

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 213
5455929

BETWEEN JASON RANGITAKATU
 Applicant

A N D CLOUDY BAY SEAFOOD
 LIMITED
 Respondent

Member of Authority: M B Loftus

Representatives: Luke Acland, Counsel for Applicant
 Michael Hardy-Jones, Counsel for Respondent

Investigation Meeting: 16 September 2014 at Nelson

Submissions Received: 23 September and 6 October 2014 from Applicant
 29 September 2014 from Respondent

Date of Determination: 19 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Jason Rangitakatu, claims he was unjustifiably dismissed by the respondent, Cloudy Bay Seafood Limited (CBSL), on 31 March 2014. He also claims he was unjustifiably disadvantaged in his employment by reason of his suspension on 7 March 2014.

[2] CBSL accepts it dismissed Mr Rangitakatu but says his conduct justified the decision. CBSL contends the suspension justified by reason of its duty to provide a safe workplace for other employees.

Background

[3] Mr Rangitakatu was initially employed by CBSL as a Production Supervisor in January 2013. He signed an employment agreement in March and was subsequently promoted to the position of Production Manager.

[4] Contained in the employment agreement are two clauses pertinent to this claim. Clause 2, general terms and conditions, reads:

You agree to abide by any policies, rules and procedures of CBSL that are in effect from time to time and that apply generally to the employees of CBSL.

[5] Clause 14, suspension, reads:

If a serious problem arises, CBSL may suspend you from work until the problem is resolved. While suspension is usually on pay, the employer has the right to suspend without pay if it decides that to be appropriate.

[6] As Production Manager, Mr Rangitakatu was responsible for some 40-50 staff. Mr Rangitakatu's office was in an area also occupied by Nick Cairney (the Factory Manager), Deanna Rangitakatu (Mr Rangitakatu's wife and CBSL's Quality Assurance Supervisor) and an administrative employee, Nicki Crosbie.

[7] Unfortunately tensions arose and three, in particular, led to Mr Rangitakatu's dismissal. They occurred on Thursday 20 February, Wednesday 5 March and Thursday 6 March 2014. The event of 6 March involved a verbal altercation between Mr Rangitakatu and Mr Cairney. Mr Cairney says that in the preceding months Mr Rangitakatu's conduct had become more aggressive and this had become a subject of conversation with his wife whose concerns had led to her phoning him at work to inquire as to his wellbeing. He goes on to say:

He [Mr Rangitakatu] is a big guy and he tends to intimidate by his presence, his tone when he is talking to you and also by the volume of his voice.

[8] Mr Cairney says that after the altercation of 6 March, and given it was the second on consecutive days, he decided he was no longer willing to work in what he described as an *environment of anger and intimidation*. At approximately 3pm (some five hours after the altercation) Mr Cairney raised his concerns with his manager,

Mike Ponder. Mr Ponder is General Manager of Cloudy Bay Holding Group and oversees the operation of a group of companies including CBSL.

[9] Mr Ponder, who works from an office in Blenheim, says Mr Cairney's complaint raised the spectre of a staff safety issue that had to be addressed quickly. He therefore decided to travel to Nelson the following day and speak to Mr Rangitakatu. In the interim he sought legal advice about suspension and prepared a letter for Mr Rangitakatu. It advises CBSL had received allegations of intimidation and bullying by Mr Rangitakatu and if proven this would constitute a breach of the staff conduct policy. The letter goes on to advise the allegations would be investigated before saying:

3. *As these are serious allegations we intend to on suspending you under clause 14 of your employment agreement while an investigation is carried out.*

[10] The decision to suspend was attributed to an obligation to ensure the health and safety of all staff potentially involved and Mr Rangitakatu was advised it was to take effect immediately. He was also told:

If you wish to respond to our decisions to suspend you, please provide a written response by close of business today, Friday 7 March 2014.

[11] The suspension letter was delivered the following morning. Mr Rangitakatu chose not to respond saying this was because the letter led him to believe his input would not alter the decision. The meeting at which it was delivered was recorded and a transcript has been provided to the Authority.

[12] On 10 March Mr Ponder received a written enunciation of Mr Cairney's complaint and he interviewed various potential witnesses on 11 and 12 March. He also received a written description of the 6 March incident from a contractor who provides occupational safety and health training to CBSL staff and witnessed it.

[13] Mr Ponder's investigation concentrated on whether there had been a breach of CBSL's staff conduct policy with an emphasis on clause 4.7.4. It reads:

"Bullying" means repeated, deliberate and targeted conduct by a person towards a member (or members) of the group which is offensive or intimidating or humiliating and which detrimentally affects that member's well-being.

[14] On 11 March 2014, Mr Rangitakatu raised a personal grievance challenging the suspension and CBSL responded the following day.

[15] On 14 March 2014, Mr Ponder again wrote to Mr Rangitakatu. The letter provided an update on the investigation's progress before giving a summary of allegations. These are that:

- a. On Thursday 20 February Mr Rangitakatu swore at and verbally abused Mr Cairney during a dispute about the late payment of wages to factory staff and then followed that by making disparaging comments about Mr Cairney and CBSL management to staff at morning tea before suggesting they walk off the job;
- b. On Wednesday 5 March Mr Rangitakatu spoke to Mr Cairney in an aggressive manner and left Mr Cairney with the view he had been the subject of a personal attack;
- c. On Thursday 6 March Mr Rangitakatu yelled and swore at Mr Cairney during a dispute about a health and safety issue. It is further alleged Mr Rangitakatu's behaviour was aggressive and that he physically intimidated Mr Cairney by blocking his egress from the room;
- d. Mr Rangitakatu had expressed to Mr Cairney negative views about the latter's appointment soon after his commencement; and
- e. Mr Rangitakatu had, on one occasion, stood the processing staff in a line against a wall and verbally abused them. It was said two left as a result.

[16] Enclosed was a revised statement from Mr Cairney and Peter's interview notes. Ms Parish's notes had already been provided.

[17] The parties initially intended meeting on 18 March but it was adjourned to 21 March. Again, the meeting was recorded. The meeting canvassed the allegations and Mr Rangitakatu's responses. Mr Rangitakatu and his solicitor also questioned the adequacy of the information they had been provided and this led to the delivery of further documentation on 25 March.

[18] A second meeting was held on Friday, 28 March. It was attended by Mr Rangitakatu, his solicitor, Mr Ponder and Mr Anthony Piper (CBSL's owner's father). Again the meeting was recorded and a transcript provided. Following the meeting, Mr Ponder wrote to Mr Rangitakatu via his solicitor. The letter opens with advice Mr Ponder had, having considered the evidence before him, concluded Mr Rangitakatu's amounted to serious misconduct.

[19] The letter then repeated the allegations contained in the 14 March letter before advising he put some weight on Ms Parish' evidence given she was not an employee of CBSL. The letter concludes with:

Today I invited you to comment on what action, if any they [sic] should be taken and you did not have any response to this.

Over the weekend I will consider the discussions we have had, the nature of the allegations and the finding of serious misconduct and decide what action should be taken if any.

The meeting on Monday may include disciplinary consequences which are disadvantageous to your employment. This may include a warning through to termination of your employment. For this reason you are suggested to bring a support person with you.

[20] The meeting on Monday was a reference to a further meeting the parties had planned. Notwithstanding that it did not occur as Mr Rangitakatu had concluded CBSL's decision was already made and he could not, therefore, be bothered going to a meeting just to hear advice of his dismissal.

[21] Mr Ponder says he considered the situation over the weekend but ultimately concluded that dismissal was the appropriate course. He sent a letter confirming the decision on 31 March. Contained therein is advice that:

I have given thought as to how any rebuilding of relationships and in particular communication could take place but in all of the circumstances I have decided that the proper way to deal with this matter is to dismiss you for serious misconduct and your employment will end today the 31st of March 2014.

I have found that your conduct was intimidating. The effect of your conduct on other employees is to make them feel intimidated and the effect on them is clearly detrimental. I do not have confidence that I am able to provide a safe workplace for other employees whilst you are in the workplace.

[22] Subsequent attempts to resolve the parties' differences were unsuccessful which led to the current investigation meeting.

Determination

[23] As already said CBSL accepts it dismissed Mr Rangitakatu. In doing so it therefore accepts it is required to justify the dismissal.

[24] Section 103A of the Employment Relations Act 2000 (the Act) states the question of whether a dismissal is justifiable:

... must be determined, on an objective basis, [by considering] 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 dismissal ... occurred.

[25] In applying the test the Authority must consider whether, having regard to the resources available to the employer, it sufficiently investigated the allegations.

[26] CBSL's resources are not, in my view, an issue given it was capable of both procuring, and using, legal advice during the process.

[27] Traditionally the objective review has been performed by considering the employer's actions from both substantive and procedural perspectives. While it is clear issues of substance and process overlap and there is no firm delineation, separation provides a useful means of analysis, especially as some of the requirements of s.103A have a procedural focus. Those requirements are, as a bare minimum, that the employer put its concerns, allow an opportunity to respond and consider the response.

[28] Mr Rangitakatu was dismissed for serious misconduct. The particular provision upon which CBSL relies when justifying the dismissal is 7.4.7, Workplace Bullying (refer [13] above).

[29] The evidence leaves doubts about whether the decision to dismiss is substantively justifiable. Conduct such as that alleged here must be considered in context and issues such as prevalence and the *acceptability* of what some may see as improper or inappropriate behaviour must be considered.

[30] In particular, and while I note Mr Rangitakatu accepts he swore during various interactions with Mr Cairney, the evidence is Mr Cairney responded with similar

behaviours. Mr Cairney accepts yelling and swearing in return, at least during the incident on March 6. He also accepts he made physical gestures with his fists and Mr Rangitakatu responded by retreating from the situation.

[31] Despite the fact Mr Rangitakatu raised Mr Cairney's behaviour when responding, there is little evidence Mr Ponder made adequate enquiries in respect to this. Indeed Mr Ponder accepts he disregarded the evidence of two witnesses who made statement that the events of both 5 and 6 March were, in essence, robust discussions between the two with both perhaps behaving inappropriately.

[32] There is then Mr Cairney's acceptance this is a factory environment where foul language is commonplace and that he has also *crossed the line* when dealing with staff. In other words Mr Rangitakatu's alleged behaviours were not inconsistent with local practice especially given the subject matter was work related.

[33] While Mr Cairney says he felt intimidated there is no evidence Mr Rangitakatu actually threatened him or exhibited a willingness to use physical aggression. In other words there must be serious doubts about the conclusion reached and whether or not Mr Rangitakatu's behaviour constituted serious misconduct.

[34] Turning to the process. Having considered the evidence I conclude the inquiry was deficient. CBSL failed to properly put its concerns and consider the response and it would appear the outcome was preordained.

[35] The initial investigation was flawed. It was much wider than the complaints before CBSL and many of the questions asked could have applied to the behaviour of any employee. Indeed Mr Ponder said, when answering questions, he decided not to identify the specific allegations as he did not want to draw attention to Mr Rangitakatu. That is a fraught approach as it could easily allow pertinent information to be missed.

[36] There is then the fact that not all employees spoken to during the investigation wanted their input disclosed to Mr Rangitakatu. Mr Ponder says he therefore discounted those statements but his answers during the investigation cast doubt on that assertion as do the transcripts which refer to comments from some of the unidentified interviewees.

[37] While Mr Ponder also claims the decision to dismiss was essentially attributable to Mr Rangitakatu's treatment of Mr Cairney, he also said *it was not just the three events* and he had to act in the staffs interests. One particular example to which he admitted was a view the fear exhibited by an administrative employee contributed to the decision but this was never raised with Mr Rangitakatu. A decision influenced by factors not put must, given the content of s.103A, be unjustified.

[38] There is then Mr Ponders admission he put considerable weight on Ms Parish's statement. That raises questions about the adequacy of the investigation and just how thoroughly Mr Ponder tested the information he was gathering as there was considerable inconsistency between Ms Parish's evidence and that of other witnesses including Mr Cairney. Her answers were also contradicted by witnesses who were present at various events but not questioned by Mr Ponder despite Mr Rangitakatu referring to their relevance. One example was Mr Anderson who gave evidence about the events of 20 February and another was Mrs Rangitakatu who was asked the general questions referred to in paragraph 36 but not questioned about specifics despite being present at two of the events. The failure to question possible witnesses despite an awareness of their potential relevance is not the act of an employer conducting a fair and reasonable inquiry.

[39] There is the fact a person subject to disciplinary action must be allowed to talk to the decision maker. While Mr Ponder says he was the decision maker, he also said the decision was ultimately that of the CBSL's owner. The owner took no overt part in the process and I am left wondering just who made the decision and whether Mr Rangitakatu was treated fairly in this regard.

[40] I also note Mr Acland's argument alternates to dismissal were not adequately canvassed. Here, and while Mr Cairney says in his brief he could not remain should Mr Rangitakatu return, he orally conceded that (a) he was not asked at the time and (b) he thought he could still work with Mr Rangitakatu provided the later addressed the way in which he communicated. This last concession must further undermine CBSL's conclusion these events were serious and warranted dismissal.

[41] Finally I conclude the lack of specificity in the questions asked of some witnesses, along with the selectivity in respect to who was questioned and about what, leads to a conclusion the outcome was preordained. That impression was enhanced by various answers Mr Ponder gave and his repeated references to guaranteeing the

safety of staff while not adequately identifying whether a threat actually existed and citing other considerations.

[42] Having weighed the evidence and for the above reasons I conclude CBSL has failed to discharge the onus it carries of justifying the decision to dismiss.

[43] Mr Rangitakatu also claims he was unjustifiably disadvantaged by the suspension and the fact it was predetermined.

[44] It is well established the requirements of s.103A apply to a decision to suspend (*Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178). In other words suspension must be preceded by advice it is being contemplated and an opportunity to argue against the proposal and the clause allowing suspension does not nullify the effect of this case law. Prior consultation must still occur.

[45] As already said the letter advising Mr Rangitakatu of his suspension also contains an invitation to comment on it. Mr Rangitakatu says he did not avail himself of this as he felt the invitation hollow and the decision unalterable.

[46] I agree. The transcript shows Mr Ponder advised Mr Rangitakatu he was to be *stood down* early in the discussion. Mr Ponder reiterated the fact of suspension later in the discussion and there is no evidence of consultation over its appropriateness. Furthermore Mr Ponder acknowledged, when questioned, that the decision had been made the previous evening and was not going to alter.

[47] Given that evidence I must conclude the decision to suspend is unjustifiable.

[48] For the above reasons I conclude Mr Rangitakatu has a personal grievance in that he was both unjustifiably dismissed and unjustifiably disadvantaged. That conclusion raises the question of remedies.

[49] Mr Rangitakatu seeks reinstatement, wages lost as a result of his unjustifiable dismissal and compensation for hurt and humiliation suffered as a result of his two grievances. He also seeks payment of a bonus he would have received but for the dismissal.

[50] Mr Rangitakatu's evidence suggests reinstatement is a remedy he truly seeks. Reinstatement is a remedy the Authority may provide if it is practicable and reasonable to do so (s.125 of the Act).

[51] CBSL concedes Mr Rangitakatu was a hard working employee who performed his tasks very well but it argues reinstatement is neither practical nor reasonable for other reasons. The lack of practicality lies in the fact the company did not replace Mr Rangitakatu but redistributed his tasks post dismissal. It says subsequent experience shows this arrangement works and that would mean Mr Rangitakatu may well face redundancy should he be reinstated. The argument reinstatement is not reasonable is based on an assertion neither CBSL nor its employees trust or have confidence in Mr Rangitakatu.

[52] The trust and confidence argument does not sway me. The only supporting evidence was a generalised comment by Mr Ponder that staff seemed happy and more relaxed and the argument was undermined by Mr Cairney's concession he could still work with Mr Rangitakatu. Similarly there are problems with the argument the job no longer exists. The evidence is the tasks previously performed by Mr Rangitakatu remain but are now performed by others. There was, however, no substantive evidence to support the assertion this works and would likely lead to a redundancy.

[53] I conclude, having considered the evidence and submissions on this claim, that reinstatement is both reasonable and practical. Mr Rangitakatu is to be reinstated into his previous position as of the date of this determination.

[54] Mr Rangitakatu also seeks wages lost as result of the dismissal.

[55] Mr Rangitakatu addressed his unemployment with alacrity and commenced in a replacement, albeit lower paid, role on 5 May. The loss to 5 May is \$4,807.70. That is payable. Mr Rangitakatu also seeks to recover the difference between his new earnings and what he would have got at CBSL for 20 weeks. The amount sought is \$2,455.80. Given Mr Rangitakatu has been reinstated I conclude it reasonable the claim be allowed in full. Had he remained (and that is the effect of reinstatement) he would have received this money.

[56] Similarly there is the bonus which the evidence suggests is, in reality, a regular quarterly payment. Mr Rangitakatu says he would have received \$2000 at the end of April, July and October. Again he has been reinstated and had he remained the evidence is he would undoubtedly have received these amounts. They are payable.

[57] Finally there is compensation for hurt and humiliation. While Mr Rangitakatu has been successful with both grievances his statement of problem sought a single

compensatory award of an unspecified amount. Via submission he asked for \$7,000 for the suspension and \$15,000 for the dismissal.

[58] The evidence Mr Rangitakatu gave in support of the claim was relatively brief and did not assign alleged injury to one or other of the grievances. For this last reason I shall consider a single holistic award. While brief, the evidence does support a conclusion Mr Rangitakatu was hurt and it was supported by the evidence of his wife. I must comment here on the talk of counselling for depression and advice I have placed little weight on this as there is no evidence linking the depression to the dismissal.

[59] Having considered the evidence and submissions I conclude an average award \$5,000 appropriate.

[60] The conclusion remedies accrue means I must, in accordance with the provisions of s.124 of the Act, address whether or not Mr Rangitakatu contributed to his dismissal in a significant way. While CBSL will undoubtedly have a different view my conclusions regarding their failure to substantively justify the dismissal must lead to a finding the answer is no, at least in the way envisaged by the Act. Similarly the procedural failures mean there is no evidence upon which a finding of contribution may safely be based.

Conclusion and Orders

[61] For the above reasons I conclude Mr Rangitakatu has a personal grievance as he was both unjustifiably dismissed and unjustifiably disadvantaged.

[62] As a result the following orders are made.

[63] The applicant, Jason Rangitakatu, is to be reinstated to his former position of Production Manager at Cloudy Bay Seafood Limited.

[64] Cloudy Bay Seafood Limited, is also to pay Mr Rangitakatu, the following:

- i. \$7,263.50 (seven thousand, two hundred and sixty three dollars and fifty cents) gross as recompense for wages lost as a result of the dismissal; and

- ii. A further \$6,000.00 (six thousand) gross as recompense of the bonus he would have received had he remained employed at CBSL; and
- iii. A further \$5,000.00 (five thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i) of the Act.

[65] Costs are reserved.

M B Loftus
Member of the Employment Relations Authority