

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 159
3000100

BETWEEN MARIE MCNABB
 Applicant

AND SILVER FERN FARMS BEEF
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Simon Mitchell for Applicant
 Tim Cleary for Respondent

Investigation Meeting: 3 and 12 April 2017

Submissions Received: 19 April 2017 from Applicant
 24 April 2017 from Respondent

Determination: 31 May 2017

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

A. Ms McNabb was justifiably dismissed.

B. Costs are reserved.

Employment relationship problem

[1] Ms Marie McNabb claims she was unjustifiably dismissed from her employment with Silver Fern Farms Beef Limited (SFF) on 27 June 2016. SFF denies the claims. For the reasons that follow I have found the decision to dismiss was an action SFF could take in all the circumstances.

[2] 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 Ms

McNabb and SFF but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Background

[3] Ms McNabb was employed at the SFF meat processing plant at Te Aroha as a seasonal meat worker from 2001 until her dismissal for serious misconduct on 27 June 2017. The terms of Ms McNabb's employment were contained in a collective agreement between SFF and the New Zealand Meat Workers and Related Trades Union Incorporated (the Union) dated 7 July 2013.

[4] The Te Aroha plant is an export plant and SFF is required to comply with stringent Ministry of Primary Industry and overseas customer regulations. In the event of breaches of the regulations SFF's export licence may be suspended and it will not be able to process meat.

The incident

[5] Ms McNabb's duties included the preparation of meat cuts for packaging. On Friday, 24 June 2016 Ms McNabb was observed by Mr Ben Hook, Operations Improvement Manager, retrieving cut meat from the floor, taking it to the dropped meat table and returning to her work station where she proceeded to handle other meat in preparation for packaging.

[6] SFF was concerned Ms McNabb had failed to follow the written "*Dropped Meat Procedure*" which was in place to protect the hygiene of packaged meat. The dropped meat procedure required Ms McNabb to wash her hands after handling dropped meat. SFF considered Ms McNabb's failure to wash her hands before returning to work at her workstation amounted to serious misconduct. It was a breach of hygiene and safety standards.

[7] The collective agreement at clause 28 sets out the agreement between SFF and the Union on the rules for personal conduct. The clause sets out examples of misconduct that would normally warrant dismissal including clause 28(b)(iv) which states:

All parties to this Agreement are involved in New Zealand's export industry, which is dependent on overseas markets for its continued existence. Therefore it is vital that the highest possible standards of work, personal cleanliness and general tidiness of

plant, grounds and amenities are consistently and constantly maintained. The deliberate refusal to comply with safety, smoking and work standards of the employer is unacceptable.

[8] Mr Hook advised Mr Stephen Greenhill, Boning Room Supervisor of what he had observed. Mr Greenhill approached Ms McNabb at her work station, stood her down then met with Ms McNabb and Mr Jason Simpson, an employee of SFF and the union secretary for the Union at the plant. Ms McNabb was advised what had been observed and was told the situation was serious because of the potential effect on the business and SFF's brand.

[9] Ms McNabb admitted she had not followed the process of washing her hands and told Mr Greenhill she was under pressure. Ms McNabb was advised that the incident could be found to be serious misconduct, and that if proven, could lead to disciplinary action including dismissal. Ms McNabb was stood down until Monday 27 June 2016. No issue has been taken by Ms McNabb over the decision to stand her down.

[10] Ms McNabb attended a disciplinary meeting on Monday, 27 June 2016 where she was represented by Mr Simpson. The meeting was led by Mr Laurie Davies, Regional Assistant Manager.

[11] Ms McNabb disputed the incident amounted to serious misconduct and maintained that she had been under pressure. Mr Davies asked Ms McNabb why she did not stop the chain. Ms McNabb told Mr Davies she did not know where the stop button was.

[12] The meeting was adjourned to allow Mr Davies to speak to one of Ms McNabb's co-workers and her supervisor about how busy the chain was on Friday 24 June 2016 and whether Ms McNabb knew where the stop button was. Mr Davies satisfied himself that the chain was not busy and Ms McNabb did know where the stop button was located.

[13] The disciplinary meeting resumed and Ms McNabb was informed of the information Mr Davies had gathered from his enquiries. Mr Davies also outlined for Ms McNabb his conclusion that the situation should have been avoided by following the hygiene procedure. Ms McNabb was invited to provide any further responses she wished to have taken into account before a decision was made.

[14] While Mr Simpson acknowledged that Ms McNabb did not follow the correct procedures he maintained it should not threaten her employment. Mr Davies was not persuaded and reiterated his view that the issue fell under serious misconduct as the plant's export licence could have been put in jeopardy and that would have affected everyone. During this exchange Mr Simpson also raised a very general issue of disparity.

[15] Mr Davies advised that he viewed the matter as serious misconduct given the potential consequences for the plant and said he would take a couple of days to consider the matter.

[16] Mr Simpson and Ms McNabb pressed Mr Davies to make a decision that day as it was the last day of the season, the plant was closing and Mr Simpson was already on leave.

[17] Mr Davies concluded Ms McNabb's conduct in not following hygiene procedures constituted serious misconduct and after considering everything his decision was to dismiss Ms McNabb.

Justifiability of the decision to dismiss

[18] The statutory test of justification is contained in section 103A of the Act. I am required to determine the question of whether an action was justifiable on an objective basis, having regard to whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[19] In applying the test in section 103A the Authority must consider the non-exhaustive list of factors outlined in section 103A(3):

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[20] In addition to the factors described in section 103A(3), the Authority may consider any other factors it thinks appropriate. An action must not be found to be unjustified solely because of defects in the process as long as those defects were minor and did not result in the employee being treated unfairly.¹

[21] The role of the Authority is not to substitute its view for that of the employer. Rather it is to assess on an objective basis whether the actions of the employer fell within the range of what a notional fair and reasonable employer could have done in all the circumstances at the time.

[22] As a full Court observed in *Angus v Ports of Auckland Ltd*²

A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be taken into consideration having regard to the particular circumstances of the case.

[23] SFF and the Union have defined serious misconduct which includes the recognition that the highest possible standards of personal cleanliness are consistently and constantly maintained. SFF and the Union have agreed that the deliberate refusal to maintain the work standards of the employer is unacceptable.

[24] Records produced at the investigation meeting show that Ms McNabb was trained in the hygiene standards expected of her. As recently as January 2016 Ms McNabb had completed two Primary ITO unit standards for the meat industry. In section 2 of the unit standards Ms McNabb is asked to write down or tell her assessor the hygiene and sanitation workplace safety practices she was required to follow on the meat processing line. Ms McNabb answered:

Always sterilise knives, handwashing if touching product off the floor for removing to dropped meat table.

¹ Employment Relations Act 2000 (the Act), section 103A(5).

² [2011] NZEmpC 160, (2011) 9 NZELR 40 at [26].

[25] Ms McNabb acknowledged twice, first on 24 June 2016 and then again on 27 June 2016 that she had failed to follow the required hygiene standard because she had failed to wash her hands.

Disparity

[26] During the disciplinary meeting on 27 June 2016 Mr Simpson raised with Mr Davies disparity issues in very general terms with respect to other employees who had not been dismissed as a result of their failure to follow the hygiene procedure.

[27] In *Wikaira v Department of Corrections* the Court considered claims by Ms Wikaira that she had been disparately treated in relation to her dismissal.³ 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.

[28] At the investigation meeting Mr Simpson gave me examples of where others who had breached similar rules had been treated more leniently. Mr Simpson told me he raised these examples in the meeting on 27 June 2016. I'm not satisfied he raised the disparity issues in the same detail as he has now, although it is more likely than not that he did discuss them with Ms McNabb prior to going into the meeting.

[29] I am cautious about relying on the notes Mr Simpson says he made following the meeting. This is because the notes on disparity include a note of an incident that occurred after 27 June 2016 and yet it is included in the list in his diary as if it had occurred prior to 27 June 2016.

[30] In particular Mr Simpson is aware of the following incidents which did not result in the summary dismissal of the employees concerned:

³ [2016] NZEmpC 175 at [214].

- a) An employee threw a ribcage across the belt which was also a breach of the hygiene regulations, and was dangerous. He received a reprimand because his actions were deemed to be skylarking which the collective agreement specifically categorises as misconduct and not serious misconduct.
- b) An employee breached the dropped meat procedure and was given a final warning. This employee was on her third and final warning at the time. After a disciplinary process SFF accepted the employee's explanation that she thought she had the approval of the veterinarian to do what she did in circumstances where she was uncertain about what she should do. The employee was apologetic and was given a second chance. Ms McNabb knew she had failed to follow the hygiene procedure and never apologised for her actions.
- c) In other examples and in similar circumstances employees resigned before SFF could make a decision to dismiss.

[31] There is no dispute that SFF has also dismissed employees for breaches of the dropped meat procedure. This was something Mr Simpson acknowledged at the investigation meeting.

Other options for Ms McNabb

[32] If Mr Simpson did not agree with the decision to dismiss Ms McNabb and if they intended to pursue a personal grievance there was a mechanism available to Mr Simpson through clause 29 of the collective agreement which allowed the employer to stand Ms McNabb down on full pay where instant (summary) dismissal was intended, and the union wished to contest the dismissal. The clause provides for payment of wages either to the end of the following day or until negotiations are concluded, whichever is the sooner.

[33] Mr Simpson acknowledged at the investigation meeting that he did not invoke this clause even though he was aware SFF considered Ms McNabb's conduct to constitute serious misconduct and dismissal was intended.

Conclusion

[34] I find SFF's decision to dismiss Ms McNabb was an action a fair and reasonable employer could make in all the circumstances of this case. Ms McNabb was clear about what the issue was and was provided with a reasonable opportunity to provide her explanation. I am satisfied SFF sufficiently investigated the allegations, including seeking clarification from others when Ms McNabb told Mr Davies she was under pressure on the chain and did not know where the stop button was. Further, I am satisfied the parity issues have been adequately explained by SFF.

[35] Ms McNabb was justifiably dismissed and I can be of no further assistance to her.

Costs

[36] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so SFF shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Ms McNabb shall 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.

[37] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority