Employment Relations Act 2000 (the Act). The test, applied to the current situation, is whether SFFB's decision to dismiss Mr Kupa was one that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[15] If I determine Mr Kupa's dismissal was unjustifiable, I will consider his request for reinstatement to his employment under ss. 125 and 126 of the Act. Those sections provide that reinstatement is a discretionary remedy that may be provided if it is practicable and reasonable to do so.

**Submissions of the parties**

[16] In submissions on behalf of the applicant, Mr Mitchell concedes that Mr Kupa was not wearing his hat. However, he submits he did not fail to follow a reasonable instruction, and that any instruction to wear the hat was not a reasonable one. This is because SFFB has provided no evidence of the health and safety benefits of the bump hats, despite taking the position it is justified in dismissing employees for not abiding by an instruction to wear them.

[17] In Mr Mitchell's submission, Mr Kupa had identified heat as an issue for him and the employer should have addressed that as a health and safety matter. He submits there was a dispute between Mr Kupa and SFFB over the safety of wearing the hats which the employer failed to address.

[18] He also submits SFFB has difficulty in maintaining that not wearing the bump hat justifies dismissal. This is because the company recognises there are circumstances in which employees cannot be required to wear them due to heat. Mr Mitchell refers to this as a double standard.

[19] With regard to the employer's process leading up to Mr Kupa's dismissal, Mr Mitchell submits it failed to give genuine consideration to Mr Kupa's explanation. Instead it focussed on his behaviour and did not address whether or not its actions were reasonable in the circumstances.

[20] Mr Cleary, in his submissions for SFFB, submits that Mr Kupa's dismissal was justified in terms of s.103A of the Act. He submits that wilfully breaching the health and safety standards of the employer constituted summarily dismissible misconduct as provided for in the Collective Agreement.

[21] He says Mr Kupa's opposition to wearing his bump cap was well-known and he had recently been warned about this by the Plant Manager and the Primary Butchery Supervisor. Mr Cleary described Mr Kupa's actions on 25 March 2015 as wilful and insubordinate. In his submission the double standard referred to by Mr Mitchell did not exist because the Primary Butchery Supervisor had made it clear to Mr Kupa that the morning was cool enough for the bump hats to be worn.

[22] Mr Cleary denies the existence of a live dispute, noting that Mr Kupa had not disputed the reasonableness of the bump hat rule but had disputed Mr Taylor's version of events on 25 March.

### **Was Mr Kupa's dismissal justifiable?**

#### ***The employer's investigation***

[23] Mr Elliott informed Mr Kupa on 25 March 2015 that he was being stood down on full pay over the allegation he had not worn his bump hat and had refused to put it on when asked to by his team leader, Ewing Taylor. The standing down, which I find to be suspension by another name, was not effected in accordance with the provisions of clause 32 of the Collective Agreement.

[24] No Union representative was present and the suspension was effected despite Mr Kupa stating his objection to meeting with Mr Elliott and Dave Scott (the Supervisor of the Primary Butchery) without Union representation. Mr Elliott recorded Mr Kupa's objection in the notes he made of the meeting. As Mr Kupa made no claim in respect of his suspension, I take this matter no further.

[25] SFFB held investigation meetings on 31 March and 2, 9 and 13 April 2015. Mr Elliott and Mr Williams represented the employer in all those meetings. Three Union representatives supported Mr Kupa: Eric Mischefski, Max McGregor and Jason Baker. Between those meetings Mr Elliott and Mr McGregor interviewed a number of employees about their knowledge of the procedure around the wearing of bump hats. Employees who worked in close proximity to Mr Kupa were, at his suggestion, asked for their recollections of the incident on 25 March.

[26] At the conclusion of the 13 April 2015 meeting, the employer informed Mr Kupa and his representatives they had decided there was "*something to answer*" and intended moving to a disciplinary meeting. That meeting occurred the following day and resulted in Mr Kupa's employment being terminated with immediate effect.

[27] Both parties took notes of their meetings and helpfully provided them to the Authority. It is clear to me from the notes, and the evidence from witnesses, that there was a sufficient investigation into the allegations against Mr Kupa; that the employer raised its concerns with him; and gave him a reasonable opportunity to respond to those concerns.<sup>1</sup> What remains for inquiry is whether the employer genuinely considered Mr Kupa's explanations, and whether its decision to dismiss was one a fair and reasonable employer could take in all the circumstances at the time.

[28] At the first investigation meeting on 31 March 2015 the parties discussed Mr Taylor's written statement about the events of the morning of 25 March. The statement recorded that, at approximately 8.40 am, Mr Taylor noticed Mr Kupa was not wearing his bump hat. He approached Mr Kupa and asked him to put his hat on. Mr Kupa replied that it was too hot and he was struggling with the heat. He would not put his hat back on.

[29] Mr Taylor's statement noted that Mr Scott had spoken with everyone about keeping their hats on until after "*smoko*" that morning. Mr Kupa was the only employee in the area who was not wearing his hat, which was "*sitting in the apron wash*". Mr Taylor had picked it up and taken it to the office.

[30] Mr Kupa asserted that he had been wearing his bump hat that morning. When Mr Taylor came over to him, he told him he was too hot and needed to remove his hat. He removed the hat after he had started talking to Mr Taylor, who then then took

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<sup>1</sup> As required by s. 103A(3)(a),(b) and(c).

the hat away. In a subsequent written response to Mr Taylor's statement, Mr Kupa said he had "*never ever put my bump cap in the apron wash*" and that "*Previously I have put my bump cap on top of the paper towel dispenser*".

[31] Mr Kupa maintained his denial of Mr Taylor's version of events throughout the four investigation meetings he attended. He suggested his employer speak with other employees in the area. Mr Elliott and Mr McGregor interviewed those employees and the employer preferred the evidence of Mr Taylor.

[32] I am satisfied the employer was entitled to form that conclusion and I note that Mr Kupa has not contested this in his statement of problem, which is framed on the basis that no direction to wear the bump hat was reasonable in the circumstances. As noted above, Mr Mitchell conceded in his opening submissions that Mr Kupa had not been wearing his bump hat. This supports the employer's conclusion that he had not been wearing the headgear when Mr Taylor approached him on the morning of 25 March.

[33] The notes of the investigation meetings taken by both the employer and Mr Kupa's representatives confirm that the Union raised concerns over the bump hats which it referred to as a health and safety issue. During the employer's investigation meeting of 31 March the parties discussed the policy of employees asking a supervisor if they could remove their hats if they were too hot. In Mr Mischefski's view it was irrelevant that Mr Taylor and Mr Kupa had made completely different statements about what had happened on 25 March. He thought the relevant point was that Mr Kupa had been hot and had told the supervisor.

[34] Mr Mischefski reiterated this view in email exchanges with Mr Williams between the 31 March and 2 April investigation meetings. Mr Mischefski's first email concerned Mr Kupa's statement in response to Mr Taylor's version of events. He said he had spoken with Mr Kupa that morning and, while they saw it as irrelevant where the hat was found, Mr Kupa's response was that he "*had never ever put his hat in the apron wash*". Mr Mischefski went on to say that "*(a)pparently there is room around the wash where he has on occasion placed his hat but never in the wash*".

[35] Mr Williams' response queried whether he could infer from Mr Kupa's statement that he did not have his hat on when initially approached by Mr Taylor and that Mr Taylor's statement was correct except for the location of Mr Kupa's hat as

found by Mr Taylor. Mr Williams reminded Mr Mischefski that Mr Kupa's verbal response had differed from this.

[36] Mr Mischefski's response was that the location of the hat was not relevant. The issue was whether workers were legally required to wear the hats if they were causing discomfort, ill health or a potential safety problem. He also raised a hygiene issue in relation the bump hats which, in the Union's view, picked up bacteria and could have a strong and pungent smell around the sweat band. He noted the Union had referred the matter of the hats to WorkSafe NZ and suggested the matter be deferred until a response had been received.

[37] Towards the end of the email exchanges, all of which occurred on 1 April 2015, Mr Mischefski stated the Union's belief that the request to wear the bump hats was unreasonable for the reasons he had referred to previously. He noted the issue of heat stress in the slaughter department at the Pacific plant, which the plant's health and safety committee focussed on recently, in relation to the wearing of bump hats. He also noted that management appeared to be selective over the employees it punished for not wearing the hat. Mr Williams' responses emphasised the employer's consistent approach to the wearing of PPE, and to its health and safety obligations.

[38] Much of the 2 April meeting, according to the notes of the parties, entailed debate over the heat discomfort from the hats; and hygiene and cleaning issues arising from the requirement that employees wear them. Mr Williams ended the meeting by stating that, in view of the difference between Mr Kupa and Mr Taylor's versions of events, further interviews would need to be conducted, and further investigation into the understanding employees had of the requirement to wear hats and when they could be removed due to heat discomfort.

[39] The next meeting took place on 9 April, at which Mr Williams referred to various statements it had obtained from staff and managers and other documents including notes from the Health and Safety Committee and induction material relating to the wearing of PPE. The notes of interviews with another five employees recorded they were asked if they knew the requirements for wearing bump caps as part of their PPE gear. All five employees had responded that an employee had to ask a supervisor or team leader before removing the hat.

[40] The Union's notes of the meeting record a Union representative's comment that, in accordance with the Health and Safety induction booklet, Mr Kupa had been looking after his own safety (on 25 March) as required by s. 19 of the HSE Act. In response, Mr Williams is recorded as saying "*That's what I have to balance up, was Hallam looking after his safety or was he ignoring the policy*". He noted the employer's tentative conclusion that Mr Kupa had a case to answer for serious misconduct.

[41] At the meeting of 13 April the Union notes record representations from Mr Mischefski over the fitness for purpose of the bump hats. He said Mr Kupa would be happy to wear one if they were fit for purpose. In their view, however, the hats were not and he asked for Mr Kupa to be reinstated and for "*proper PPE gear*" to be considered.

[42] Mr Williams noted that the explanation Mr Kupa had given throughout the investigation was that that he had been complying with the health and safety requirement to wear his hat and there was no reasonable request made to him by Mr Taylor. Mr Williams stated the employer's position that it was a health and safety requirement to wear PPE and, if Mr Kupa was not wearing his PPE, the question for the employer was whether that was a breach. Was a reasonable request made for him to wear the PPE and, if so, was that a breach by Mr Kupa.

[43] Mr Williams said he and Mr Elliott had gone through the various statements made by Mr Taylor, Mr Kupa and other employees. They had also taken into account statements from Mr Scott and Mr O'Neill about an incident approximately two weeks earlier when Mr Kupa had been spoken to about not wearing his hat. They had concluded Mr Kupa was not wearing his hat on 25 March and had not followed the correct procedure of asking the supervisor if he could remove his hat because of heat. Mr Williams said they were moving to a disciplinary meeting that would take place the following day.

[44] At the meeting on 14 April Mr Mischefski challenged the credibility of Mr Taylor's statement that Mr Kupa had left his hat in the apron wash. Mr Williams stated this was irrelevant. He said the employer had completed its investigation and had concluded that Mr Kupa had failed to wear his PPE and failed to follow a reasonable request. It did not accept Mr Kupa's version of events. The employer found his behaviour to be unacceptable and justified the termination of his

employment. Mr Kupa was given ten minutes in which to talk with his Union representatives to discuss anything he wanted the employer to consider, and any assurances he could give that this would not happen again in the future.

[45] Following the adjournment Mr Mischefski expressed his surprise that the employer would go straight to a dismissal where the statements the company had gathered reflected a difference of opinions as to what had happened. He said that at other plants employees were only getting warnings for not wearing hats and Mr Kupa had been set up as an example. He also restated the Union view that the bump hats were not fit for purpose.

[46] He (and Mr Kupa) stated that Mr Kupa was prepared to follow the rules and procedures of wearing the bump hats. He urged the employer to reconsider and take note of Mr Kupa's commitment, noting that he had a clean record with no warnings over the 16 years of his employment. After another short break Mr Elliott said the matters raised in mitigation had not changed his or Mr Williams' minds and their decision was to terminate Mr Kupa's employment with immediate effect.

[47] I find SFFB did genuinely consider Mr Kupa's views in coming to its decision to dismiss him. Mr Kupa remained steadfast throughout his employer's investigation in his denial that he had removed his bump hat before being approached by Mr Taylor. His employer did not believe him and nor, it could be inferred, did his Union, which downplayed the difference between Mr Kupa and his team leader's versions of events, instead focussing on the health and safety aspect of the headwear.

[48] I am satisfied from the evidence given at the Authority's investigation meeting that Mr Taylor's version of the events of 25 March was accurate and Mr Kupa's was not. Mr Taylor instructed Mr Kupa to put his hat on and Mr Kupa refused. While there were some issues with the hats, SFFB was attempting to deal with them and had engaged with the Union over this. It had adopted a pragmatic approach, which was that, while employees must wear their bump hats, they should talk with a supervisor if they were finding the heat difficult. The Union's notice of 11 March endorsed that approach.

[49] Mr Kupa removed his hat without first talking with his supervisor on 25 March in defiance of the company's policy. He could not claim ignorance of the policy as Mr Scott had spoken to all staff earlier in the morning of 25 March,

reiterating the requirement to wear bump hats. Mr Scott had reminded them that, if they became uncomfortable, they were to see him or their team leader before any decision was made regarding the temporary removal of the hat. Mr Scott had informed the employees that, as it was a cool morning, he did not expect anyone to have an issue with heat *"until after smoko at least and that ....there would be no excuses for (employees) not wearing a hat"*.

[50] Mr Kupa did not deny that he argued with Mr Scott, who then took him into his office to have a discussion away from other staff. Mr Scott said he reiterated to Mr Kupa that the hats should stay on at least until after morning smoko, when any discomfort issues would be evaluated on a case by case basis. Mr Scott, who provided a statement he wrote on the day of the incident, told Mr Kupa there was no use debating the issue. He said it was part of the health and safety program and introduction of the new PPE and that, if he did not like it or comply with it, he would be held accountable for his actions.

[51] I do not accept the submission made by Mr Mitchell that Mr Kupa had a dispute with his employer over the safety of wearing the bump hats. That is inconsistent with the position Mr Kupa took throughout SFFB's investigation, which was that he had been wearing his bump hat until Mr Taylor took it away after he had informed him it was too hot. The Union raised issues over heat and the bump hat during the employer's investigation but did not raise a dispute with SFFB over the matter.

[52] Having found that SFFB carried out a sufficient investigation and genuinely considered Mr Kupa's explanation, I also find it was justified in concluding that Mr Kupa, despite his assertions to the contrary, had deliberately failed to wear his bump hat and had failed to follow an instruction reasonably issued by his team leader to put it on.

[53] In the circumstances, I find the decision made by SFFB to dismiss Mr Kupa was one that a fair and reasonable employer could make.

### **Determination**

[54] Mr Kupa does not have a personal grievance and I dismiss his application.

**Costs**

[55] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority