

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 304/10
5301510

BETWEEN ANDREW MATTHEWS
 Applicant

AND HAMILTON CITY COUNCIL
 Respondent

Member of Authority: Dzintra King

Representatives: Joanne Watson, Counsel for Applicant
 Glenys Steele, Counsel for Respondent

Investigation Meeting: 24 and 25 May 2010

Submissions Received: 2 June and 17 June 2010 from Applicant
 16 June 2010 from Respondent

Determination: 28 June 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Andrew Matthews, said he was unjustifiably dismissed by the respondent, Hamilton City Council (“the Council”), and that he was unlawfully suspended. He seeks reinstatement. The respondent says that the dismissal was justified and opposes reinstatement.

[2] Mr Mathews was employed as a parking warden in 2008.

[3] During the induction process Mr Matthews signed a document on 4 February 2008 to confirm that he had read, understood and accepted the respondent’s code of conduct entitled The Way We Work. This has a prohibition on physical violence.

[4] He was provided with the Hamilton City Council Parking Enforcement Unit Parking Warden Services and Training Manual and was given training regarding this manual.

22 March 2010 Incident

[5] On 22 March 2010 Mr Matthews was carrying out his duties as a parking warden when he came across a vehicle parked in a loading bay in Victoria Street outside the Bank of New Zealand. He checked the car and found it had no warrant of fitness or registration and decided to ticket the vehicle. At that stage, he noticed two people, a man and an older woman, standing near the vehicle which was idling. He proceeded to have a discussion with them about the car, the proposed infringement notice and the liability of a fine of \$400. The man told Mr Matthews to go and do his job saying it was not his job to issue infringement notices for not having any warrant of fitness or registration. There was a discussion about the validity of Mr Matthews intending to ticket the vehicle. The man was abusive.

[6] Mr Matthews gave the man the opportunity to leave then and there and not have a ticket issued. The man walked around the vehicle and began to get into the vehicle to drive away. At this point the older woman told Mr Matthews that she was going to make an official complaint as she did not believe parking wardens had the authority to issue tickets for warrants of fitness or registration. Mr Matthews offered to walk her across the road to the Hamilton City Council offices to verify that he did have such authority. At this stage, the man got out of the vehicle and approached Mr Matthews. He said Mr Matthews was not to speak to his mother like that. He then pushed Mr Matthews twice. Mr Matthews told him not push him, and moved backwards. Mr Matthews was then pushed a third time and the man then grabbed Mr Matthews by his throat and lifted him, moving him across the pavement and pushing him up against a bollard which was behind him. Mr Matthews punched the man so that he was released from his grip. Other members of the public became involved and pulled the man away.

[7] Mr Matthews then intended to walk away, carrying on with his duties. As he tried to pick up his ticket machine and other effects that had been dropped in the incident, the man grabbed the ticket machine and threw it across the street. Mr Matthews told him to piss off. The woman hit Mr Matthews, either with her handbag or her umbrella. A member of the public called the Police and told Mr Matthews that the Police were on their way. The man got into his car and left, leaving the older woman behind.

[8] Mr Matthews waited until the Police arrived and spoke to them. As he waited, he called his manager, Ms Fay Tooman, and told her briefly what had happened and that the Police had been called. Ms Tooman arrived before the Police did. Mr Matthews went to the Police station so photographs of his injuries could be taken.

[9] However, the Police officer informed him that if the Police were to lay a charge of assault against a member of the public, the likely scenario would be that the member of the public would then lay a complaint or want a charge of assault laid against Mr Matthews. It would then be up to the Court to determine who had assaulted who and who had acted in self defence. The officer thought it was a likely tit-for-tat scenario and that any formal complaint by Mr Matthews would result in the man making a similar complaint. That was the end of the Police matter.

23 March Meeting

[10] The following morning when Mr Matthews arrived at work Ms Tooman told him that someone from Human Resources was coming to see him that morning. The meeting took place between 7.30 and 8.30am. He met with the HR adviser, Mr Stuart Brown, with Ms Janice Burns present. Ms Burns is the Operations Manager. Mr Brown made notes of this meeting. Mr Matthews had some issues with the details recorded and mentioned it to Mr Brown who said it was not necessary to get it correct word-for-word as it was just to get a general idea of the incident.

[11] The minutes state:

Andrew showed us his neck and chest this morning. It is grazed and bruised.

[12] Ms Burns denied in evidence that there had been any marks to the throat. She also denied that he had spoken about being lifted up although the minutes indicate that Mr Matthews said that the man had lifted him and pushed him into the bollards behind him and that the man would not stop. Mr Mathews said he had acted in a mannerly way until he was grabbed by the throat at which stage he punched the man.

[13] During this meeting, Mr Matthews was advised of the decision to suspend him while an investigation was undertaken. He was not given reasons for the suspension nor an opportunity to respond to the imposition of the suspension. Mr Brown said Mr Matthews replied “good as gold” as he had done nothing wrong. The respondent says

he was not concerned about being suspended and gave his approval and said he would go home.

[14] On 24 March, Mr Matthews was provided with a letter headed *Notice of Disciplinary Meeting*. The letter was signed by Mr Elton Parata, the Unit Manager. The letter stated that further to the discussion on 23 March regarding the incident on 19 March where he had assaulted a member of the public Mr Parata wanted to meet with him to discuss the matter further, specifically in relation to clause 7.6:

In The Way We Work document (I have enclosed a copy of this for your consideration). This states “Physical violence against any person either during working hours or when attending Council functions.”

This is considered serious misconduct under our code of conduct.

[15] Mr Matthews was invited to bring a support person with him to the meeting and told he would be given every opportunity to give further explanation and he was advised that if those concerns were confirmed it may result in his dismissal.

[16] Mr Matthews said the incident did not take place on 19 March and he did not assault a member of the public. He had simply used reasonable force to free himself from the hold around his neck.

[17] The respondent provided Mr Matthews with a copy of a witness statement from an at that stage unidentified witness. He was also given photos taken by a security camera which takes still photos at 50 second intervals.

[18] The witness statement which was made at 6.30pm on 23 March, in response to a phone call made by Mr Brown to the witness, who had left a message/email for Mr Brown, said:

I spoke with a witness of the incident that Andrew Matthews was involved in.

The witness said he saw Andrew (Traffic Warden) looking at the car and then Andrew looked like he was going to issue a ticket as he looked at his ticket machine. At this stage the witness told me that a guy approached Andrew and started yelling and verbally abusing him.

Following this the guy pushed Andrew and then the warden punched him. They began to wrestle with each other.

Andrew went to lift his stuff up and the guy threw his ticket machine across the road. The guy then left in his truck.

I asked the witness “did the traffic warden have much time to leave the situation before it escalated into physical violence?”

The witness told me that Andrew had plenty of time to walk away because the guy was verbally abusing him for a good bit before he started pushing him a few times. The witness said Andrew could have walked away before the punch was thrown.

25 March Disciplinary Meeting

[19] The disciplinary meeting on 25 March was attended by Mr Matthews and his support person, Mr Les Graham. Mr Parata and Mr Brown were also present. Mr Parata asked Mr Matthews to give him a full explanation regarding what took place on the Monday. Mr Matthews said he had not assaulted anyone. He had acted in self defence when he was attacked and had not provoked the attack. Mr Matthews said the man became abusive and started yelling and shouting at him.

[20] Mr Matthews told the man he could leave and referred to the “softer compliance” approach adopted by the Council. He then spoke to the woman, the man’s mother. The man got out of the car and told Mr Matthews to go away and do his job as the car was not parked and was not on private land with the engine running. Mr Matthews said it was on public land and was parked. The man became abusive and was yelling, then he pushed Mr Matthews.

