

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 221
5366652

BETWEEN TONY LOOKER
 Applicant

A N D AG WALTER AND SONS
 LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Mitchell Paewai, Advocate for Applicant
 Richard Upton, Counsel for Respondent

Investigation meeting: 16 May 2012 at Auckland

Date of Determination: 28 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Looker) alleges that he was unjustifiably dismissed from his employment as a truck driver by the respondent (Walter and Sons). Walter and Sons resists that claim and say that the dismissal was what a fair and reasonable employer could do in the circumstances obtaining at the relevant time.

[2] Mr Looker commenced employment with Walter and Sons on 1 August 2009 and the dismissal, which is the subject of Mr Looker's application to the Authority, took place on 18 October 2011.

[3] There was an incident in early October 2011 when Mr Looker was spoken to by Walter and Sons for allegedly drinking alcohol on the job. The source of the information that Walter and Sons relied upon to raise this matter with Mr Looker was a fellow employee, Alex Pobar. By common consent this disciplinary process did not conclude with any negative consequence for Mr Looker. Walter and Sons issued a written statement clarifying that the drinking of alcohol on the job was unacceptable.

[4] Early in the working day of 18 October 2011 Walter and Sons Operations Manager, Mr Rick Linton, received a complaint from Alex Pobar to the effect that he (Mr Pobar) had been threatened by Mr Looker.

[5] Forthwith on his arrival at work at 7am (something like an hour and a half after the events complained of allegedly happened) Mr Linton began undertaking inquiries. Mr Linton had already spoken with Mr Brian Piper, who is the Business Development Manager for Walter and Sons.

[6] The first step that Mr Linton took on his arrival at work was to speak in more detail with the complainant Mr Pobar and the essence of the complaint can best be recorded in the words of the contemporaneous written complaint prepared on Mr Linton's instructions by Mr Pobar. According to the complaint from Mr Pobar the events happened at 5.20am that morning when he (Mr Pobar) was making a cup of tea in the smoko room. Mr Pobar then recites the following particulars:

He (Mr Looker) then came over and said that he had a mate of his that was coming over to my house to cut out my tongue and kill my dogs because that is what he does to narks. I replied that's fine to which he said I will fucking drop you here.

I left the lunch room and was half way to the stores office when I heard him running at me from behind and shoulder barged me and said again that his mate would cut my tongue out and kill my dogs. I proceeded to ignore him and he repeated the threat again, then took his shoulder off mine and again threatened me. He then went outside to truck 55 and came back to the stores office and looked at the screen saver and said nice puppy dead puppy ...

[7] The only matter that needs to be explained from that document is the reference to Mr Pobar's screen saver. The Authority accepts that Mr Pobar had pictures of his own dogs on his computer screen saver and it was to that that Mr Looker was allegedly referring in the last mentioned exchanged between the protagonists.

[8] Walter and Sons spoke with another employee who had seen the exchange (although not heard the words used) and then subsequently were provided with evidence from a third member of staff who told Walter and Sons that Mr Looker had boasted to him that he had threatened to kill Mr Pobar's dogs and to cut out Mr Pobar's tongue.

[9] A disciplinary meeting was convened that afternoon. Mr Looker was at the relevant time a member of the Northern Distribution Union. A delegate from that Union was in attendance at the meeting. Mr Looker was asked for his explanation as to the events complained of. Mr Looker denied that he knew that Mr Pobar owned dogs and denied having spoken to Mr Pobar at all during that working day. Walter and Sons did not believe Mr Looker's denials, preferring the evidence that they had gathered following the receipt of the complaint from Mr Pobar. Mr Looker was summarily dismissed.

Issues

[10] Because during his evidence to the Authority, Mr Looker made a number of observations critical of the basis on which Walter and Sons made their decision to dismiss, it will be helpful if the Authority considers each of these aspects in turn on the way to determining the question of whether Mr Looker was in fact unjustifiably dismissed from his employment, or not.

[11] The questions that the Authority proposes to address are as follows:

- (a) Was the employment agreement properly relied upon?
- (b) Was the disciplinary meeting fair?
- (c) Was the employer's evidence tainted?
- (d) Was Mr Looker properly represented?

