

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 309/07
5070497

BETWEEN GREG MARTIN
 Applicant

AND COOK & GALLOWAY
 ENGINEERS LTD
 Respondent

Member of Authority: Vicki Campbell

Representatives: Mark Nutsford for Applicant
 Anne Aitken for Respondent

Investigation Meeting 8 August 2007 at Hamilton

Submissions Received: 16 August from Applicant
 17 August from Respondent

Determination: 5 October 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Greg Martin was employed by Cook & Galloway Engineers Limited (CGEL) until he was dismissed on 26 May 2007. Mr Martin was involved in a confrontation with a co-worker, Mr Raymond Eketone, which resulted in Mr Martin requiring medical attention including stitches to his ear. Both Mr Martin and Mr Eketone were dismissed. Mr Martin claims his dismissal was unjustified.

[2] CGEL carries out manufacturing engineering, including sheet metal work, repair and maintenance on machinery, welding, fabrication, bending, assembly and from time to time site installations. The workshop is noisy, dirty and dangerous. Mr Tony Trenberth, Foreman/Workshop Manager says Mr Martin and Mr Eketone were both responsible for the altercation which took place.

Background

[3] It was common ground at the investigation meeting that at the beginning of Mr Martin's employment at CGEL he and Mr Eketone had got along very well. However, that ended in March 2006 when Mr Eketone accused him of stealing an 18 inch crescent and, some time later, some scrap metal. Mr Martin says Mr Eketone would also harass him during the day. He told me, by way of example, that Mr Eketone would tell him he was using the grinder in the wrong way, and was taking too long to do the job.

[4] The relationship between the two deteriorated quickly, to the extent that each of them was making complaints about the other on a regular basis to Mr Trenberth. It seems Mr Trenberth did nothing to resolve the complaints he was receiving, preferring instead to hope for the problem to resolve itself. Mr Trenberth acknowledged that Mr Eketone actually complained about Mr Martin, more often than Mr Martin complained about Mr Eketone.

[5] Mr Trenberth said that when something occurred in the workplace between the two men they would both then come to him and complain about the other one and give their side of the incident. Mr Trenberth said he would listen to what each had to say and then he would tell them to get over it and get on with their jobs.

[6] Mr Trenberth says that each of the men wanted the other one to be moved to another part of the business but neither one of them were prepared to be moved. Indeed at one stage Mr Trenberth threatened to separate the two but both then threatened to resign if that happened. He said Mr Martin was of the view that Mr Eketone should be moved because he [Mr Martin] had been in that particular workshop longer. Mr Eketone, on the other hand, felt he had been at CGEL longer and therefore Mr Martin should be moved.

[7] On the Thursday before the altercation which resulted in both men losing their jobs, Mr Martin had a grinder at his work station which Mr Eketone wanted to use. Mr Eketone says Mr Martin would not hand it over to him so he grabbed it out of his hands. There was some scuffling during which Mr Eketone says Mr Martin tried to goad him into hitting him. Mr Eketone says he then returned to his job and when Mr Trenberth passed his work station later that day, he told him that if Mr Martin

physically threatened him again he[Mr Eketone] would break Mr Martin's kneecaps. Mr Martin says, Mr Eketone told Mr Trenberth he would "...smash him over the head with a sledgehammer."

[8] Mr Trenberth says he doesn't recall much about what Mr Eketone said to him. He says both men were complaining and it didn't seem any more serious than on other occasions where they had made idle threats which he took to be just winding each other up.

The incident

[9] On Monday 15 May 2006 Mr Eketone approached Mr Steve Jackson, CGEL's Project Manager, and advised him to check Mr Martin's timesheets from the previous week as he believed Mr Martin had not put the correct information on it. Mr Jackson checked the timesheets but they seemed to be in order. The fact of Mr Eketone's complaint to Mr Jackson was passed on to Mr Martin by Mr Trenberth. An exchange occurred between Mr Martin and Mr Eketone, but that was short lived.

[10] The facts about what happened next are disputed. What is common ground is that the time was about 11.30am and Mr Martin was using a grinder, and in accordance with the safety rules was wearing a safety visor to prevent sparks from harming him. Mr Eketone, was not wearing a safety visor.

[11] Mr Martin gave the following account. Mr Eketone appeared at his work station with a steel bar about a meter long and 20mm thick. Mr Eketone started causing trouble, mouthing off. Mr Martin told Mr Eketone to leave or he would get a face full of sparks. Mr Eketone told Mr Martin he didn't have the guts after which Mr Martin ground sparks in Mr Eketone's direction. Mr Martin continued working in the belief Mr Eketone had gone away. However, Mr Eketone then approached Mr Martin and assaulted him with the metal bar.

[12] Mr Eketone's account differed. He says he was speaking with Mr Martin, probably about the timesheet issue, when Mr Martin ground sparks directly at him. Mr Eketone removed himself and got the steel bar only after Mr Martin sprayed sparks at him.

[13] There is no dispute that Mr Martin sprayed Mr Eketone with sparks, at least twice, and that Mr Eketone then attacked Mr Martin with the steel bar and that as a result of that attack Mr Martin required stitches to his ear.

[14] I am satisfied that it is more likely than not that Mr Martin's account of the events are the more accurate of the two. I prefer not to rely on Mr Eketone's account as it varies with what he reportedly told Mr Jackson on the day of the incident. Mr Jackson has recorded that on 15 May 2006 Mr Eketone told him "...he hit Greg with a steel bar in self defence when Greg threw a trolley at him." In his written evidence to the Authority Mr Eketone says "I got the steel bar when he ground the sparks at me and hit him on the leg". Mr Martin made a formal statement to the police which accords with his written evidence in the Authority and is supported by a statement made by Mr Morgan to Mr Jackson on 22 May 2006 where Mr Morgan is reported as stating:

Muk working approx 8m away from the scene. Machine not running. His attention drawn firstly to Greg who was at his bench, telling Ray to F... off. He says he did not hear what Ray was saying. Both Greg and Ray in an angry verbal exchange.

Next observation to Muks surprise Ray lifts the steel bar up & hits Greg & again a second time. Greg walks around the back of his bench & throws a pallet trolley toward Ray. Muk could not say what Ray did regarding the trolley or what he did next.

[15] Mr Trenberth said that when Mr Eketone hit Mr Martin he was working at the far end of the workshop and was with a customer. He says he didn't know anything about the incident until Mr Martin came and told him what had happened. Mr Trenberth said he was very surprised when he was told Mr Eketone had hit Mr Martin as it was completely out of character for him. Mr Trenberth said that after investigating the incident he was satisfied that Mr Eketone had been acting in a threatening way towards Mr Martin but that Mr Martin did not defuse the situation, he exacerbated it by threatening Mr Eketone with sparks and then doing it, not once, but twice.

[16] Immediately following the assault, Mr Martin approached Mr Trenberth to seek assistance. Mr Trenberth was still with his clients so Mr Martin waited until Mr Trenberth noticed him and then explained what had happened. I am satisfied it is more likely than not that after hearing of the altercation, Mr Trenberth was dismissive of Mr Martin and told him to report to the office and indicated that he was really not interested in hearing anything more about how the incident had come about.

[17] After being told to go to the office, Mr Martin returned to his work station, still bleeding from the attack with the steel bar. Mr Martin was advised by a fellow work mate to attend the office and arrange to get taken to A & E. Mr Martin says that as he approached the office he noticed that Mr Eketone was already there talking with Mr Gary Clarkin, who was responsible for organising the work, client liaison, costing, design and looking after the major customers of CGEL.

[18] Mr Martin was taken to A & E by Mr Jackson. Mr Jackson also dropped Mr Martin off at the police station to enable him to file a complaint. While he was there the bleeding from his ear continued and it was arranged for him to be picked up and taken back to A & E, where he was referred to Waikato Hospital. Mr Martin was in attendance at Waikato Hospital until some time after 7.30pm that evening.

[19] Mr Martin returned to the police station the following day to complete his report. Mr Eketone was charged and convicted of assault with intent.

[20] As a result of his injury Mr Martin proceeded on leave (receiving ACC payments for a work related injury). While Mr Martin was away on ACC, Mr Jackson contacted him regularly and was encouraging about him returning to work.

Determination

[21] The key issue for this determination is set out in section 103A of the Employment Relations Act which states:

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[22] I must scrutinise CGEL's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[23] CGEL was aware of the difficulties Mr Martin and Mr Eketone were having in their relationship at work. Mr Martin's evidence, which was confirmed by Mr Trenberth, is that he raised the difficulties he was having on more than one occasion, likewise Mr Eketone raised his concerns also. Mr Trenberth told the two men to sort it out and hoped that the problems would go away. As we know, neither of those two things happened.

[24] On Thursday 18 May 2006, Mr Martin attended a meeting with Mr Trenberth, Mr Jackson and Mr Clarkin. Mr Martin understood the meeting was part of an investigation into Mr Eketone's conduct in relation to the injury sustained by him.

[25] At the investigation meeting Mr Clarkin conceded that the process followed by CGEL was not perfect in that it did not meet some of the obligations of procedural fairness. For example Mr Martin was not provided with the opportunity to seek representation or advice prior to attending a meeting on 18 May 2006 and he was not advised that a possible consequence of the meeting may be dismissal.

[26] When a respondent is considering taking the ultimate sanction of dismissal the employee concerned is entitled to seek advice and/or representation and have a reasonable opportunity to do so. It is also well known that an employer must tell an employee, who is summoned to a disciplinary meeting, that he is in peril of dismissal if that is the case (*Morris v Christchurch Airport Limited*, unreported, Goddard CJ, 24 June 2004, CC13/04).

[27] On behalf of CGEL it was submitted that while there were aspects to the disciplinary procedure which were not present, CGEL did listen carefully to Mr Martin's account of the incident and gave careful consideration to it. That may be so, however, what CGEL heard from Mr Martin was Mr Martin's explanation of what had happened on the understanding that he was helping the company with its enquiries into Mr Eketone's behaviour and his understanding that the issue was about him throwing a barrow at Mr Eketone (which I accept Mr Martin eventually did, in self defence). Mr Martin had no idea that he may be facing dismissal as a result of his explanations to the company.

[28] Following its enquiries CGEL concluded both Mr Martin and Mr Eketone were equally responsible for the altercation. Mr Martin's part in that altercation was to break safety rules by grinding in such a way that sparks hit Mr Eketone's person, both on his body and around the facial area and throwing a barrow at Mr Eketone. Mr Eketone's part was to assault Mr Martin with an iron bar.

[29] On 26 May 2006 Mr Martin was required to attend a further meeting. Mr Martin was not told that the meeting was to discuss his dismissal. The notes of the meeting show that the meeting opened with the announcement that Mr Martin was to be dismissed.

[30] The Authority is required to ensure that CGEL acted fairly and reasonably in undertaking its investigation. In this case, an employer acting fairly and reasonably would have ensured Mr Martin was clearly aware of the allegations he was being asked to respond to, provided with an opportunity to seek legal advice and/or representation, and that Mr Martin was fully informed as to the possible consequences of the meetings he attended. The failure to provide an opportunity for Mr Martin to seek legal advice is incredulous, given that Mr Jackson's diary notes show that both CGEL and Mr Eketone were in receipt of legal advice from the day of the altercation.

[31] In coming to its conclusions that both men were equally to blame for the altercation, there is no evidence that CGEL took into account the fact that it was Mr Eketone who approached Mr Martin and that he already had the steel bar in his hand or that Mr Eketone had threatened to cause physical injury to Mr Martin, the previous week. Also Mr Eketone had raised a suggestion that Mr Martin had falsified his timesheet, something that, on investigation, was proven to be incorrect. Indeed the minutes taken of the final meeting on 26 May 2006 show that CGEL could not establish where the blame lay and so determined Mr Martin should be dismissed.

[32] While Mr Martin was in breach of his obligations pursuant to s.19 of the Health and Safety in Employment Act 1993, not to take any action that may cause harm to another employee when he showered sparks at Mr Eketone, an employer acting fairly and reasonably would also have taken into account the actions of Mr Eketone in moving into an area, without the necessary safety equipment, where he

could see Mr Martin was using a grinder. Further, Mr Eketone was armed with a steel bar.

[33] I have concluded that these actions, combined with the fact that that morning Mr Eketone had made unmeritorious accusations about Mr Martin falsifying his time sheets, together with the earlier threat made by Mr Eketone, tip the balance of blame squarely in favour of Mr Eketone.

[34] Further, CGEL had an obligation to take all practicable steps to ensure Mr Eketone did nothing to cause harm or injury to Mr Martin, at work. Despite all the complaints, and the threat made by Mr Eketone the previous week, CGEL did nothing to address the serious situation which had developed and failed to provide a safe work environment for Mr Martin.

[35] For the reasons set out in this determination I find that CGEL have not acted as a fair and reasonable employer in this regard. I find Mr Martin's dismissal to be unjustified.

Remedies

Lost wages

[36] Mr Martin claims 12 weeks loss of wages. He commenced new employment on 19 June 2006. Mr Martin's actual loss was \$4,403.22 gross. This amount is to be paid to Mr Martin, subject to my findings on contribution.

Compensation

[37] Mr Martin's evidence under this head was scant. Notwithstanding that it was clear to me at the investigation meeting that Mr Martin was hurt by the manner of his dismissal. This hurt was compounded by the knowledge that Mr Eketone was given permission to return to CGEL to undertake personal work and ultimately was reemployed there. Considering all aspects of the case I think it just to award Mr Martin \$3,000 in compensation under section 123(c)(i) of the Employment Relations Act. This amount will be subject to my findings on contribution.

Contribution

[38] I am bound by section 124 of the Act to consider the extent to which Mr Martin's actions contributed towards the situation that gave rise to his personal grievance and if those actions so require to reduce the remedies that would otherwise have been awarded accordingly.

[39] It was common ground that, with the exception of his relationship with Mr Eketone, Mr Martin was a good worker with an unblemished record. However, I am satisfied that Mr Martin contributed to the situation giving rise to his dismissal when he showered sparks at Mr Eketone, who was not wearing any protective equipment. I have assessed Mr Martin's contribution at 10%. The remedies awarded are to be reduced accordingly.

Summary of orders

Cook & Galloway Engineering Limited is ordered to pay to Mr Martin the sum of \$3,962.90 gross pursuant to section 123(1)(b) within 28 days of the date of this determination.

Cook & Galloway Engineering Limited is ordered to pay to Mr Martin the sum of \$2,700.00 pursuant to section 123(1)(c) within 28 days of the date of this determination.

Costs

[40] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the parties may file and serve a memorandum as to costs within 28 days of the date of this determination. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority