

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Andy Nathan (Applicant)  
**AND** Ports of Auckland Limited (Respondent)  
**REPRESENTATIVES** Simon Mitchell, for the applicant  
Philip Skelton and Kirsti Laird, for the respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 3 April 2006  
**SUBMISSIONS RECEIVED** 4 and 7 April 2006  
**DATE OF DETERMINATION** 26 July 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Andy Nathan was employed by the Ports of Auckland Limited (“POAL”) from 1 June 2003 until his dismissal on 4 November 2005. Mr Nathan worked as a stevedore, first in the Fergusson Terminal and from December 2004 in the Axis Rail/Shuttle area. In Axis Rail/Shuttle Mr Nathan was one of a small group of employees working a 24 hour seven day roster. Their duties involved moving containers from trains and transporters onto the port.

[2] Mr Nathan was dismissed following an investigation by POAL into an allegation that he had assaulted another Axis Rail/Shuttle employee, Craig Dunsmore, on 27 October 2005. Parallel with this investigation, POAL investigated an allegation against Mr Dunsmore that he had used offensive language to describe Mr Nathan immediately prior to the assault occurring.

[3] Mr Nathan says that when he heard Mr Dunsmore say “f\*\*\*\*\* black c\*\*\*\*” he saw red and assaulted him. He says he had been subject to racist remarks from Mr Dunsmore and another Axis Rail/Shuttle employee since he had moved to that work area, that he was offended by these remarks, had drawn this to the attention of Mr Dunsmore and POAL but that the remarks had continued and POAL had failed to take adequate steps to prevent the racial abuse. Mr Nathan says POAL failed to provide him with a safe workplace free from racial abuse and failed to adequately weigh this factor which provoked the assault. He says that in these circumstances no fair or reasonable employer could have reached the conclusion to dismiss. To remedy his employment relationship problem Mr Nathan seeks reinstatement to the position from which he was dismissed, the reimbursement of lost wages and compensation for hurt and humiliation consequent to his dismissal.

[4] POAL says it fairly investigated the allegation against Mr Nathan, fairly weighed all the relevant factors, including provocation, and concluded dismissal was appropriate in the circumstances.

[5] To resolve this employment relationship problem the Authority must determine whether, pursuant to section 103A of the Act, POAL's decision to dismiss Mr Nathan was justified in all the circumstances, including:

- (i) whether POAL's inquiry was fair and reasonable in the circumstances;
- (ii) whether the decision to dismiss Mr Nathan was open to a fair and reasonable employer in the circumstances; and
- (iii) whether POAL failed to provide Mr Nathan with a safe work place.

### **7 February meeting**

[6] In February 2005 Colleen Aberhart, the manager of Axis Rail/Shuttle, called a team meeting to discuss a complaint Mr Dunsmore had raised that Mr Nathan had said he would "knock his head off".

[7] During the meeting Mr Nathan said he was sick of the racist remarks that were being made and had reacted to a comment Mr Dunsmore had made in the mess room about "bombing the lot of them". This comment was made while Mr Nathan and Mr Dunsmore were viewing a television item on a Maori/Pacific Island cultural festival. Mr Nathan said he did not appreciate the comment because he had a family member attending the festival. The minutes of the meeting record that a discussion followed about racist comments on the site, including:

"We agreed racist comments needed to stop immediately. Inappropriate and wouldn't be tolerated. In (sic) unhappy with anything advice was not to let it build up but tell the person immediately. If continues address with team leader or Manager."

[8] Mr Nathan said he shook hands with Mr Dunsmore at the end of the meeting and said "lets move on", to which he understood Mr Dunsmore agreed.

### **June roster change**

[9] In May 2005 Mrs Aberhart received complaints that the rostered teams where becoming "cliquey". She asked Joe Campbell, the first shift team leader, to re-roster the teams and specifically asked that he roster Mr Nathan and Mr Dunsmore, together with a team leader, on the night shift. Mrs Aberhart told me she made this request because she felt Mr Nathan and Mr Dunsmore did not know each other very well and that if they got to know each other better the groups would get along better. Mrs Aberhart said the 7 February meeting did not influence her decision to roster them together. She said she thought that matter had been resolved in February and she had heard nothing further on the matter.