(e) Was the collective employment agreement properly relied upon?

[12] Mr Looker complains that Walter and Sons misdirected themselves in relation to the operative collective employment agreement executed by Walter and Sons and the Northern Distribution Union (the Union) in respect to Unionised workers at the site.

[13] Mr Looker contends that Walter and Sons ought to have gone through a formal disciplinary process which is set out in the agreement. Broadly speaking, the process that Mr Looker relies upon is a process (and an absolutely standard process at that) developed for ordinary misconduct investigations. What Mr Looker overlooks is that there is another provision in the agreement, which the Authority drew his attention to in the investigation meeting, the effect of which is that in cases which appear to be serious misconduct, the employer can truncate the process as it did on this particular occasion.

[14] Given the nature and extent of the allegations against Mr Looker, it is difficult to agree with him that the employer adopted the wrong process in the disciplinary meeting that it convened with him on 18 October 2011.

Was the employer's evidence tainted?

[15] Mr Looker maintained that first Walter and Sons ought to have had more evidence than they did (and in particular ought to have talked to more witnesses than they did) and second that the witnesses that they did have and that they clearly relied upon, were biased against Mr Looker or, in the alternative, had at other times said different things.

[16] Dealing with each of these matters in turn, the Authority is satisfied that the evidence which Walter and Sons obtained from the witnesses they relied upon was the only relevant evidence that Walter and Sons needed in order to frame an allegation to put to Mr Looker for comment. The events complained of happened apparently at 5.20am on 18 October 2011. At that hour of the morning, not many of Walter and Sons staff were already on duty. The evidence that Walter and Sons accumulated on the matter came first from the complainant, Mr Pobar without whose complaint there could be no allegation to put to Mr Looker for comment. Second a statement was obtained from Mr Yelavich who

witnessed the altercation because he happened to be in the smoko room at the time it happened, and thirdly and finally there was evidence from Mr Fou Ah Lam.

[17] As to Mr Pobar, Mr Looker says that Mr Pobar is biased against him (Mr Looker) because Mr Pobar is aware that Mr Looker knows things about Mr Pobar's private life which Mr Pobar would want to keep private. Mr Looker also alleged that Mr Pobar had been instrumental in the dismissal of other Walter and Sons staff including former colleagues that he (Mr Looker) was close to.

[18] Assuming for a moment that all of these allegations are true and Mr Pobar was biased against Mr Looker, it is difficult to see how Walter and Sons was supposed to know about these allegations when Mr Looker did not tell them. The Authority satisfied itself during the investigation meeting that neither Mr Linton nor Mr Piper were in any way aware of any suggestion that Mr Pobar was anything other than absolutely honourable. If Mr Looker had reason to think that Mr Pobar was a person lacking in integrity then he had an obligation to share that with the employer so that they could factor that into the decision making process. The fact that he did not do that means that the employer cannot be under any obligation to consider that matter when it makes a disciplinary decision.

[19] As a matter of judgment though, the Authority must say that there is absolutely no evidence before the Authority to support Mr Looker's contention in relation to Mr Pobar save his bare allegation. Even Mr Looker himself says in his brief of evidence that he got on reasonably well with Mr Pobar so despite these claims of dishonesty, there is actually nothing to back it up.

[20] Mr Looker makes no complaint about Mr Yelavich's evidence save to point out that as Mr Yelavich did not hear anything it cannot have been a very lively discussion of the sort that Mr Pobar claims took place. Again, that is a fair enough observation as far as it goes but the Authority feels obliged to comment again that that observation was not made to the employer at the time it made the decision to dismiss. It is a fair point and it is one that the employer would have been duty bound to consider, if it had been brought to the employer's attention. Clearly, from the employer's standpoint the evidence of

Mr Yelavich was of less import than the evidence of Mr Pobar on the one hand and Mr Lam on the other.

[21] Turning to Mr Lam, his evidence has been the source of great controversy so far as the Authority's investigation meeting is concerned. However, for the purposes of the employer's investigation into Mr Looker's conduct, there is much less confusion. What happened when Walter and Sons were investigating Mr Looker's conduct was that Mr Linton was told by Mr Pobar during the course of the morning that he (Mr Pobar) had just had a conversation with a co-worker in which the latter allegedly repeated everything that Mr Looker was supposed to have said to Mr Pobar. That colleague was Mr Lam.

