

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Shri Ramlu Sidal (Applicant)
AND Chief of Defence Force (Respondent)
REPRESENTATIVES Ian Hard for Applicant
Nigel Lucie-Smith and Joanna Holden for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 21 November 2006
MEETING
DATE OF 1 December 2006
DETERMINATION

DETERMINATION OF THE AUTHORITY

Introduction

1. Mr Sidal claims that he was unjustifiably dismissed after in excess of 15 years good service as a storeman at the Trentham Army Camp. The Chief of Defence Force claims that Mr Sidal's dismissal was justified because of his arriving at work drunk and separately for his continuing pattern of insubordination, threatening and abusive behaviour toward, and false accusations against, his manager.

The Facts

2. The Authority can never be certain of what occurred in events that took place months or even years before. The job of the Authority is to ascertain the facts on the basis of the balance of probabilities, i.e. what is more likely to have occurred than not. In doing so, it takes account not only of oral evidence given before the Authority, but, equally importantly, documentary evidence of what occurred at the time, as well as the surrounding circumstances and what led to the events in question.

3. In coming to findings of credibility, I have preferred the evidence of Colonel Cunningham and Staff Sergeant David O'Carroll, the key decision-makers in relation to Mr Sidal's employment, over that of Mr Sidal, because their evidence was more consistent and it was more in accord with the preponderance of all other evidence before the Authority.
4. Mr Sidal had worked as a storeman in the Q Store at Trentham Army Camp for over 15 years. During that period, he had reported to a number of Staff Sergeants, who took charge of the stores area. It was only with the arrival in early 2005 of Staff Sergeant David O'Carroll that Mr Sidal began to have serious difficulties with his employer. That is not to say that Sergeant O'Carroll was responsible for these problems, but his more firm approach, coinciding as it did with a reduction in Mr Sidal's workload following an internal restructuring, and Mr Sidal suffering from depression, led to Mr Sidal lapsing into several unfortunate recurrences of unacceptable levels of drinking, resulting in unacceptable behaviour.
5. In particular, Mr Sidal was required to undertake additional duties to replace tasks lost as a result of the restructuring. It also led to a shift in the location of what he saw as his computer, and him being required to do more work in the public area, which Mr Sidal resented. He saw this as an example of Sergeant O'Carroll picking on him. I find that the changes made were a reasonable response open to the Defence Force in order to not only improve efficiencies in the store, but also to provide Mr Sidal with ongoing employment.
6. Mr Sidal complained about the shift causing him muscular-skeletal discomfort. Changes were made to accommodate this. Mr Sidal's ongoing concerns, however, led to an argument with Sergeant O'Carroll, with Mr Sidal taking steps to remove the computer to his own work station rather than the open counter. In spite of being told not to move the computer, Mr Sidal arranged for its shift and was subsequently given a warning for misconduct under the Code of Conduct, namely disregarding a lawful instruction and acting in an improper or inappropriate manner when performing his duties. Mr Sidal took no action to dispute this warning.

7. In late October, Mr Sidal attended a formal dinner at which it was alleged he became drunk and tried to restrain another staff member by grabbing her arm, bruising her in the process, after she had objected to Mr Sidal taking her picture. These allegations were denied by Mr Sidal. It was further alleged that when approached by Sergeant O'Carroll and told to quieten down, he abused Sergeant O'Carroll and refused to become quiet. Mr Sidal's response was that he argued with Sergeant O'Carroll because of the problems he was having with him.
8. It was also alleged that, at the same event, he threatened Sergeant O'Carroll that as a union delegate he had the power to have him sacked and that he should look out. Mr Sidal's response to this allegation was that it resulted from Sergeant O'Carroll's treatment of him. It was then alleged that Mr Sidal was instructed by Captain Dean Rennie to behave better and that he ignored that direction. Mr Sidal apologised for his behaviour in this regard.
9. Another allegation raised was that he was 15 minutes late to work one day and did not turn up for work at all on the day following the formal dinner, without authorisation and without contacting stores to give any reason.
10. In relation to the latter absence, Mr Sidal stated that he had rung in. He also stated that he recognised that he had a drinking problem and issues with depression and anger and had sought assistance from the Padre. During the investigation process he also advised that he wished to apologise to the staff member and Sergeant O'Carroll.
11. In determining that Mr Sidal should on this occasion be issued with a final warning, Commander Stitt found against Mr Sidal on all issues, noting that he was satisfied that Mr Sidal had been treated in a fair and reasonable manner by Sergeant O'Carroll. He also advised Mr Sidal that if he had any more concerns about Sergeant O'Carroll he was to take them directly to Captain Rennie. The warning was issued for 12 months and specifically covered two areas of serious misconduct and three areas of misconduct under the Code.
12. Mr Sidal was told that he had to demonstrate, during the term of the warning, that he was a responsible employee who could be trusted to behave accordingly, otherwise dismissal could result. He was also required to pursue assistance in relation to his