[10] Mrs Aberhart discussed the new rosters with all affected employees, including Mr Nathan, who told Mrs Aberhart he was happy to change teams. Mr Nathan told the Authority that up to then he was unaware of any racist comments being made since the February incident.

[11] Mr Nathan told the Authority that over the months following the roster change and during the rostered night shift, he heard Mr Dunsmore and Mr Boyce make a number of racist remarks. He said none of these comments were directed at him and were comments directed at television news items or throw away comments such as "you've got to watch you fellas, you'll take anything" or "must have stolen it" as someone identifiable as Maori or Pacific Island drove past in a late model car. Mr Nathan said as a consequence of hearing these comments he knew Mr Dunsmore had no respect for him or any Maori or Pacific Island person.

[12] Mr Nathan said he did not raise these issues with Mrs Aberhart because, though he thought

hard about it, he found it uncomfortable to talk about. He said he almost raised the racist comments with Mr Campbell one evening when they were alone having a few drinks but felt too embarrassed to do so.

[13] In the weeks immediately before the incident which led up to Mr Nathan's dismissal Donna Awatere-Huata's fraud trial featured in the media. During this time Mr Nathan heard Mr Dunsmore make a number of comments about Maori in positions of authority stealing. Mr Nathan said that he got up a number of times and left the mess room when Mr Dunsmore made these comments. He said Mr Dunsmore must have known he was uncomfortable. Mr Nathan did not raise his concerns with Mrs Aberhart or his team leader.

## **26 October 2005**

[14] On 26 October Mr Nathan, Mr Dunsmore and Mr Campbell were rostered to work the night shift together. The shift started at 11pm and finished at 7am on 27 October. During the course of the evening Mr Dunsmore and Mr Nathan had a disagreement about when smoko breaks should be taken; Mr Dunsmore wanted Mr Nathan to work through so he, Mr Dunsmore, could finish early, Mr Nathan wanted to take a smoko break.

[15] Mr Nathan took his break at about 1.40am. As he was walking down the side of the mess room building he heard Mr Dunsmore say to Bruce Miller "f\*\*\*\*\* black c\*\*\*". He said he understood the comment was a reference to him and their earlier disagreement over the breaks, that he saw red and struck Mr Dunsmore. Mr Nathan could not recall how many times her hit Mr Dunsmore. A co-worker, Phil Angus, attempted to pull Mr Nathan away from Mr Dunsmore and was tripped up in the fracas. When everyone had calmed down Mr Dunsmore apologised to Mr Nathan for his comment. Mr Nathan understood that would be the end of the matter.

### **(i) Full and fair inquiry?**

[16] Mr Dunsmore contacted Ms Aberhart on the afternoon of 27 October. He told her Mr Nathan had assaulted him during the nightshift, that he had spoken with his team leader Mr Campbell about the incident and wished to raise a complaint. Ms Aberhart was on leave at the time and referred the matter to Terry McKenna, POAL's Human Resources Manager.

[17] Mr McKenna contacted Mr Dunsmore that same afternoon who confirmed his complaint. Mr McKenna then went down to the site and spoke with Mr Campbell. He met Bob Riwai, who is a delegate from Mr Nathan's union, the Maritime Union of New Zealand, and discussed the issue with him.

[18] On 28 October Mr McKenna held separate meetings with Mr Dunsmore and Mr Nathan. Mr Riwai and Mr Carlisle were present at both meetings representing Mr Nathan and Mr Dunsmore. Mr McKenna's notes of those meetings have been made available to the Authority. Mr Nathan told Mr McKenna that he had been subject to racist comments, that this had gone on for some months, that he had asked Mr Dunsmore to stop and it had been referred to management.

[19] Following these meetings and discussion with the union representatives Mr McKenna decided that further grounds for investigation existed. At this stage no allegation had been raised with Mr Nathan and these investigations were, Mr McKenna stated, and I accept, in the nature of preliminary investigations.

[20] The decision was made then to suspend Mr Nathan and Mr Dunsmore. The consultation over this proposal was conducted with the union representatives. Mr Nathan was then advised by his

union representative of POAL's decision to suspend.

[21] Mr McKenna met with a number of employees to investigate Mr Nathan's allegation that racist comments had been made. Mr Nathan's representatives were present at these meetings and had put forward names for Mr McKenna to interview. Mr McKenna also met with Bruce Miller and Phil Angus who had witnessed the assault. The notes of these meetings have been made available to the Authority.

[22] On 3 November Mr McKenna wrote to Mr Nathan:

"Dear Andy

As you are aware we are investigating the events surrounding the use of offensive language to describe you and the allegation that you assaulted a fellow employee at the workplace on Thursday 27 October 2005 at approximately 1.40am.

You are required to attend a disciplinary meeting on Friday 4 November 2005 at 9am in meeting Room 3 of the Ports of Auckland Building. The purpose of this meeting is to provide you with further opportunity to explain the allegation that you assaulted a fellow employee at the workplace on Thursday 27 October 2005 at approximately 1.40am.

As per our Human Resource Policy Manual – Code of Employment; fighting or assaulting another person is considered serious misconduct.

Therefore it is possible that if the allegation is established against you, you may be issued with a warning/or you may be dismissed with notice.

You have a right to bring a Union Representative or some other representative to this meeting.

Yours sincerely,

Tony McKenna  
Manager Human Resources"

[23] Mr Dunsmore was sent a similar letter on the same day advising a disciplinary meeting would be held the following day. The allegation against Mr Dunsmore outlined in that letter was serious misconduct for behaving in an offensive manner by the language used to describe Mr Nathan. Following a disciplinary process this allegation was upheld as serious misconduct and Mr Dunsmore was issued with a final written warning for six months and moved from Axis Rail/Shuttle to another area of the Port.

[24] During the 4 November meeting Mr McKenna put the serious misconduct allegation to Mr Nathan again and restated Mr Nathan's 28 October explanation of the events of the morning of 27 October. Mr McKenna then asked Mr Nathan if there was any further information he wished to give him about the events of 27 October. Mr Nathan said there was none. Mr Nathan's union representative then submitted that the assault could not be separated from the racist comments being made in Axis Rail/Shuttle. Mr McKenna reiterated the seriousness of the allegation and an adjournment was taken for POAL to consider its position.

[25] The conduct in question was the assault on Mr Dunsmore. POAL accepted Mr Dunsmore's version of the assault; that Mr Nathan had punched him in the face three times, kneed him in the face and hit him on the back of the head. At the investigation meeting Mr Nathan accepted he had assaulted Mr Dunsmore but denied that he had assaulted Mr Dunsmore in the manner described. Mr Nathan was unable to recall the details of the assault.

[26] Was the decision making process tainted by the failure to put this description directly to Mr Nathan to comment? Mr Nathan acknowledged that he had assaulted Mr Dunsmore and did not seek to describe the assault as technical or minor. Mr Nathan's union representatives were present when Mr Dunsmore described the assault to Mr McKeena. They were also present when Mr Angus was interviewed and described what he witnessed. I find that no unfairness was occasioned by the failure to directly put to Mr Nathan Mr Dunsmore's description of the assault. Mr Nathan's representatives heard all the accounts of the assault and it was reasonable for POAL to infer that this information would have been communicated to Mr Nathan.

[27] I am satisfied that POAL conducted a full and fair inquiry into the allegations against Mr Dunsmore.

**(ii) Was the decision to dismiss one open to a fair and reasonable employer?**

[28] Having conducted the investigation and received submissions on Mr Nathan's behalf Mr McKenna and Mrs Aberhart formed the view that his conduct amounted to serious misconduct warranting dismissal. Were their conclusions justified in all the circumstances?

