

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2018] NZERA Auckland 19  
5630152

BETWEEN                      LONNY MATTHEWS  
   Applicant  
  
AND                                PENGELLYS LIMITED  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Soane Foliaki for Applicant  
   Garry Pollak for Respondent  
  
Investigation Meeting:      18 January 2018  
  
Oral Determination:        18 January 2018  
  
Record of Oral  
Determination:               19 January 2018

**RECORD OF ORAL DETERMINATION OF THE AUTHORITY**

- A.      Mr Matthews was unjustifiably dismissed.**
  
- B.      Mr Matthews conduct was so egregious that no remedies are awarded.**
  
- C.      Costs are reserved.**

**Employment relationship problem**

[1]      Mr Lonny Matthews worked for about three years as a Driver for Pengellys Limited. Mr Matthews was a member of First Union Incorporated and the terms of his employment was covered by a collective agreement. During his employment Mr Matthews raised issues with his union and Worksafe New Zealand about concerns he had over the use of forklifts at Pengellys.

[2] Following an altercation with another employee on 24 November 2015 Mr Matthews was dismissed. Mr Matthews says the dismissal was unjustified and he was treated disparately with the other employee involved in the altercation.

[3] Pengellys denies the claims and says Mr Matthews did not raise a personal grievance within the requisite 90 day period and the Authority does not have jurisdiction to investigate and determine his claims.

### **Issue**

[4] In order to resolve Mr Matthews' employment relationship problems I must determine the following questions:

- a) Did Mr Matthews raise his grievance within the statutory 90 day period after the action alleged to amount to the grievance occurred?
- b) Was Mr Matthews unjustifiably dismissed, if so, what if any remedies should be awarded?

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Matthews and Pengellys but has stated findings of fact, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result.

### **Jurisdiction**

[6] Pengellys says Mr Matthews failed to raise his personal grievance within 90 days as required by s 114 of the Act. Mr Matthews was dismissed on 24 November 2015.

[7] Attached to Mr Matthews' statement of problem is a document dated 7 December 2015 prepared by his union organiser. The document sets out Mr Matthews' side of the events that occurred, leading up to his dismissal and includes a statement that Mr Matthews is raising a personal grievance. The document records the remedies being sought by Mr Matthews.

[8] The content of the document is consistent with Mr Matthews' evidence. He told me he contacted the union the day after being dismissed, met with the union organiser and was told the union would take care of his personal grievance.

[9] Pengellys told me that during a meeting with Mr Warren Pengelly, Managing Director and Mr Don Filmer, Transport Manager, Mr Matthews' union representative was shown the video footage of the incident that led to Mr Matthews' dismissal. Mr Matthews was not present at this meeting.

[10] Days after the meeting Mr Pengelly told me the union organiser contacted him and told him he would not be pursuing a personal grievance for Mr Matthews. At the investigation meeting Mr Matthews told me the union did not discuss this decision with him before contacting Mr Pengelly. Indeed Mr Matthews told me he has had no contact with the union organiser and has written a letter of complaint about this lack of contact.

[11] I am satisfied Mr Matthews asked the union to raise a personal grievance on his behalf and that when the union organiser attended the meeting with Mr Pengelly and Mr Filmer on 7 December, he raised the grievance for unjustified dismissal. Mr Matthews was not consulted by the union before it decided not to pursue the grievance and did not act on any instructions from Mr Matthews when notifying Pengellys that the personal grievance would not be pursued.

[12] It is always up to the union as to whether it will expend funds representing its members in personal grievance claims. This does not mean that the raising of the grievance on 7 December is negated by the fact that the union was not pursuing the grievance on Mr Matthews' behalf. It was open for Mr Matthews himself or someone else on his behalf to pursue the grievance. Ultimately this is what happened.

[13] Mr Matthews raised his personal grievance on 7 December 2015 and is entitled to have his claim for unjustified dismissal investigated and determined by the Authority.

### **Unjustified dismissal**

[14] Whether a dismissal was justifiable must be determined under s 103A of the Act which provides the test of justification. The Authority must objectively determine

whether Pengellys' actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[15] In applying this test, the Authority must consider the matters set out in s 103A (3)(a)-(d). These matters include whether, having regard to the resources available, Pengellys sufficiently investigated allegations, raised the concerns with Mr Matthews, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to dismissal.

[16] The Authority must not determine a dismissal unjustifiable solely because of defects in the process if they were minor and did not result in Mr Matthews being treated unfairly.<sup>1</sup> A failure to meet any of the s 103A (3) tests is likely to result in a dismissal being found to be unjustified.

[17] Mr Matthews had an altercation with another employee on 24 November 2015. I have viewed the video recording of the incident and find:

- Standing beside a forklift Mr Matthews is having a conversation with the driver of the forklift.
- The driver indicates with his left arm away from the forklift. This gesture would be consistent with Mr Matthews' evidence that he was told by the forklift driver to get on with his job.
- The driver steps down from the forklift. The driver steps right into Mr Matthews' path.
- The two employees turn 180 degrees chest to chest and Mr Matthews shoves the driver away from him. The video does not support Mr Matthews' evidence that the driver struck or otherwise assaulted him.
- The driver walks away towards some steps leading to an elevated walkway on the left side of the warehouse building. Mr Matthews follows him during which time the two continue to interact verbally.

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<sup>1</sup> Employment Relations Act 2000 (the Act), s 103A(5).

- The driver steps down from the walkway onto the floor at which time the two move behind a pole and the view is obstructed.
- As they move from behind the pole it is clear that the driver has hold of Mr Matthews' clothing at chest height, Mr Matthews then grabs the driver's clothes, also at chest height, and then pushes him away.
- The driver attempts to strike Mr Matthews who is backing away while still being held by the driver.
- There is then a "scuffle" with both employees holding the clothes of the other and attempting to gain dominance over each other. They end up at the left hand wall with Mr Matthews pinning the driver against the wall.
- At this point Mr Filmer appears on the walkway. Mr Matthews has the driver held against the wall who kicks at Mr Matthews and appears to be trying to get away from Mr Matthews.
- Another employee also appears on the walkway and this person breaks up the two employees. Mr Matthews turns back towards the driver and the two employees continue to dialogue with each other.
- Both Mr Filmer and the other employee leave the walkway. Mr Matthews, who is now on the walkway turns his attention again to the driver and continues to dialogue with him while gesticulating widely with both arms.
- The driver approaches Mr Matthews, continues to dialogue with him, then walks away. Mr Matthews continues to gesticulate while the driver appears to have calmed down.
- Mr Matthews leaves the walkway and approaches the driver standing very close to him. The driver backs away. The two continue their dialogue. The driver puts a hand on Mr Matthews' shoulder. This movement does not look threatening but looks to be an attempt to calm Mr Matthews down.
- The driver is shaking his head. Mr Matthews forcibly removes the driver's hand off his shoulder and pushes the driver away from him.

- The two continue their dialogue and Mr Filmer appears on the walkway for the second time.
- The driver leaves the area and Mr Matthews turns his attention to Mr Filmer. At this stage Mr Filmer is on the walkway and Mr Matthews is on the main floor.
- Mr Matthews and Mr Filmer are seen in dialogue with each other, both gesticulating to each other.
- Mr Matthews approaches the walkway while continuing to dialogue with Mr Filmer. Mr Filmer looks to be attempting to leave the situation but Mr Matthews continues to get his attention.
- Mr Matthews approaches the steps and moves onto the walkway. He approaches Mr Filmer and continues to dialogue with him while moving toward him.
- Mr Matthews turns to leave the walkway down the stairs but stops, turns back and pursues Mr Filmer by moving swiftly toward him. The two then move out of sight although Mr Matthews' arm is visible as he continues to gesticulate.

[18] Mr Matthews told me he was not allowed to provide an explanation to Mr Filmer about his altercation with the driver but that he did explain everything to Mr Ken Blackie, the financial controller.

[19] Mr Filmer says that after the altercation between the driver and Mr Matthews had been stopped, Mr Matthews swore at him and abused him.

[20] The video is more consistent with Mr Filmer's recollection of the events. It is more likely than not that during the time Mr Matthews was in dialogue with Mr Filmer, based on his posture and gestures, he was having a very heated discussion with his manager.

[21] Mr Matthews then proceeded to complete his delivery for that day. Mr Filmer took time that afternoon to review the video footage of the event and spoke to Mr

Pengelly. Mr Pengelly determined that Mr Matthews' conduct was serious enough to warrant dismissal. That decision was conveyed to Mr Matthews that evening by telephone.

### ***Disparity***

[22] Mr Matthews says he was treated disparately with the driver who was not disciplined at all for his part in the altercation while he himself was dismissed.

[23] In *Wikaira v Department of Corrections* the Court considered claims by Ms Wikaira that she had been disparately treated in relation to her dismissal.<sup>2</sup> The Court had evidence that other Corrections Officers had received a warning or had no action taken against them, in circumstances where they, like Ms Wikaira been discharged without conviction. The court held that the department's failure to differentiate Ms Wikaira's case from others of her colleagues for similar or more serious misconduct was so significant that it failed to justify the fairness and reasonableness of her dismissal.

[24] Ms Wikaira's case can be distinguished from this case. Ms Wikaira raised parity of treatment during the disciplinary process. In this case Mr Matthews did not raise any concerns about being treated disparately until June 2016 when he lodged his statement of problem in the Authority. There is no mention of disparate treatment in the notes Mr Matthews' union organiser provided to Mr Pengelly on 7 December.

[25] The driver was provided with a full opportunity to explain his side of the story to Mr Filmer. This courtesy was not given to Mr Matthews even though the video clearly shows that at stages during the altercation both Mr Matthews and the driver were equal participants.

[26] Pengellys says there was a difference between the actions of the two employees. The driver left the warehouse when instructed to by Mr Filmer but Mr Matthews continued to abuse and swear at him. This in itself was considered serious misconduct.

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<sup>2</sup> [2016] NZEmpC 175 at [214].

[27] I am satisfied Pengellys could distinguish the action to be taken against its two employees. It had reasonable grounds on which to conclude Mr Matthews had initiated the altercation and then had sworn at and abused his manager.

### ***Conclusion***

[28] The process leading to Mr Matthews' dismissal was defective. Pengellys has failed to meet any of the mandatory considerations set out in s 103A(3). There was no opportunity for Mr Matthews to respond to any concerns before dismissal and therefore no genuine consideration of any explanation. The dismissal was immediate and abrupt. These defects were not minor and resulted in Mr Matthews being treated unfairly.<sup>3</sup>

[29] Mr Matthews was unjustifiably dismissed. However, I consider Mr Matthews' conduct on 24 November to be so egregious that no remedies should be granted.<sup>4</sup>

### **Costs**

[30] Costs are reserved. I am of the view that given the parties' success, costs should lie where they fall. However, the parties are invited to resolve the matter. If they are unable to do so Mr Matthews will have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Pengellys will have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell  
Member of the Employment Relations Authority

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<sup>3</sup> The Act at s 103A(5).

<sup>4</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136 at [216].