

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 128/08  
5127552

BETWEEN                      MICHAEL PAKI  
   Applicant  
  
AND                                LEVIN MEATS LIMITED  
   Respondents

Member of Authority:        P R Stapp  
  
Representatives:              Simon Mitchell and Paul Wintringham for Applicant  
   Andru Isac and Andrew Bell for Respondent  
  
Investigation Meeting:        12 and 13 August 2008  
  
Submissions:                    22 & 29 August and 1 & 4 September 2008  
  
Determination:                 26 September 2008

---

**DETERMINATION OF THE AUTHORITY**

---

[1] Michael Paki is a meat process worker employed at Levin Meats Limited. He was one of a number of employees who refused to start work when requested, and their refusal to start work, was regarded by Levin Meats as an illegal strike. They were suspended from work. Mr Paki was dismissed on 12 June 2008 following an investigation. Other suspended employees were able to return to work.

[2] Mr Paki is the subject of a consent determination issued by the Authority. He has challenged the dismissal and is seeking permanent reinstatement, lost wages, compensation, and costs.

[3] Levin Meats accepted that Mr Paki has been dismissed. It contended that the dismissal was justified and fair. It rejected Mr Paki's claims including that for reinstatement.

[4] I hold that the issues are:

- What was Mr Paki's role in the events of 15 May?

- Would a fair and reasonable employer have concluded that Mr Paki organised and orchestrated the refusal to start work on 15 May?
- Did Mr Paki refuse to start work when requested?
- Did Mr Paki refuse to leave when requested?
- Would a fair and reasonable employer have concluded that Mr Paki breached a duty of loyalty and fidelity through comments he made to the media? What did Levin Meats rely on to reach such a conclusion?
- Was Mr Paki treated differently to the other suspended employees who were allowed to return to work?

### **Levin Meats Limited and Mr Paki's Employment**

[5] Levin Meats has a meat freezing plant at Levin. Previously it was run by Lake View Farm Fresh Limited, which went into liquidation.

[6] Levin Meats employs its workforce from around Levin and surrounding districts. It is common ground that it is a robust place of work.

[7] Mr Paki worked in the cutting room where there approximately 31 employees work. The employees are engaged on individual employment agreements and have common piece work rates of pay in three grades: A, B and C. There is no union on site. In addition, the cutting room is complemented by hourly paid workers employed by Allied Workforce. It is common ground that there had been difficulties with production in the lamb cutting room.

[8] Mr Philip Grey is the General Manager of Levin Meats. He was the decision maker in Mr Paki's dismissal. The plant is run by the Assistant General Manager, Mr Stephen Paynter, who suspended the workers. Others involved in the matter were the Plant Manager, Mr Philip Puketapu; and the relevant supervisors Messrs Geoffrey Gutschlag and Richard Gerrand.

[9] Michael Paki was recognised as the cutting room representative for the employees. There is a difference of opinion amongst the company and workers on how he assumed that role. There is an informal arrangement for election of the room representative. The supervisors have recognised the room representative acts on behalf

of the workforce in regard to any problems that arise from time to time. Indeed Mr Paki was involved in the negotiation, and signed off, the piece rates that applied in the cutting room.

[10] Another employee, Mr Nicky Morgan, a saw-man in the lamb cutting room was regarded as the joint room representative, alongside Mr Paki. He was not involved in the subsequent events that involved the lamb cutting room workers.

[11] The company representatives have a very poor view of Mr Paki's behaviour and attitude. They are very critical of the way in which Mr Paki has communicated and behaved. There is a background history involving Mr Paki's disciplinary record: involving warnings in regard to absenteeism, attendance, and his refusal to work when directed to work elsewhere other than in the lamb cutting room.

### **Events leading up to 15 May 2008**

[12] On 13 May Mr Paki approached Mr Paynter to raise an issue related to the use of the Allied Workforce workers in the cutting room because of concerns amongst other workers that their pay was declining each week. Mr Paki objected to the Allied Workforce workers being paid an hourly rate. Mr Paki also raised his concern that the lower pay related to cuts that were too difficult to achieve.

[13] Mr Paynter said he tried to explain to Mr Paki the arrangements surrounding the Allied Workforce workers and that their engagement should have no impact on the pay for workers employed directly by Levin Meats. He said the payments for both categories of workers were entirely separate.

[14] Mr Paynter also said that he tried to point out to Mr Paki the arrangement in regard to the calculation of the pay involving the pool was divided by the 31 permanent employees who are included in it, and that the Allied Workforce workers formed no part of the pool and that the pool was divisible by the number of permanent employees who actually worked.

[15] He said that Mr Paki could not understand what he was saying.

[16] Mr Paynter also said that the rates were originally set in consultation with Mr Paki. The rates had been in place without complaint since November 2006. He says he showed Mr Paki a copy of the rates complete with his own signature and raised with

him that he had negotiated the rates and no issues had been raised in respect of those rates until that day. Mr Paki would not acknowledge them. The matter was not advanced.

[17] On 14 May 2008 Mr Paki and two other process workers: Messrs Clint Edge and Cale Raemaki; arrived at Mr Paynter's office unannounced. Mr Paynter refused to speak with Mr Paki.

[18] There are two credibility issues arising out of the meeting to do with what Mr Paynter said when Mr Paki arrived, and what Mr Raemaki said when the meeting finished.

[19] Mr Paki says that he left and shut the door. This was supported by Selina Edge, another lamb cutting room process worker. She says she overheard Mr Paynter swear when he saw Mr Paki. Mr Paynter denied swearing, but agreed he called Mr Paki an idiot before excluding him. I hold that it was not likely that he swore at Mr Paki because no one else referred to Mr Paynter swearing, and Mr Paynter denied it without being challenged in the replies.

[20] Mr Paynter said that the door remained open and Mr Paki was listening to what was happening and in his opinion Messrs Edge and Raemaki relied upon Mr Paki's experience and knowledge for advice because they did not understand the issues.

[21] Mr Paki said that when that meeting ended, Mr Raemaki came out and told him that he had said to Mr Paynter that they would not start work until Mr Paynter met the workforce. Mr Paki told me he was in awe of Mr Raemaki making that comment. Mr Raemaki's version is different, and he says he said, the workers would not start unless Mr Paynter spoke with Mr Paki.

[22] Mr Paynter said that no arrangement had been made for any meeting between him and the workforce and or Mr Paki. A meeting was their idea. He says that during his discussion with Mr Edge and Mr Raemaki they said the workers would not start unless he spoke with Mr Paki. Mr Paynter's position is that he was quite prepared to keep talking to resolve the matter with anybody else, other than Mr Paki.

[23] Mr Paynter said he advised the three individuals that refusing to work would be an illegal strike and would result in disciplinary action.

**The Events of 15 May 2008**

[24] The lamb cutting room employees started to assemble for work around 4.30am. They went to the dining room. Some went to their workstations.

[25] Work did not start at the normal starting time because the employees in the dining room remained there. Mr Paki was present in the room. He was moving about, talking and sitting in a group as other workers were doing. Also there were a number of Department of Labour complaint forms being circulated and left on tables for the workers to fill out. These forms, Mr Paki told me, were provided from the internet by his mother.

[26] Mr Gutschlag, the lamb cutting room supervisor, telephoned Mr Paynter to inform him that the employees were refusing to work. Mr Gutschlag says that Mr Paynter told him to warn the senior staff that the company considered they were taking illegal strike action. Mr Gutschlag says he went and advised Mr Paki of this: it is probable that he did so because Mr Paki was the room representative.

[27] Mr Gutschlag said he requested employees to return to work. This did not happen, the direction was not followed.

[28] Also, during the early part of that morning, Mr Puketapu went to the room and advised the workers that the action taken was illegal and they were risking losing their jobs.

[29] When the workers continued to refuse to return to work, Mr Paynter arrived and went to the room. He says he was confronted by a room full of workers who were angry, refusing to work, sitting at tables and standing and moving around the room. He says that he pointed out that a refusal to return to work meant that they were involved in an illegal strike. Mr Paynter asked them to leave and when they did not leave, he called the Police.

[30] The Police arrived and requested the employees to leave, at which point some returned to work and others, when they got into the car park, were advised that they could meet with Mr Paynter individually.

[31] The other workers congregated in the car park as a group and a local newspaper and a television station arrived.

[32] Billie Paki, Mr Paki's mother, confirmed she telephoned the television station. A statement has been provided by a local reporter and he says he learnt independently that Police cars had been seen at Levin Meats. He thought there was an accident and went to find out what was happening. There was a newspaper report with a banner photo showing Mr Paki at the front of the workforce group. In addition a number of people had their views reported, including Mr Paki who says he was misrepresented.

[33] Mr Paynter confirmed that prior to the request for the employees to leave and the Police becoming involved, he referred to Mr Paki as an idiot because he was frustrated with Mr Paki's unwillingness to listen or allow him to respond to the matters that Mr Paki was putting forward. It is common ground that Mr Paynter referred to mediation and the company paying for a lawyer to assist. The opportunity was not taken up. He confirmed that in requesting the employees to leave he was suspending them.

[34] He decided to deal with staff on an individual basis because he considered they were under pressure, had been intimidated and were taking action that they might not have been comfortable with. In order to get to the bottom of the concerns of the employees, Mr Paynter met with senior staff first. This involved Mark Wheeler, Nicky Morgan, Garry Scanlan, process workers; and Mr Micky Turangi, a respected former employee, who on arrival, had also advised the workers to return to work. Mr Paynter also endeavoured to meet with Messrs Edge, Raemaki and Paki after they left the dining room and went out to the car park.

[35] During the conversations with the senior staff the following concerns were discussed:

- The allocation of staff training;
- Records of downtime due to machinery failure;
- The time it took to identify stoppages;
- Time lost during changeovers of shifts;
- The Allied Workforce;
- C graders being paid less than the minimum wage.

[36] No progress was made, but it was the first time any issue to do with the minimum wage was raised. Thereafter a few of the assembled workers were permitted to return to work, but only after they had met with Mr Paynter. Two employees said they were allowed to return to work, but they allege that they had to acknowledge to Mr Paynter that they had been intimidated. Mr Paynter denied putting such a demand on the employees, except that he was concerned about the position they were being put in and their ability to make a decision. I have mentioned this only because it was raised during the Authority's investigation, but I hold that nothing turns on it.

### **The Events After 15 May 2008**

[37] Mr Paynter says that he and one of the company's solicitors commenced interviewing workers to establish what had transpired. Interview notes were kept. Some of the workers were unwilling to speak or cooperate. Some were evasive.

[38] By this stage the workers had obtained assistance from a union representing meat workers, and that union engaged a lawyer, Mr Mitchell, for help.

[39] The parties attended mediation, but in regard to Mr Paki, the company decided there would be an ongoing investigation and disciplinary process and decision to be made about his continued employment at Levin Meats. Other workers were permitted to return to work.

[40] Mr Mitchell challenged Mr Paynter's ability to make an impartial decision. Thereupon Mr Grey, the General Manager, decided to take the matter over, review the material that Mr Paynter and the company solicitor had obtained from witnesses, newspaper articles and witness statements to make a decision.

[41] As a matter of background, correspondence was exchanged between the parties. On 29 May 2008 two letters were sent to Mr Paki's representative. The first outlined the allegations against Mr Paki that included:

1. *The organisation and orchestration of an illegal strike action.*
2. *A breach of loyalty and fidelity through comments to the media.*
3. *Failure to follow the reasonable and lawful direction of the employer to return to work.*
4. *Failure to follow the reasonable and lawful direction of the employer to leave the company premises.*

[42] There is no dispute that Mr Paki was on adequate notice that an outcome of the process might involve him losing his job, although it is not mentioned in the correspondence I have referred to here. I accept this was conveyed by the company in an earlier letter in May. There is no procedural issue being taken on this.

[43] The second letter dated 29 May 2008 provided the names and notes of employees who had been interviewed by Levin Meats and included a copy of a letter from one employee and Mr Paki's prior written warnings.

[44] Levin Meats undertook to also provide a statement of a supervisor of the cutting room, a security recording of the "smoko-room" recorded on 15 May 2008, if it was needed, and a statement from Mr Paynter.

[45] Levin Meats referred to a discussion in which it was believed that Mr Paki's representative indicated that Mr Paki conceded to a leadership role and organising the action that took place on 15 May 2008. There is no evidence that Mr Paki made any concession that he had a leadership role and organised the action that took place on 15 May 2008.

[46] Mr Paki and his representative met with Mr Grey and the company's solicitor for a disciplinary meeting.

[47] During that process statements supporting Mr Paki were handed in from Mr Edge and Mr Raemaki. In addition, an affidavit from a local reporter was also provided, that I referred to earlier.

[48] Following the meeting Mr Grey considered the material before him and on 10 June 2008 set out in writing the company's preliminary view on the allegations of misconduct put to Mr Paki. The company had reached a preliminary view to dismiss Mr Paki for serious misconduct. But it decided to give him a further opportunity to comment before a final decision was made. The company's reasoning for its preliminary view was set out, along with a conclusion that Mr Grey had reached, that the relationship of trust and confidence with Mr Paki had been destroyed. He added that Mr Paki was aware of other avenues that could have been pursued for the concerns that existed.

[49] Mr Mitchell responded on 12 June 2008 with a further submission opposing the decision. No other issues in mitigation were put forward.

[50] Mr Paki was dismissed by Mr Grey on 12 June 2008 for serious misconduct involving:

1. *Organisation and orchestration of an illegal strike action;*
2. *A breach of loyalty and fidelity through comments made to the media;*
3. *Failure to follow the reasonable and lawful direction of the employer to return to work on 15 May 2008; and*
4. *Failure to follow the reasonable and lawful directions of the employer to leave the company premises on 15 May 2008.*

[51] I hold that a fair and reasonable employer would not have concluded that Mr Paki deliberately and wilfully orchestrated and organised the group failing to start work and not to leave the premises when they were requested to and Mr Paki breached a duty of loyalty and fidelity through comments he made to the media. My reasons for reaching this conclusion include: that other employees were involved, another employee contacted the television, other employees talked to the media and were reported including making what could be considered negative comments, the absence of any media policy and instructions, the condonation of Mr Paki's role as the room representative, the existence of a problem relating to declining pay, especially for the C graders, and that Labour Department complaint forms had been obtained by somebody and no linkage for this could be established involving Mr Paki, except that he kept the forms and did not proceed with a complaint to the department.

### **Disparity of Treatment and Reasoning for the Decision to Dismiss Mr Paki**

[52] I find that Mr Paki has a personal grievance because he was treated differently from all the other employees who were permitted to return to work.

[53] Mr Grey failed during his interview with me to adequately provide his reasoning as to how he reached his conclusion that Mr Paki was the leader organising and orchestrating the strike when other employees were also involved. This is despite his written evidence providing an evaluation of the interview notes he was given.

[54] There is no evidence that Mr Grey put any findings as to what it was that led to a conclusion that Mr Paki organised and orchestrated an illegal strike that he referred to

in his written statement, and which he alluded in part to during his interview in the Authority, for Mr Paki to comment on at the time.

[55] Also, Mr Grey could not satisfactorily explain what it was that led him to conclude that Mr Paki wilfully and deliberately breached any fidelity and loyalty by commenting to the media after he was suspended. Mr Grey handed up newspaper reports he has relied upon, but could not identify any evidence he relied upon, whereas when Mr Paki says he was misrepresented, disputed some of the reporting, and there is deposed evidence from a journalist about how he learnt of the event.

[56] Indeed there was no evidence that Mr Paki called the media. Mr Paki cannot be held responsible for any reporting on the incident when the media arrived. Another employee was responsible for calling the television, but was able to return to work. There is independent evidence deposed by a journalist about arriving that did not involve Mr Paki. There was no enquiry carried out by Mr Grey other than reading the articles and relying on his advisors to reach his conclusions. There was no media policy and no instructions given to anyone on handling the media. Indeed other employees were also involved and commented to the media and were allowed to return to work later. No details of the reasoning applied by Mr Grey have been provided other than what he read and disagreed with. That was not satisfactory I hold. A fair and reasonable employer would have made the findings known and allowed them to be commented on before making a decision. I am not satisfied that this actually occurred and that the 10 June letter with preliminary findings was satisfactory to illicit and comment from Mr Paki.