[29] POAL's decision that Mr Nathan's conduct amounted to serious misconduct was fair and reasonable. The assault was not denied and POAL's code of conduct is clear that assaulting another person may constitute serious misconduct.

[30] I am satisfied that the full circumstances of the assault, including the provocative conduct of Mr Dunsmore, were fully examined and taken into account in the assessment of whether Mr Nathan's conduct was sufficiently inconsistent with his continued employment so as to render the dismissal justifiable<sup>1</sup>. The investigators interviewed 12 employees in their investigation of the assertion of racist comments in Axis Rail and Shuttle. The information received reflected a mixed range of views and it was fair to conclude, based on this information, that racist comments were made but that the practise was not wide spread. Mr McKenna and Mrs Aberhart also reviewed the process that had been put in place for raising a complaint of racial abuse in February, satisfied themselves that Mr Nathan was aware of this process and that he had not raised the events leading up to the incident in October.

[31] While I accept that Mr Dunsmore's comments were provocative and unacceptable this specific issue had been raised in February of that year, POAL had unequivocally condemned such conduct and advised staff, including Mr Nathan, of a process for complaining about such conduct which Mr Nathan had decided not to use. In such circumstances it was open for POAL to conclude that Mr Dunsmore's racially offensive comments on 27 October did not excuse Mr Nathan's actions and that the decision to dismiss was fair and reasonable in the circumstances.

**(iii) Health and safety**

[32] POAL does not have a written policy which describes racial harassment as unacceptable in the workplace and why or a policy which sets out a process for raising complaints about racial harassment.

[33] An employer has an obligation to provide a safe workplace. A safe and healthy workplace includes one free from psychological harm such as racial abuse. Clause 3.2.1 of the POAL Collective Employment Agreement 2004-06, the relevant collective employment agreement, provides:

"A programme to ensure a safe and healthy work environment in accordance with the Health and Safety in

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<sup>1</sup> *Central Clerical Workers IUOW v EV McConnell Ltd* [1990] 3 NZILR 1048

Employment Act 1992 has been implemented.”

[34] Janina Adamiak gave expert evidence on behalf of Mr Nathan. She is a registered clinical psychologist with extensive experience in family and occupational psychology. Having read the witness statements provided by the parties she concluded that:

- (i) Mr Nathan was the subject of chronic workplace bullying;
- (ii) by October 2005 he had reached a point of psychological double jeopardy;
- (iii) that, in such circumstances, a reaction of physical abuse could be described as predictable.

[35] Ms Adamiak said that, in her opinion, POAL had failed to implement appropriate strategies to prevent racial harassment. Ms Adamiak had not interviewed any of the witnesses had not had the opportunity to read the bundle of documents which were provided to the Authority. Given the limited information provided to Mr Adamiak I am unable to much, if any weight on her evidence.

[36] I accept that Mr Nathan’s health and safety would be compromised by racist comments being made on the workplace. However, I do not accept that the risk posed to Mr Nathan’s psychological health of Mr Dunsmore’s conduct was foreseeable to POAL. There was no evidence that Mr Nathan alerted POAL to his concerns about Mr Dunsmore’s conduct following the 5 February meeting when it was made clear that racist comments were unacceptable in the workplace and a process was put in place for raising any ongoing concerns.

[37] POAL does not have a written racial harassment prevention policy in the workplace. As I have found Mr Nathan does not have a personal grievance I am unable to make a recommendation that POAL take steps to develop such a policy under section 123 (1)(ca) of the Act. However, it seems to me that it would be in the interests of POAL and its workforce to develop such a policy as part of its health and safety programme.

## **Conclusion**

[38] In all the circumstances, I conclude that it was open to POAL, acting fairly and reasonably, to conclude that Mr Nathan’s conduct was sufficiently serious as to constitute serious misconduct warranting summary dismissal. Mr Nathan does not have a personal grievance.

## **Costs**

[39] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so they may file memoranda as to costs within 21 days of the date of this determination.

Marija Urlich  
Member of Employment Relations Authority