

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 381
5374236

BETWEEN	SHAUN MICHAEL MCCARTNEY Applicant
AND	ATLAS CONCRETE LIMITED First Respondent
	FIRST UNION (formerly National Distribution Union) Second Respondent

Member of Authority:	R A Monaghan
Representatives:	S Fonua, counsel for applicant J Turner, counsel for first respondent Second respondent excused from participating
Investigation Meeting:	10 July 2013
Additional information provided:	11 and 19 July 2013
Submissions received:	19 July 2013
Determination:	27 August 2013

DETERMINATION OF THE AUTHORITY

A. Atlas Concrete Limited's action in dismissing Mr McCartney was justified

Preliminary matter

[1] Mr McCartney's statement of problem contained numerous claims against both his former employer, Atlas Concrete Limited (ACL), and the union of which he was a member at relevant times, First Union (formerly the National Distribution Union) (the union). ACL replied by saying, among other things, that Mr McCartney's personal grievance could not proceed because it was raised outside the 90-day period

in s 114 of the Employment Relations Act 2000. The union replied by saying no claim against it was disclosed and it should not remain a party to the proceeding.

[2] Following a teleconference with the parties I found there was one substantive claim against the union which could proceed. Because it encompassed the circumstances of the raising of the grievance, it was heard together with the preliminary matter arising under s 114. Those matters have now been determined.¹

[3] One substantive matter remains, namely Mr McCartney's personal grievance alleging unjustified dismissal. It is the subject of this determination. As it is a matter between Mr McCartney and his former employer, the union was excused from further participation in the Authority's investigation.

Employment relationship problem

[4] ACL employed Shaun McCartney as a truck driver, based at its depot in Kumeu.

[5] On the morning of 12 March 2009 a driver, Tony, informed the manager of the Kumeu depot, Mike Beretta, of threats that had been made against him. He said he was advised the previous day that Mr McCartney had said to another employee, Sam, that Mr McCartney was: *'going to bash Tony'*. When Tony asked Mr McCartney himself if he had said this, Mr McCartney confirmed he had. Tony said *'well bring it on'* and Mr McCartney replied: *'I will get you, your time is up'*.

[6] Later that day Mr Beretta convened a preliminary meeting with Mr McCartney and his union site delegate, in order to gather the facts. He says Mr McCartney denied threatening Tony directly, but admitted telling Sam he would *'bash'* Tony.

[7] In addition, only a few days earlier Mr Beretta had raised concerns with Mr McCartney about his use of threatening language following another incident. He warned Mr McCartney such language was unacceptable. He says he reminded Mr McCartney of that on 12 March. Although Mr McCartney denied making the threats in question, he accepted Mr Beretta's concern was made clear.

¹ *McCartney v Atlas Concrete Limited & Anor* [2013] NZERA Auckland 46

[8] Mr Beretta decided to investigate further.

[9] Mr McCartney went home sick later on 12 March. He provided Mr Beretta with a series of medical certificates, the last of which was to expire on 25 March. There was to have been a further meeting that day, but it was abandoned because of the unavailability of the union site delegate.

[10] Mr McCartney was not expected to attend work on 25 March. However he arrived unexpectedly later in the morning, accompanied by his brother. He raised with Mr Beretta various matters of concern to him, including other allegations that employees were drinking on duty. These were not directly related to the allegation of threatening behaviour or to the disciplinary investigation, were not raised in connection with the investigation, and did not form part of it. Mr Beretta did, however, advise Mr McCartney that the more formal meeting still being sought was intended to address the complaint against him, and that his ongoing employment at ACL could be affected. That information was confirmed in a letter dated 27 March.

[11] Mr McCartney took a further period of sick leave.

[12] A disciplinary meeting went ahead on 2 April. Mr Beretta and the Chief Financial Officer Greg Stewart attended the meeting, as did Mr McCartney with his brother and the union site delegate. Mr Beretta told Mr McCartney the meeting was to investigate the alleged threats, and to understand what caused the threats to be made.

[13] At the meeting Mr McCartney denied Tony's allegations, and denied making any admissions at the preliminary meeting on 12 March. When asked again whether a threat was made, and whether there were any factors causing it, he again denied that any threat was made.

[14] At the end of the meeting Mr McCartney was suspended while the matter was investigated, but no grievance has been raised in respect of the suspension.

[15] Mr Beretta obtained written statements from Tony, Sam, and a third employee, Warren. Warren was present during the exchange between Tony and Mr McCartney. He confirmed Tony's account.

[16] At a further meeting on 7 April 2009 Mr McCartney was advised of this, but again repeated his denials.

[17] Messrs Stewart and Beretta concluded Mr McCartney had threatened Tony. They found Mr McCartney had created a hostile workplace situation, and there was a real risk of a violent dispute. In that respect they noted also that Mr McCartney was aggressive and confrontational during the disciplinary meetings, and that in general his workplace behaviour was volatile. They believed his threats posed a risk to safety in the workplace.

[18] For these reasons they concluded dismissal was appropriate.

The issues

[19] The test of justification for the dismissal is set out in s 103A of the Employment Relations Act 2000 as it read at the time of Mr McCartney's dismissal in March 2009.² It concerns 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 occurred.

[20] The issues are:

- a. did ACL follow a fair and reasonable procedure in reaching its conclusions;
- b. was its finding that Mr McCartney had engaged in threatening behaviour reasonably open to it;
- c. was its finding that the behaviour was serious misconduct one a fair and reasonable employer would make;
- d. was dismissal the action a fair and reasonable employer would take;
and
- e. if not, what is the appropriate remedy.

Did ACL follow a fair and reasonable procedure

² An amended s 103A came into force on 1 April 2011.

[21] Mr McCartney challenged the fairness and reasonableness of the investigation. He said that:

- his allegations that employees were drinking alcohol on duty were not properly investigated;
- the allegations against him were made in retaliation for his reporting of drinking alcohol on duty and
- there was a failure to follow up on the conflicting accounts of whether threats were made.

Allegations of drinking alcohol on duty

[22] In or about early March 2009, Mr McCartney was making a delivery to an address in West Auckland. A comment by a tradesman on the site led him to believe other ACL drivers had been seen drinking alcohol while on duty. The date and place where the drivers were seen drinking was not available at the time, and none of the individuals concerned was named. However Mr McCartney took the matter very seriously and reported it to Mr Beretta.

[23] Mr Fonua submitted that Mr McCartney's report that drivers were drinking while on duty should have been investigated. Indeed Mr McCartney's stance during the employer's investigation and the Authority's was to urge that those allegations be investigated.

[24] Mr Fonua went further and said if ACL had investigated and found the drivers had been drinking, this would show Tony had a motive for fabricating his complaint against Mr McCartney. The submission is based in part on information which Mr McCartney must have obtained some months later, and which he says shows Tony to be one of the drivers involved in the incident reported by the tradesman. It also transpired that the relevant observation was made in November or December 2008, although it was not reported even to Mr McCartney until March 2009. At the time of the disciplinary investigation in March 2009 there was no evidence identifying Tony as one of the drivers who was allegedly seen drinking, and Mr McCartney had not named anyone when he reported the tradesman's comment.

[25] Further, I do not necessarily accept there was a failure by ACL to investigate the allegations of drinking while on duty. Mr McCartney made several such allegations in addition to the one about the behaviour reported by the tradesman. The dates on which the other incidents occurred were not provided, but the incidents appeared to span a period of months.

[26] Mr Beretta said he made enquiries but could not obtain enough information to proceed, and the allegations Mr McCartney himself made lacked detail at the time. One of the allegations - that staff were drinking after hours in the car park - was addressed in or about December 2008. Another allegation concerned a contractor on ACL's site, and he was spoken to.

[27] In any event the point is whether Tony's allegations were made in retaliation for Mr McCartney's, and were fabricated for that reason. An investigation of that question would begin with the timing, nature and content of the report that drivers were drinking on duty, the identity of the drivers in question, whether and when the drivers became aware of the report, and their reactions on becoming aware of it. An investigation into whether drivers were actually drinking on duty is not required for findings about the credibility of Tony's allegations about Mr McCartney's conduct.

[28] Accordingly I do not accept the submission that ACL's disciplinary investigation was flawed because of a failure to investigate the allegations of drinking while on duty.

Retaliation

[29] The wider question of whether the allegations against Mr McCartney were fabricated in retaliation for his own allegations was not raised in that form during ACL's disciplinary investigation.

[30] Mr McCartney did say during ACL's investigation that the other drivers believed he had 'narked' on them for drinking. However he raised the matter in the context of his attempts to press his allegations of drinking on the job. Rather than saying the allegations against him were fabricated and retaliatory because he had 'narked', he appeared at the time to be raising the matter in support of his own allegations. There was no suggestion at all that Tony had fabricated his complaint in retaliation for being 'narked' on.

Failure to follow up

[31] Mr Fonua also submitted that ACL did not carry out the further investigation it said it would at the 2 April meeting.

[32] If he meant ACL should have investigated the allegations of drinking on duty, I have commented on that matter and I do not accept the submission.

[33] Otherwise nothing requiring further investigation had been raised. If there had been a statement that the allegations were fabricated and retaliatory the matter could have been further investigated, but no such statement was made.

Was the finding of threatening behaviour reasonably open to ACL

[34] The only direct response Mr McCartney gave to ACL during its investigation was that the allegations about his conduct were lies, without going further. ACL was therefore obliged to rely on the credibility of the accounts provided to it.

[35] Mr Fonua submitted that ACL failed to take proper account of Mr McCartney's denials, but I do not accept that.

[36] I accept Mr Beretta's evidence that Mr McCartney initially admitted telling Sam that he would '*bash*' Tony. The admission was also recorded in Mr Beretta's note of the 12 March meeting. When the relevant passage was drawn to Mr McCartney's attention during the 2 April meeting Mr McCartney said it was wrong, and repeated that view when giving evidence. I find it unlikely the note was wrong or was in error, and I prefer Mr Beretta's evidence.

[37] As for the direct encounter with Tony there was a witness, Warren, who also gave evidence in the Authority.

[38] ACL was entitled to prefer the other drivers' accounts. The finding that Mr McCartney engaged in threatening behaviour was reasonably open to it.

Was the finding of serious misconduct one a fair and reasonable employer would make

[39] ACL conducted a fair and reasonable investigation, as a result of which it was entitled to conclude that the conduct complained of had occurred.

[40] The use of offensive language or threatening behaviour was listed in the applicable employment agreements as an example of serious misconduct for which an employee could be summarily dismissed. Mr McCartney had engaged in that conduct.

[41] ACL's finding that the conduct was serious misconduct was one a fair and reasonable employer would make.

Was dismissal an action a fair and reasonable employer would take

[42] Although Mr McCartney denied it, I prefer Mr Beretta's evidence that Mr McCartney had recently made other threats, and had been told this conduct was unacceptable. I also accept the evidence that, such was his unpredictability, Mr McCartney's threats were taken seriously. This was not conduct which could more appropriately be addressed by the issue of a warning, for example.

[43] For these reasons I find dismissal was the action a fair and reasonable employer would take.

Costs

[44] Mr McCartney has a grant of legal aid.

[45] If, in the light of that, either party seeks an order for costs that party shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days from the date of receipt of the memorandum in which to file and serve a memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority