



New Zealand Employment Relations Authority Decisions

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McPherson v Silver Fern Farms Limited AA358/10 (Auckland) [2010] NZERA 666 (13 August 2010)

Last Updated: 9 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 358/10 5273476

BETWEEN

AND

BRUCE McPHERSON, applicants

SILVER FERN FARMS LTD, respondent

Member of Authority: Representatives:

Investigation Meeting:

James Wilson

Simon Mitchell for the applicant Tim Cleary for the respondent

15 April 2010 at Dargaville

Determination:

13 August 2010

DETERMINATION OF THE AUTHORITY

Mr McPherson's employment relationship problem

[1] Bruce McPherson was employed by Silver Fern Farms Ltd. (Silver Fern) as meat processing operator at the company's meat processing plant at Dargaville, from April 2005 until his dismissal on 9 June 2009. Mr McPherson says that his dismissal was unjustified and is seeking reinstatement, reimbursement of the wages he has lost since his dismissal and compensation for the hurt and humiliation that dismissal has caused him.

[2] Silver Fern say that they dismissed Mr McPherson only after a fair and reasonable investigation process and that his dismissal was justified because he had again breached the company's strict hygiene rules while on a final written warning for a similar breach.

The events which led to Mr McPherson's dismissal

[3] There is no dispute that Mr McPherson received warnings on 14 May 2008 and 31 July 2008, in both cases for absenteeism/bad attendance record. Both of these warnings are endorsed to the effect that the union disagreed that a warning should be issued. However the parties also agree that no further action was taken in respect to these warnings, the latter of which is referred to as a *second written warning in relation to a bad trend in absenteeism*.

[4] In January 2009 Mr McPherson was issued with a *final warning*. This warning is described as being for

... wearing green offal/petfood ppe gear in an edible support area. i.e. through anteroom into shared changing room during processing. Non compliance relating to Chinese OMAR technical brief 05 10 Green Offal Facilities and Processing, that was explained to all operators the previous evening. Copy of regulatory procedures supplied also to each operator concerned.

This warning was endorsed:

Union secretary will be in consultation with Union President regarding this matter. They will review and inform us of further action if intended.

Again there is no dispute that the Union did not take any further action on this matter.

[5] The company says that it was appropriate to issue Mr McPherson with a *final* written warning, despite the first and second warnings being in respect to poor attendance rather than a breach of the hygiene rules, because the applicable collective agreements states:

Warnings shall be issued in three stages and shall lapse after one year from the date of recording.

Stage 1: A first official written warning.

Stage 2: A second official written warning.

Stage 3: An official final written warning.

The CEA does not require that the subject of the warnings must be for the same or similar offence.

[6] According to the company's witnesses Mr McPherson again breached hygiene compliance on several occasions between February and May 2009. In particular they say that on 9 February and 23 March 2009, specific breaches were brought to his attention but that no further action was taken at the time. Mr McPherson does not dispute that these incidents occurred but says that he was given no indication that these were disciplinary matters.

[7] On 6 June 2009 Mr McPherson was seen again breaching hygiene rules. In his evidence the plant supervisor, Mr Matt Araroa says:

This was a serious compliance issue as the breach could have been a critical one for the plant had the veterinarian or other official auditors observed it ..

[8] On 9 June 2009 Mr Araroa met with Mr McPherson and advised him that he had been seen breaching the hygiene rules and that, as he was already on a final warning and therefore could potentially be dismissed, a disciplinary meeting in accordance with the CEA would be convened. A disciplinary meeting was then arranged with the Assistant Plant Manager, Mr Laurie Davies, Mr Araroa and Mr McPherson represented by the Union Secretary, Phil Ashby and Union President, Warren Clarke.

[9] Mr Davies explained, at the commencement of the meeting, that due to the seriousness of the issue and the fact that Mr McPherson was already on a final warning there appeared to be no option but to dismiss. In the course of the meeting the Union queried the documentation and training records, raising the possibility that perhaps Mr McPherson had not been properly trained or made aware of recent amendments to the hygiene rules. During an adjournment the company checked the documentation of various training sessions and confirmed, on reconvening, that the documentation established that Mr McPherson had received all of the appropriate training. After further discussion Mr Davies made the decision that Mr McPherson's employment should be terminated and advised him accordingly.

The issues for determination

[10] The main issue for determination in this matter is whether or not the actions of Silver Fern Farms, and the way Silver Fern acted, in dismissing Mr McPherson were, in the words of s.103A of the Employment Relations Act (the Act) *what a fair and reasonable employer would have done in all the circumstances at the time...* . In deciding whether Silver Fern's actions were fair and reasonable it is also necessary to consider whether the final written warning issued to Mr McPherson in January 2009 was itself fair and reasonable and if it was not whether it should have been taken into account in the final decision to dismiss him.

Why Mr McPherson says his dismissal was unfair

[11] Mr McPherson says that he is well aware of the importance of hygiene rules in the meat processing industry. He says that he was not aware of the new rules that he breached on 6 June 2009. He says that he was not aware that he was on a final written warning, that he had never received a copy of this warning and that, in any event the previous warnings were regarding absenteeism and it was unfair that a final warning should have been issued for an unrelated offence. He also

argues that he, through his union, had disputed the previous warnings and that he considered them to be unfair.

Silver Fern's response

The previous warnings

[12] Silver Fern, in response, says that while of the union had indicated that they did not agree with the first two warnings issued to Mr McPherson neither they, nor Mr McPherson had ever raised a personal grievance in respect to those warnings. They point out that while the final warning was regarding a different issue the CEA does not require the various levels of warning to be regarding the same type of offence.

The final written warning

[13] The company say it is usual practice that, where a warning is to be issued the company provides the union official with a copy of the warning for handing to the employee. They are adamant that this is what happened with Mr McPherson's final written warning in January 2009. They are supported in this view by the evidence of the union official who represented Mr McPherson on that occasion. Despite Mr McPherson's assertion that he did not know that he had been given a final written warning the union official stated unequivocally when questioned by the Authority, that *Mr McPherson could have been in no doubt that he was being given a final written warning.*

Had Mr McPherson being properly informed of the hygiene rules?

[14] Despite his protestation to the contrary the company was able to produce ample evidence that Mr McPherson had been made aware of the evolving rules regarding hygiene. Mr McPherson's training record indicates that he received, and acknowledged understanding, instruction regarding the hygiene rules which he subsequently breached.

Discussion

[15] I am satisfied on the evidence that Mr McPherson had been trained in and understood the hygiene rules which he breached. I am also satisfied that Mr McPherson was aware that he was on a final written warning and that any further breach could result in his dismissal. Mr Mitchell, for Mr McPherson has argued that the final written warning should not have been issued because the earlier warnings had been issued for different offences. That being the case his breach of the hygiene rules in June 2009 would almost certainly have resulted in a further warning and not dismissal. While there may be some merit in this argument the final written warning was not challenged at the time and it appears that there has been no previous challenge by the Union as to the appropriateness of the company's interpretation of the relevant clauses of the CEA.

[16] Irrespective of whether or not Mr McPherson should have received a final written warning in January 2009 that warning was in existence, and unchallenged, when he again breached the hygiene rules. These rules are not simply pedantic regulation of little consequence. Breaches of the rules can result in a meat processing plant losing its export license with devastating consequences not just for the company but for all of the staff it employs and its suppliers. Silver Fern, rightly, place a good deal of importance on ensuring that staff are familiar with the rules to the point where each employee has an individual training record which records when they have been trained in particular processes and applicable regulations.

Determination

[17] The circumstances Mr Davies had to consider *at the time* included the fact that Mr McPherson had been given a final written warning and had again breached the hygiene rules. Under the circumstances, I find, Mr Davies, on behalf of Silver Fern Farms did *what a fair and reasonable employer would have done* he dismissed Mr McPherson. **Mr McPherson's dismissal was justified** and he is not therefore entitled to the remedies he seeks.

Costs

[18] Costs are reserved. The parties are requested to attempt to resolve the issue between themselves in the first instance. If they are unable to do so Silver Fern may file and serve submissions in respect to costs within 28 days of the date of this determination. Mr McPherson will then have 14 days in which to file a response. I will not accept submissions outside this time frame except with leave.

James Wilson

Member of the Employment Relations Authority