problems with alcohol and anger management. Mr Sidal took no action to dispute this warning either.

13. Like many state sector employers, the Defence Force operates a system that on the last working day of the year employees are only required to work half a day and are then released on pay for the rest of the day. Any worker who takes the whole day off, however, has to take a full day's leave. I am satisfied that this practice was well understood by Mr Sidal.
14. Mr Sidal went out drinking at a family function on 22 December 2005. He turned up to work on the last day, being 23 December, at 7.30am, half an hour in advance of his start time. A number of other stores staff were concerned that Mr Sidal was still drunk. He was dressed in clothes unsuitable for the workplace in that he did not have his safety boots on. Mr Sidal's supervisor, Mr Eddie Joe, approached him to ascertain whether he was, in Mr Joe's opinion, in fact drunk. On quickly concluding that he was, Mr Joe advised him that he would have to take the day on leave. Mr Joe therefore attempted to help Mr Sidal to get a leave application form filled out and to arrange for Mr Sidal to be taken home, before anyone of a more senior level, in particular Sergeant O'Carroll, saw him.
15. Unfortunately, while Mr Joe was trying to arrange for the leave application form to be filled out, Mr Sidal wandered off and came across Sergeant O'Carroll. He told Sergeant O'Carroll that he was still drunk and would like to go home and claim a half day's leave. Sergeant O'Carroll told him that he could apply for leave, but that he was in breach of his agreement by coming to work drunk. He also told Mr Sidal the matter would have to be taken further.
16. Mr Sidal then followed Sergeant O'Carroll to his office and told him that he was a PSA delegate and he could have Sergeant O'Carroll fired, and further that he had been around longer than Sergeant O'Carroll and could make things difficult for him.
17. Mr Sidal wanted to know why he would have to explain things next year. Sergeant O'Carroll explained to him that it was a breach of the Code of Conduct to be at work drunk, which he had admitted to. This latter conversation took place in heated tones

and as a result a number of staff attended Sergeant O'Carroll's office and ensured that Mr Sidal left Sergeant O'Carroll's office. Mr Sidal was then taken home.

18. Sergeant O'Carroll took the matter up with Captain Rennie, his commanding officer. On Sergeant O'Carroll's recommendation, Captain Rennie approved half a day's leave for Mr Sidal, as it was agreed that it was appropriate for him to have been sent home. At the same time, it was agreed that Mr Sidal's behaviour was serious and warranted a disciplinary investigation. A letter from Major Bill Collins was accordingly sent to Mr Sidal that day about him arriving at work in a state of self-confessed drunkenness. This was said to be serious misconduct in accordance with s.40(a) of the Code, namely being drunk and/or becoming violent at work. The letter informed Mr Sidal that this was considered extremely serious, particularly given that he was currently subject to a final warning for serious misconduct as a result of his self-confessed problems with alcohol.
19. A full investigation was then conducted by the Army, resulting in a report by Captain Rick Anderson. This included the interview of 10 witnesses, six of whom (plus Mr Sidal) were present when Mr Sidal arrived at work on 23 December. Further investigations were also made into complaints raised with the Defence Force by Mr Sidal about Sergeant O'Carroll's treatment of him. The whole disciplinary process, which also involved two disciplinary meetings with Mr Sidal, took place between 17 January and 27 March 2006. During the course of this investigation, Mr Sidal continued in employment, albeit that he was extremely unwell for much of the period and thus had to take sick leave.
20. Quite properly, no dispute has been taken with the process of investigation by the Defence Force, but rather the conclusions that Colonel Peter Cunningham, the Trentham Superior Commander, drew from his investigation.
21. During the investigation, Mr Sidal made a number of serious allegations about Sergeant O'Carroll's treatment of him and in particular about racist comments he was alleged to have made. No evidence other than that of Mr Sidal was provided in support of these allegations. Because of the seriousness of the allegations, the lack of

evidence in support of them and my preference of Sergeant O'Carroll's evidence over that Mr Sidal, I do not accept that these events occurred as Mr Sidal alleges.

22. In his letter of dismissal, Colonel Cunningham sets out the process of investigation, including the additional inquiries he made, and makes the following findings:

"... I consider that on the balance of probabilities you breached clause 40(a) of the NZDF Civil Staff Code of Conduct by arriving at work on 23 December 2005 while drunk. I consider the evidence presented by those individuals who witnessed your state on the morning of 23 December 2005 to be compelling. Conversely, I do not accept that you arrived at work with the intention of taking leave and consider that your version of events lacks credibility. ...

I therefore have concluded that your conduct in arriving at work drunk on 23 December 2005 constitutes serious misconduct and that the repetition of this behaviour has seriously undermined your working relationship with NZDF beyond repair.

...Separately, I find your sustained accusations of bullying, racism, unfair and unequal treatment against SSgt O'Carroll to be unacceptable. You were advised of the substance of this behaviour in my letter of 16 March 2006 and you had the opportunity to comment on it at our meeting of 23 March 2006.

I consider that your conduct towards SSGT O'Carroll on 23 December 2005, in spite of the terms of the first and final warnings for similar behaviour given to you in August and November 2005 and your evident lack of integrity in terms of your continuing pattern of insubordination, threatening and abusive behaviour towards and false allegations against your manager to have destroyed the relationship of trust and confidence that must exist in the employer/employee relationship.

Decision

Therefore, acting under delegated authority and in accordance with the NZDF disciplinary procedures, I have determined that your employment will be terminated. I therefore formally advise you that you are summarily dismissed from your employment with NZDF for arriving at work while drunk on 23 December 2005 and, separately, for your continuing pattern of insubordination, threatening and abusive behaviour towards and false accusations against your manager."

23. Mr Sidal raised a grievance against his dismissal and claimed reinstatement. His personal grievance has not been resolved, despite mediation and the best efforts of the parties' representatives in the course of the investigation. It therefore falls to the Authority to make a determination.

Determination

24. I must determine, on an objective basis, whether this dismissal was justifiable by considering whether the Defence Force's actions and how the Defence Force acted

was what a fair and reasonable employer would have done in all the circumstances at the time Mr Sidal was dismissed. This can only be assessed on the balance of probabilities, given that there are a multitude of possible options an employer might utilise in any given disciplinary situation. Thus I must assess what a fair and reasonable employer would most likely do in all the circumstances. In doing so, one looks both at the process of dismissal to ensure that it was fair and also the reason for the dismissal to ensure that too was fair.

25. The procedure adopted by the Defence Force was quite rightly not in issue in this case, because of the exhaustive nature of the investigation. In this regard it was quite clear, because of the preponderance of the evidence, that a fair and reasonable employer would have concluded that Mr Sidal was, as indicated by the Code of Conduct, drunk while at work. While Mr Sidal may not have ever been on duty, he was, it was agreed, at work.
26. Given that a fair and reasonable employer would likely conclude on the basis of six eye witnesses that Mr Sidal was drunk while at work, I find that this was a conclusion a fair and reasonable employer would have reached in all the circumstances. I do not accept that it was incumbent on the Defence Force to be completely satisfied that Mr Sidal was drunk by getting an evidential breath test or blood test done. What Colonel Cunningham was required to do, in fact, was to conduct a sufficiently thorough investigation so that he could safely conclude that Mr Sidal was more likely than not to be drunk, which he did. In any event, the Defence Force could not compel Mr Sidal to undergo an evidential breath or blood alcohol test.
27. I also accept that Colonel Cunningham's decision to reject Mr Sidal's later explanation that he had always intended to attend work only to apply for leave and not to commence his duties was one a fair and reasonable employer would likely make. In this regard, Colonel Cunningham took account of the fact that Mr Sidal never told anyone so at the time, despite several opportunities to do so, until well after Mr Joe had told him that that was what was going to happen. Furthermore, Mr Sidal could have chosen to apply for annual leave earlier, as was generally accepted practice, and need not even have attended work had he not wanted to work that day. Colonel Cunningham also properly took into account the fact that, by attending work, Mr Sidal

could have left after a few hours and had an extra half day's leave without it being deducted from his leave balance. These factors appropriately overshadowed, in Colonel Cunningham's mind, the fact that Mr Sidal was not in the habit of attending work without his safety boots.

28. I also reject the argument made on Mr Sidal's behalf that for serious misconduct to apply under clause 40(a) a worker must be both drunk and violent. In a code of conduct context the intended meaning of the words "*drunk and/or become violent*" is clear. The intended meaning is that whether a person is drunk, or violent, or if the person is both drunk and violent, that person will have committed serious misconduct exposing him or her to the possibility of summary dismissal. In any event, clause 40(a) is only one of a non-exhaustive list of behaviours that may warrant summary dismissal, given as examples only. The Defence Force's conclusions about Mr Sidal's behaviour meant that serious misconduct, in terms of the intent of the Code, had been clearly established.
29. Finally, I do not accept that the Defence Force was in effect estopped from taking disciplinary action over Mr Sidal's alleged drunkenness at work because it allowed him to take a day's leave rather than suspending him on pay. In all the circumstances it would probably have been more appropriate for Mr Sidal to be suspended, although that may in fact have led to more difficulties in the workplace at the time. In any event, the way that the Defence Force dealt with Mr Sidal's attendance issues on the day did not mean that it condoned his behaviour, because at worst it was only a mis-categorisation of his work status for the day, which could be later remedied by crediting him with any additional leave owed, for example.
30. The most important point here, however, is that at almost exactly the same time as leave was granted, Mr Sidal was informed that disciplinary proceedings would take place. Furthermore, Mr Sidal he had already been told that the matter would be taken further. There was thus no condonation by the Defence Force and no prejudice resulted to Mr Sidal accordingly.
31. A separate reason, i.e. one standing on its own merits, for Mr Sidal's summary dismissal was a continuing pattern of insubordination, threatening and abusive

behaviour towards and false accusations against Sergeant O'Carroll. I find that this was a conclusion that a fair and reasonable employer would likely have reached in all the circumstances. Given Mr Sidal's denial over the issue of him being drunk, despite the overwhelming weight of evidence, it naturally follows that Colonel Cunningham was more likely to believe Sergeant O'Carroll in relation to the incident in the office than Mr Sidal. This was particularly so when Colonel Cunningham was told by other staff that they heard heated voices coming from Sergeant O'Carroll's office, with most if not all of the yelling being done by Mr Sidal.

32. This is not to say that such behaviour might necessarily justify summary dismissal on its own. By contrast, the finding over drunkenness did justify summary dismissal on its own. In the case of the abuse of Sergeant O'Carroll, the Defence Force relied on previous incidents which had resulted in Mr Sidal being issued a final warning. In these circumstances, I find that it would have been more appropriate for Mr Sidal to have been dismissed on notice, i.e. given one month's pay. However, given that Mr Sidal's dismissal has already been justified on the grounds of being drunk at work, this factor is of no relevance (*Zendel Consumer Products Ltd v Henderson* [1992] 2 ERNZ 377 applied).
33. I therefore dismiss Mr Sidal's claim that he was unjustifiably dismissed.
34. In these circumstances, given a finding of serious misconduct, together with repeated misconduct, I find that a fair and reasonable employer would most likely have decided to dismiss Mr Sidal, despite his sustained period of good service of over 15 years. This is because it was clear that at the relevant point in time the Defence Force justifiably considered that could no longer have trust and confidence in Mr Sidal as an employee.

Costs

35. Costs are reserved.

G J Wood
Member of Employment Relations Authority