[57] I accept that Mr Grey analysed the interview statements and reached his conclusion on credibility, but I hold this is affected by the following circumstances.

[58] The issues of credibility (the meeting on 14 May and the difference between Mr Raemaki and Mr Paki) that I have referred to earlier have arisen during this investigation, except that they do show that there was confusion and a possibility of group activity linked to an issue of declining weekly pay. Those two credibility issues are not critical to the outcome. However, a fair and reasonable employer would have had more evidence than that relied upon given the gravity of the offences involving the allegations that Mr Paki has been accused of: organising and orchestrating an illegal strike and breaching a duty of fidelity and trust and confidence.

[59] There was a credibility issue about what Billie Paki meant by a comment she allegedly made to Mr Paki "*If you're going to do this, then everybody has got to*". There is conflict and ambiguity about whether or not this meant that she was urging Mr Paki to make sure everyone refused to work as Mr Grey concluded. Furthermore I was not satisfied that Mr Grey's reliance on two employees saying they heard or overheard Mr Paki refer to a "sit in" was put to Mr Paki to comment on as a factor for credibility at the time and when he now denies saying it in such a context..

[60] The company had recognised Mr Paki as the cutting room representative for some time, albeit nothing otherwise formal existed around Mr Paki's status. Indeed a fair and reasonable employer might have concluded the group was acting together given the pay problems some of them were experiencing, including the C graders, and the company had no back up to check compliance with the minimum wage and the application of piece rates. Also two other employees met with Mr Paynter on 14 May and the company consulted with other workers without much success either. Finally when the direction was given to return to work and leave the premises individual workers seem to have made their own choice, although I suspect there was group pressure because of the mixed reaction that occurred. There was no enquiry on intimidation and no findings except in general against Mr Paki, without any sufficient detail. There was no evidence to link any intimidation with Mr Paki.

[61] Having said the above I accept that the company was concerned about the group's behaviour in not starting work. However the company's decision to suspend was a retaliatory action, also open to criticism, when perhaps other options might have sufficed to de-escalate and manage the situation, and then deal with the problem, consistent with the dispute resolution provisions in their employment agreements, and the Act, and to use the mediation services of the Department of Labour. All parties, including individual employees, have a responsibility to engage in best practice to resolve their problems and be communicative, and that has not happened here.

[62] For whatever reason Mr Paynter decided he would not talk to Mr Paki and called him an idiot. Mr Paynter's response was not a helpful way of dealing with the recognised room representative, even if Mr Paki did not understand what he was being told. I have to say that although the employees might consider Mr Paki as an experienced and knowledgeable representative his conduct fell very short of that level. Mr Paki should have known that the employees were putting themselves at serious risk

in not starting work, especially when he and his two colleagues informed Mr Paynter that a meeting would take place and that the workers would expect to meet with Mr Paynter, but did not get his agreement. Their ultimatum was a hollow one.

[63] Mr Paki should have acted to find another way through the situation when it became clear that Mr Paynter was not prepared to meet the employees collectively or talk to Mr Paki because (Mr Paynter) was so annoyed.

[64] Mr Paki has left himself open to criticism over what he was trying to achieve on the rates, especially as he did not have the detail of any individual problems involved with the declining pay and any breaches of the Minimum Wage Act.

[65] The company has left itself open to criticism given the individual employment agreements appear to be unclear about the rates that applied; and employees are entitled to know how and what they are paid, especially when it emerged later that there was an issue about the minimum wage being met for a number of the C graders.

### **Conclusion**

[66] I hold that Mr Paki has a personal grievance. He was unjustifiably dismissed.

### **Remedies Available to Mr Paki**

[67] I now turn to remedies. Mr Paki is seeking reinstatement. He is genuine about the claim. He is also seeking compensation, lost wages and costs.

[68] Levin Meats was not able to justify the decision to dismiss Mr Paki. It has relied on his actions to try and show he is not worthy of being an employee at Levin Meats. It was open to a fair and reasonable employer at the time to take different action and that could have included different disciplinary action of a lesser degree because Mr Paki as the acknowledged informal room representative had to take some responsibility for what happened.

[69] Levin Meats has not established any evidence that it would be impracticable to reinstate Mr Paki. There are certainly issues surrounding the way Mr Paki behaved, but the characteristics of his behaviour complained about by Mr Grey and the supervisors, including Mr Paynter, fall short of examples that make it impracticable to reinstate him.

[70] I also find that Levin Meats has up until these events recognised Mr Paki as the room representative, albeit informally, and given the absence of a union on site left Mr Paki to undertake the role of his own accord without any training.

[71] This is a robust industry, and Levin Meats is a large employer that is well resourced and undoubtedly should have the experience to deal with the sort of issues existing between the supervisors and Mr Paki and Mr Paki's attitude to some aspects of the work and what he wants to do and what the employer is reasonably entitled to expect him to do.

[72] Since reinstatement is the prime remedy I order that Levin Meats Limited reinstate Mr Paki to the position he held or a position not less favourable, with effect from the date of his summary dismissal, and as soon as practicable.

### **Mr Paki's Contribution**

[73] I am required to determine if Mr Paki's behaviour contributed to the situation giving rise to his personal grievance: (s 124 applied). I have no hesitation to find that Mr Paki did contribute to the situation. By doing nothing to try and de-escalate a refusal by the group to return to work and by not trying to sort out the problem by use of the dispute resolution provisions were omissions partly attributable to Mr Paki's handling of the situation, and hence his dismissal. But, on balance, I hold that Mr Paki had a difficulty in that Mr Paynter decided not to talk to him. It is clear Mr Paynter's annoyance with Mr Paki got the better of Mr Paynter. However, Mr Paki's refusal to carry out a lawful instruction to return to work and then not leave the premises when requested to was blameworthy contribution in the situation giving rise to his dismissal. Indeed I hold that Mr Paki has tried to deflect and shift any responsibility in regard to his involvement in the events. As he was the room representative at the time and the cutting room employees had some regard for him to act on their behalf, I hold, it would have been expected that he could have persuaded them to take a different course of action and then to follow a different course to identify what the problem was and then how best to deal with it for each of the employees affected. There are procedures that exist for this. I do not accept for one moment Mr Paki's opinion that complaints to the Department of Labour on the minimum wage could not have reasonably been pursued, at least in the first instance.

[74] Mr Paki was requested to return to work, and did not do so. That action was inexcusable given there are procedures to deal with disputes over pay for instance by complaining to the Department of Labour or invoking the dispute resolution processes in each of the individual employment agreements. Also the parties have ready recourse to a mediator from the Department of Labour for urgent help. Another course of action would have been to get advice and assistance as to the role of a union in regard to collective bargaining and the proper legal process to be followed to initiate bargaining lawfully for a collective employment agreement.

[75] It is my decision Mr Paki's omission to act responsibly in the situation to lead the group to return to work when they were requested to do so, and his failure to return to work, means that there should be a substantial reduction in compensation. I have regarded the remedies globally because of the order for reinstatement and that Mr Paki has been paid. Mr Paki has satisfied me that his dismissal has had some impact on his feelings but my assessment globally of the remedies and applying contribution means Mr Paki must get less compensation than what he would have received in other circumstances because of the reinstatement and the wages paid. My assessment of a sum of compensation would be \$1,500 compensation.

[76] I would not like Mr Paki to think or consider he has come out of this situation with clean hands because his action was not the sort of behaviour that would be expected of anyone with a leadership role. Mr Paki needs to note that the company holds strong views about his behaviour, that he is regarded as manipulative and a "hot-head". This may be his last opportunity and now that the union is involved with the company he needs to take seriously the opportunity of getting back to work and to focus on that.

### **Summary of Remedies**

[77] Levin Meats Limited is to reinstate Mr Paki to the position he held or a position not less favourable, with effect from the date of his summary dismissal, and as soon as practicable.

[78] Levin Meats Limited is to pay Mr Paki the sum of \$1,500 compensation under s123 (1) (i) (c) of the Act for hurt feelings.

[79] I reserve leave for any issue arising on any lost wages.

[80] Costs are reserved.

**P R Stapp**  
**Member of the Authority**