[21] The meeting notes state:

Andrew said that even though this was happening he still felt in no way threatened or intimidated. Following this the man pushed Andrew. Andrew said he warned the man not to push him again. And again the man pushed Andrew, and again Andrew warned the man not to push him. Andrew also indicated that while he was being pushed and verbally abused he was walking backwards although it all happened so fast he could not get away. At this stage the man pushed Andrew for the third time and at the same time he grabbed Andrew by the throat. Andrew said that he acted in self-defence and in line with the training he had received around this saying that he used reasonable force to defend himself and he punched the man.

[22] At the hearing Mr Parata said he accepted Mr Matthews’ version of events and if there was any doubt he gave him the benefit of the doubt. He said that Mr Matthews had been open, honest and co-operative throughout the disciplinary process.

26 March Dismissal Meeting

[23] At the meeting on 26 March, the decision was made to terminate Mr Matthews' employment.

[24] Mr Parata wrote a dismissal letter which said:

This is to confirm previous advice that I have today issued you with your dismissal notice in accordance with the Discipline Policy of the Hamilton City Council namely:

1. *Your actions on Monday 22nd March 2010 in no way displayed the new Go Beyond Qualities of Hamilton City Council.*
2. *We do have a copy of your induction documents with HR in which you have signed to say you have read and understood the "Way We Work" document in which we have referred you to section 7.6 (Physical violence against any person either during working hours or when attending Council functions.) in previous correspondence on this matter. This proves to me that you understood what was and was not acceptable within the workplace.*
3. *On 12 June 2009 you received a previous warning that outlined the fact that you were clearly directed not to engage with discussion with the public around such matters as this.*
4. *Your "Parking Warden Services and Training Manual" specifically page 40, paragraphs six and seven relate to the ability to walk away from an abusive situation early in the transaction and in fact you are advised to do so.*
5. *You commented yesterday at the fact you have had to become hardened to abuse and threats from the public on the streets. In our view this simply serves to support our thinking that you no longer have the ability to successfully undertake the duties and in particular the approach required of you by Hamilton City Council as a Parking Warden.*
6. *We believe that during the incident, you had ample opportunity to withdraw prior to any physical altercation occurring on the day and have chosen not to do so.*
7. *The undisputed facts remain that you struck a member of the public while undertaking the duties of a parking warden and as a representative of Hamilton City Council and in respect of the Way We Work document, this behaviour is unacceptable.*

As a result of the information we have and the discussions at yesterday's meeting, I feel that I have no choice but to dismiss you without notice from your role within the Parking Unit of Hamilton City Council on the grounds that you are in direct conflict with the Way We Work document, specifically s.7.6.

[25] Mr Parata had been the Unit Manager at the Hamilton City Council responsible for the parking officers for 18 months. Mr Parata said that Mr Matthews had a lack of understanding regarding the issues raised. He showed no remorse that he had punched a member of the public. He never denied that he had been trained to walk away. There was ample time to walk away based on the photos, the witness evidence and his own evidence. Had he walked away the most serious action could have been avoided.

Suspension

[26] Ms Burns said she was the person who had decided to suspend Mr Matthews. The record of the meeting indicates that Mr Brown told Mr Matthews that he would be suspended. The decision to suspend must have been made before the meeting as Ms Burns did not have the opportunity during the meeting to discuss that issue before the decision was announced. She said the suspension was justified because he had told a member of the public to “piss off” and that she was concerned he would not keep himself safe on the streets and that the Council could not guarantee his safety and that he had punched a member of the public. These reasons were not out to him. Ms Burns was of the view that she did not need to tell Mr Matthews why suspension was being contemplated.

[27] Mr Matthews should have been told of the reasons for the proposed suspension and given an opportunity to respond. There is no provision in the employment agreement for suspension.

Dismissal

[28] The dismissal letter claimed that Mr Matthews’ actions did not display the new Go Beyond qualities of Hamilton City Council yet Mr Parata admitted that Mr Matthews had acted in accordance with policies by giving the driver the opportunity to move the vehicle and not incur the infringement notice; and that he had offered to help the woman across the road so his authority could be clarified for her. Mr Parata accepted that it was only when a warden felt threatened that s/he was expected to walk away and that that depended on the situation.

[29] The letter asserted that because he had received the policy he knew what was acceptable. Mr Matthews said he acted in accordance with it. He adopted a softer approach and went the extra mile by his offer of help.

[30] He had received a previous warning and was “clearly directed not to engage in discussion with public around such matters as this”. The warning was not raised with him during the disciplinary process and it had expired. Ms Burns said his behaviour had improved since he had been given the warning. Mr Parata said he had not taken the warning into account but the letter shows he had. As Ms Watson commented, if Mr Matthews was not to engage with the public how could he give the driver an opportunity to leave or try to assist the woman regarding his authority.

[31] The manual related to the ability to walk away from an abusive situation early in the transaction. The manual also states that a warden is to always go out of his way to furnish information to the public and “*be able to stand and listen to verbal abuse without comment or reply*” and “*If you are sworn at or abused, tell the person as a warning the first time that you will not accept being sworn at or abused and if it continues you will terminate the discussion*”.

[32] The manual states if a verbal confrontation is developing into a physical one the person is remove himself from the situation.

[33] Mr Matthews did not respond to the verbal abuse. He offered to assist the woman and when he was pushed by the man, he warned him while walking backwards. It was only when he was pushed again and grabbed by the throat that he hit the man. Mr Matthews said he had not felt threatened during the verbal abuse.

[34] The issue of hardening to abuse was not explored with Mr Matthews at the meeting and was not out to him as a consideration for dismissal. It was not put to him that this adversely affected his ability to do his job, although he had shown that he was able to do, for example, the pilot night shift on weekends dealing with intoxicated people without any problems.

[35] Regarding the issue of ample time to withdraw before a physical altercation arose and choosing not to do so, I accept the submission that Mr Matthews would not have known or seen that the matter was going to escalate as the man had gone back to his vehicle and he was talking to the woman when the man came back and started to push him. There was a time interval of probably 20-40 seconds and Mr Matthews

told Mr Parata that he was walking backwards and it all happened so fast he could not get away.

[36] Mr Parata did not sufficiently consider whether Mr Matthews had used reasonable force to defend himself, although this is at the heart of the matter. The striking of a member of the public must be considered in the context of all the circumstances and not as an isolated incident.

[37] Ms Burns said she had spoken with Mr Parata a number of times about Mr Matthews and the incident and that after the meeting on 25 March and before the dismissal she told Mr Parata about a number of issues. These were not put to Mr Matthews. When asked why they had not been out to him Ms Burns said there was no point as he would have lied about them. She said the only important fact was that he had struck a member of the public and that she was not interested in what had been done to him.

[38] The respondent asserted that he was dismissed because the Council could not have other staff thinking it was alright to strike a member of the public and if he had not been dismissed it would have caused disruption and confusion. That act needs to be considered in context and the dismissal was disruptive in any event. In *Teao v Stormonts Bakeries Co Ltd*, 19/12/95, Colgan J, AEC 133/05 the Court stated that it was not fair to dismiss an employee found to be in breach of policy as a deterrent to others. The decision to dismiss has to deal with a fair consideration of the pertinent circumstances.

Decision

[39] Section 103A requires the Authority to consider whether the employer' actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal.

[40] The focus of the Council in this matter has been on the fact that Mr Matthews assaulted a member of the public. What appears to have been very largely ignored is that a member of the public assaulted Mr Matthews and did so prior to Mr Matthews taking any action. First of all he was verbally abused, then physically assaulted.

[41] The respondent submits that there are no grounds for a justified claim of self defence.

[42] The Council has emphasised the need to abide by the provisions of manuals and policies without taking due consideration of the practical exigencies that arise in a situation such as the one that Mr Matthews found himself in. He was walking backwards away from the person who was assaulting him. He was telling the person to cease doing it. The Council did not give adequate consideration to the fact that it was Mr Matthews who was assaulted.

[43] In *Housham v Juken New Zealand Ltd* [2007] ERNZ 183 the Court said at para [23] that an employer could regard assault as serious misconduct meriting dismissal but that that “*could not reasonably extend to every participant in such a confrontation under any circumstances.*”

[44] The Court went on to say that an employee was entitled to take all reasonable steps in the circumstances to avoid an assault. No hard and fast rules could be provided as each case was different and what amounted to a reasonable response to actual or impending violence would depend on the circumstances.

[45] The Court cautioned against using policies as a rationale for avoiding a critical assessment of all the relevant circumstances. Unfortunately, this is what the Council did.

[46] Section 4 of the Crimes Act 1961 provides that “*Everyone is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.*”

[47] The force Mr Matthews used for the purposes of defence. He had been grabbed by the throat and pushed backwards. He had attempted to get out of the situation by moving backwards and telling the man not to push him.

[48] Although Mr Matthews had been assaulted he did not respond to further provocation by using force when the man picked up his belongings and threw them away nor did he respond when he was hit by the woman.

[49] Mr Matthews' use of force in those circumstances was reasonable.

[50] The dismissal was unjustified not only because there was an inadequate consideration of the defence proposition put by Mr Matthews but also because Mr Parata had been given potentially damaging information by Ms Burns that was not put

to Mr Matthews; and the assertion that his attitude disqualified him from properly carrying out the job of a parking warden was also not put to him.

Remedies

[51] The primary remedy is reinstatement.

[52] There are obviously contrary views amongst Mr Matthews' co-employees about the advisability or otherwise of reinstating him. This is not surprising in a workplace which has a relatively large workforce.

[53] Ms Tooman said that if Mr Matthews was reinstated it would upset the morale of the unit. The wardens would be receiving confusing messages and the workforce could be divided. The message the Council always tried to convey was that wardens should take steps before it got to a serious physical altercation. Violence did not come into parking offences at all. In the time she had been in the job, seven years, there had been very few incidents of physical violence, considering the number of people involved.

[54] Ms Watson said that the claim that his reinstatement would cause confusion about the Council's policies and give a false impression of unacceptable behaviour to other parking wardens was not sufficient. This case had highlighted that the policy was not clear cut and could not be: assessments had to be made in particular circumstances.

[55] The parking wardens were divided about the dismissal in any event. Mr. Matthews had said he could work under Ms Burns.

[56] His actions had not destroyed the trust and confidence in the employment relationship. Mr Parata had stated that Mr Matthews had acted in accordance with expected standards and behaviour up until the physical altercation and also accepted that the physical altercation took place in less than a minute, probably twenty to forty seconds.

[57] Reinstating Mr Matthews would not detract from the message that violence should be avoided.

[58] Mr Matthews is to be reinstated to his position as parking warden. This is to take effect from the date of this determination.

[59] Mr Matthews is to be reimbursed for lost remuneration for the period from the date of dismissal to the date of this determination. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority.

[60] Mr Matthews is also entitled to compensation for humiliation and distress. This award is for the dismissal and not for the suspension as there was no evidence that Mr Matthews was distressed by the suspension. The respondent is to pay Mr Matthews the sum of \$4,000 pursuant to s 123 (1) (c) (i).

[61] I have considered the matter of contribution. Mr Matthews did not contribute to the situation that gave rise to the personal grievance. There is to be no reduction in remedies.

[62] Ms Watson asked that the Authority make recommendations. Section 123 (1) (ca) provides that if the Authority or the Court finds that any workplace conduct or practices are a significant factor in the personal grievance, recommendations to the employer concerning the action the employer should take to prevent similar employment relationship problems occurring may be made.

[63] It was neither workplace practices nor workplace conduct that were significant factors in the personal grievance. I am confident the Council will consider the application of policies in the light of particular circumstances in the future.

Costs

[64] If the parties are unable to resolve the matter of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King

Member of the Employment Relations Authority