[22] Mr Linton went to find Mr Lam and asked him to repeat what he had said. Mr Lam said something to the effect that Mr Linton knew what was said and Mr Linton retorted with something to the effect that he wanted Mr Lam to repeat it again. Mr Lam then repeated to Mr Linton that Mr Looker had boasted to him earlier in the morning that he had told Mr Pobar that he would cut out his tongue and kill his dogs. Mr Linton's evidence to the Authority was that what Mr Lam had told him was not only consistent with Mr Pobar's original complaint but also consistent with what Mr Pobar had said Mr Lam had reported to him.

[23] No doubt it would have been difficult for Mr Looker to complain to Walter and Sons about Mr Lam's evidence at the point that the disciplinary meeting took place because at that time, there may not have been any real controversy about what he was saying. The controversy developed later. It seemed to the Authority that both parties to the litigation had sought to interest Mr Lam in assisting the Authority with its investigation but the intimation from Mr Looker's side was that the evidence which the employer relied upon from Mr Lam (which was of course corroborative of the fundamental complaint from Mr Pobar) was itself unreliable. Mr Looker makes that allegation because of his claim that Mr Lam had offered to give evidence of a different character to the Authority but was deflected from that by duress from Walter and Sons and in particular by an alleged threat that Mr Lam might himself be subjected to the attentions of the Police.

[24] The Authority must observe at this juncture that there was absolutely no evidence to suggest that Walter and Sons had exercised any undue influence to suborn Mr Lam as a witness. Indeed, the evidence suggest that Walter and Sons made it very clear to Mr Lam that, in giving evidence to the Authority, he should simply *tell it like it was*. But Mr Looker continued to maintain at the investigation meeting both in his own evidence and through his representative that Mr Lam had offered an alternative view of the critical evidence and had been prepared to make that available to the Authority until he was *got at* by the employer.

[25] That alternative view of the relevant evidence was that the remarks attributed to Mr Looker, specifically the allegation of cutting out a man's tongue and killing his dogs, were actually remarks that were made by Mr Lam not particularly in relation to Mr Pobar but generally. Although Mr Lam is Samoan, it was characterised to the Authority that the words complained of were in effect a Tongan curse in wide use.

[26] Because of this controversy continuing to bubble up to and including the investigation meeting, the Authority decided it was prudent to interview Mr Lam itself and it did so after the investigation meeting. In that discussion, the Authority could derive no evidence to support Mr Looker's claim that Mr Lam was the author of the offending words, either because they were a Tongan curse or otherwise. Mr Lam maintained the evidence he gave to the employer and confirmed to the Authority was truthful. In addition, Mr Lam said that it was Mr Looker who suggested he say the word in question were originally his, but that he refused this. Despite this evidence, Mr Paewai stoutly maintained that Mr Lam had spoken to him and said the words in question came from him (Mr Lam). For the avoidance of doubt, the Authority confirms its preference for Mr Lam's recollection of events.

Was Mr Looker properly represented?

[27] Mr Looker maintained that the Union representative provided for him at the 18 October 2011 disciplinary meeting was not of his choosing and that it was well known in the workplace that he and that delegate did not get on. He told the Authority that he would have preferred the other delegate who was available at the workplace. But again,

the Authority must observe that it carefully questioned the employer about whether it knew that Mr Looker and the presenting delegate were not on good terms and it had no idea that that was the position. Again, Mr Looker made no effort during the meeting to tell the employer that he wanted to be represented by somebody else. Had he done so, Walter and Sons evidence was categorical that the meeting would have been adjourned to enable Mr Looker's chosen representative to be found and to assist him.

Determination

[28] Applying S103A of the Employment Relations Act 2000, (the Act) the Authority concludes that summary dismissal is one of the responses which a fair and reasonable employer could make to the complaint found proved against Mr Looker.: *Angus v. Ports of Auckland [2011] NZ EmpC160 at paragraph 59* It follows from that conclusion that Mr Looker's claim that he suffered an unjustified dismissal is not sustained. The Authority's conclusion is that the employer conducted a proper investigation of the very serious allegation made against Mr Looker and then gave him a proper opportunity to be heard.

[29] That investigation, in the Authority's judgement, met the terms of S103A(3) of the Act. First, the investigation was sufficient. The employer here considered the initial verbal complaint from Mr Pobar, had him reduce that to writing, and then obtained two further statements from witnesses. Clearly, this process, just described, was sufficient to frame a complaint sufficient to put to Mr Looker.

[30] Next, Walter and Sons summoned Mr Looker to a meeting, provided him with proper representation at that meeting and put the allegation to him fair and square.

[31] Third, Walter and Sons gave Mr Looker every opportunity to respond to the allegation. The fact that Mr Looker, for whatever reason, choose not to respond to the allegation and engaged in what could best be described as bald denials cannot be sheeted home to the employer.

[32] Finally, Walter and Sons gave earnest consideration to Mr Looker's representations, such as they were. The Authority agrees with counsel for Walter and

Sons that this aspect is best demonstrated by Mr Piper's clear evidence that if Mr Looker had told the employer the truth, he would probably have escaped with a warning.

[33] But it remains the case that while Mr Looker was able to raise a series of objections to the employer's process and procedure at the investigation meeting, he had not taken the opportunity to adequately defend himself during the disciplinary process when he had the chance. It is quite pointless raising matters of complaint long after the dismissal when the employer has not been given the opportunity to take those matters into account at the time the dismissal decision is made. The short point is that by failing to respond "openly" and "constructively" to the employer during the investigatory process that led to his dismissal, Mr Looker did himself no service and can hardly now be seen to rely on claims of procedural infelicities when he failed to raise these with the employer at the appropriate time.

[34] Mr Looker simply denied any wrongdoing and even went so far in the disciplinary meeting as to deny that he had even spoken with Mr Pobar on the day in question. He also denied that he knew that Mr Pobar had dogs.

[35] What Mr Looker said to the employer in the disciplinary meeting was at variance to what he told the Authority in the investigation meeting. In the investigation meeting, Mr Looker admitted that he had spoken with Mr Pobar but he denied the use of the words complained about. He did say that he had used those words in a joking fashion the previous night, that is the evening of 17 October 2011, but that on that occasion (when he used those words) Mr Pobar was not even present. So, according to Mr Looker, his complaint was not to deny that there had been some sort of altercation with Mr Pobar on 18 October but rather to deny that the words he used were actually used on that occasion. But if Mr Looker made that clear to the Authority he did not bother to draw that distinction to his employer and his employer can only be judged on that which they know or ought to know at the time they make the decision to dismiss.

[36] The evidence before the Authority was that Mr Looker denied everything at the disciplinary meeting because he thought that was the best option, given that he did not have the representative of his choice. But he hardly helped himself by denying that

which was (by his own admission to the Authority) absolutely untrue (his claim that he had not spoken to Mr Pobar at all that day) nor did he assist his case by not making clear to Walter and Sons that he wanted a different representative.

[37] It is interesting also that the reason that Mr Looker was dismissed was arguably not so much because of the words that he was found to have uttered, but more because of the implacable denial that he had done anything or had even spoken with Mr Pobar on the day in question. Clearly, on Mr Piper's evidence, if Mr Looker had pleaded to the allegation in some way shape or form, had perhaps maintained it was said in humour (which was Mr Looker's position) then the disciplinary consequence, on Mr Piper's explicit evidence, would have been a warning rather than a dismissal.

[38] Sadly, this is a very good example of an employee who has simply not helped themselves in the course of a disciplinary process. Mr Looker is plainly an intelligent man and was very well able to engage with his employer but for entirely mistaken reasons, he chose to stonewall and to not raise with Walter and Sons, matters which he should have raised at the time.

[39] In the end, the Authority can only judge Walter and Sons on the basis of the evidence they had before them at the time that they made the decision to dismiss and on that basis the decision was a justified one.

Costs

[40] Costs are reserved. The parties representatives are encouraged to try to resolve matters between themselves. Failing that, an application may be made to the Authority by the successful party for costs to be fixed.

James Crichton
Member of the Employment Relations Authority