

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 92
5287792

BETWEEN ANDREW STRINGER
 Applicant

AND SOUTH PACIFIC MEATS
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Sarah McKenzie, Counsel for Applicant
 Graeme Malone, Counsel for Respondent

Investigation Meeting: 6 May 2011 at Invercargill

Further Information: 8 May 2011 from Respondent

Submissions received: 18 May 2011 from Applicant
 2 June 2011 from Respondent

Determination: 23 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Andrew Stringer worked fulltime as a fitter at South Pacific Meats Limited (SPM) from July 2006 until he was dismissed on notice on 17 July 2009 following an incident between him and his supervisor (Murray Warhurst). Mr Stringer says that he was unjustifiably dismissed in a procedurally unfair manner and without substantive justification. His statement of problem to that effect was lodged with the Authority in November 2010 even though the dismissal occurred in July 2009.

[2] Against a background of a personality conflict between Mr Stringer and Mr Warhurst, there was an earlier incident in January 2009 which resulted in Mr Stringer receiving a final written warning. Mr Stringer challenges some of the facts relied on

by SPM for the warning. With respect to the dismissal, Mr Stringer says that there were several defects in SPM's investigation making it unfair. Mr Stringer also points to a number of circumstances to support his contention that a fair and reasonable employer would not have dismissed him.

[3] SPM says that Mr Stringer was justifiably dismissed on notice after it fully and fairly investigated the July incident. It also says that it properly investigated the January incident, concluded that it should issue Mr Stringer with a final written warning and advised him at the time that he was entitled to challenge it by way of personal grievance but Mr Stringer took no further action until after his dismissal.

[4] To resolve these issues I will first outline the January incident before determining Mr Stringer's concerns about the facts relied on by SPM. Next, I will explain the nature of the July incident before detailing SPM's investigation. That will include consideration of the procedural issues raised by Mr Stringer. I must apply the legal test for justification by considering whether SPM's actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[5] There is a preliminary matter that it is convenient to address first.

Preliminary matter

[6] Mr Stringer sought to widen the scope of the proceedings at the time his statements of evidence were lodged in April 2011 shortly before the investigation meeting. He did this by expressing his belief that SPM acted in an unfair manner towards him by bullying him and abusing him, all unjustified actions causing him disadvantage.

[7] To the extent that this represents an attempt to raise a personal grievance out of time I decline to accept it. The grievance that was raised in time concerns Mr Stringer's dismissal. He did not raise any grievance about the January incident described below and he is now too late to do so without leave. There is no application for leave.

The January 2009 incident

[8] It is sufficient to summarise what happened between Mr Stringer and Mr Warhurst on 21 January 2009. There was a tense exchange between the two men that escalated to the point where they confronted one another with their noses touching. On investigation SPM found Mr Stringer's conduct to be threatening and intimidating. There ensued a physical altercation. Mr Stringer alleged that Mr Warhurst hit him on the chin with his left hand. Mr Warhurst claimed that he stepped back and his arm came into contact with Mr Stringer partly as a result of losing balance. SPM concluded that Mr Warhurst's account was more logical in light of the immediately preceding situation.

[9] SPM investigated the incident by speaking to others who might have seen the incident as well as the two protagonists. It was decided to issue a warning to Mr Warhurst and a final written warning to Mr Stringer. It is worth quoting parts of the final written warning:

Further more, you created the situation by presenting yourself in the threatening and intimidating manner described above. This type of behaviour is unacceptable and would normally warrant dismissal.

As a result of your work record and in an endeavour to assist you to with improving the relationship with your Supervisor, you are being issued with this Final Written Warning in place of dismissal for this event. Any further repetition of this unacceptable behaviour will result in the termination of your employment from SPM. Andrew, you have made it very clear over the last few months that you do not want to work with or for your Supervisor, and there is obviously a personality conflict between the two of you.

...

There is a building history of dissention towards your supervisor, and you need to address this situation and work on improvement.

I have endeavoured to work with you to resolve the personality conflict, however it has now reached a point where significant changes need to occur if you are to retain your job at SPM. ...I strongly urge you to seek independent advice on this matter and possibly some professional assistance to effect change.

[10] Wiremu Maere works at SPM. He provided a statement of evidence but did not appear at the investigation meeting. His statement is that he witnessed Mr Warhurst move forward so as to get into Mr Stringer's face. He also says that Mr Warhurst was yelling at Mr Stringer and was intimidating in his tone and approach and that Mr Stringer yelled but only in retaliation. When it investigated the January incident, SPM spoke to Mr Maere but he did not say that he had witnessed Mr Warhurst move forward into Mr Stringer's face. In fact he said that he witnessed:

reasonable questioning from a Supervisor, although also noted that voices were raised and were not conducive to effective problem solving.

[11] Mr Stringer's sworn evidence is that the physical altercation occurred shortly after Mr Maere had left. That reflects the allegation in his statement of problem. There is no reason to doubt that evidence as to timing which means that Mr Maere's statement of evidence, even if true, takes matters no further for Mr Stringer than did his statement at the time of SPM's investigation.

[12] While Mr Stringer refused to acknowledge receipt of the January warning I am satisfied that he was clearly warned that any repetition of such unacceptable behaviour would result in the termination of his employment. Mr Stringer was also advised of his right to pursue a personal grievance claim if dissatisfied with the final warning but he elected not to.

[13] The shift patterns meant that Mr Stringer had little or no contact with Mr Warhurst for some months following the final warning.

The July 2009 incident

[14] On 10 July 2009 Mr Stringer was in the back workshop cutting some flat bar and he used the side of the cut off wheel on the drop saw to take the burr off. There is evidence that this practice was used by others as there was no finishing belt on site and no grinder in the workshop. Mr Warhurst observed this and intervened.

[15] There are some disputes between the two men about what happened next. Mr Stringer's evidence is that Mr Warhurst tapped him on the shoulder while he was still using the drop saw, that there was an exchange during which he acknowledged it was unsafe to use the drop saw in that manner and said *I can not do anything right in your eyes Murray*, that Mr Warhurst agreed and after a few more words were exchanged he walked off saying *I cannot do anything fucking right*. Mr Warhurst version is that he tapped Mr Stringer on the shoulder once he had finished using the cutoff wheel and told him that it was unsafe. Mr Stringer started to walk away before Mr Warhurst had finished so he called Mr Stringer back. Mr Stringer returned saying he was sick of Mr Warhurst telling him what to *fucken do every fucken time he is doing something*

wrong and he walked away again flapping his arms and saying he was sick of it. Mr Warhurst said that Mr Stringer's attitude was *belligerent and angry* towards him.

[16] Mr Stringer was asked by the engineering manager (Mr Brett) to write a note of the incident which he did. His evidence in response to a question was that he also presumed that Mr Brett had asked Mr Warhurst to write a note about the incident. There was some history of such matters being documented so there is no reason to doubt that evidence. The summary above is based on the respective notes.

[17] Also on 10 July Mr Stringer was given a letter informing him that the altercation with Mr Warhurst would be fully investigated, that he had to attend a meeting on 13 July, that he was entitled to bring a support person and that the matter was serious and could result in disciplinary action.

SPM's investigation

[18] Mr Stringer's evidence is that the following meeting came about through his note mentioned above and that he thought it would be a meeting about his complaint. I do not accept this evidence. SPM's 10 July 2009 letter made the purpose of the meeting explicit.

[19] Present at the meeting on 13 July were Mr Stringer, his support person (Pat Barnes, a work colleague), SPM's engineering manger (Corey Brett) and SPM's plant manager (Malcolm Hampton). Mr Hampton told Mr Stringer that that the meeting was about the incident on 10 July where he had apparently sworn at Mr Warhurst and acted inappropriately. They wanted to get his side of the story. Mr Hampton's evidence, which I accept, is that it was made clear to Mr Stringer that it was a disciplinary matter and if it was found against him he might be dismissed. Mr Stringer started by mentioning his recent request to stay on night shift and several recent exchanges with Mr Warhurst. He then gave his account of the incident from Friday, as summarised above. Mr Stringer was told that SPM would speak to Mr Warhurst and to Tom (another employee who was present) before meeting again with Mr Stringer next day.

[20] Both Mr Brett and Mr Hampton made notes of their discussion with Tom. Tom confirmed that Mr Warhurst called Mr Stringer back, that Mr Stringer said *Everything I do is wrong* and that Mr Warhurst agreed. Mr Hampton's notes record Tom saying *Raised voices by Andrew Heard Andrew say fucking time" etc ...Not very pleasant to be around* while Mr Brett's notes record Tom saying that both men had raised voices.

[21] Next, Mr Brett and Mr Hampton met with Mr Warhurst who confirmed his original account which is summarised above.

[22] There was a second meeting with Mr Stringer on 16 July involving the same participants as the earlier meeting. Mr Hampton recapped on the purpose of the meeting. He read out the statements that had been made by Mr Stringer and Mr Warhurst and he referred to notes made by him during the investigation to that point. Mr Stringer and Mr Barnes spoke about some earlier incidents between them and Mr Warhurst. I reject Mr Stringer's evidence to the contrary. Mr Stringer said he felt like he could not do anything right and that while he no longer enjoyed working at the plant he did not want to lose his job because there were no other jobs out there and he had three children and a mortgage. He also said that there was not enough assistance and that they sometimes had to do dodgy stuff to keep things going. Mr Stringer accepted that he had lost the plot with Mr Warhurst but said that was because he was sick of Mr Warhurst picking on him. The meeting ended with Mr Hampton to consider what action to take.

[23] Later on 16 July Mr Hampton received a letter signed by trades staff (including Mr Stringer) setting out complaints about Mr Warhurst's conduct towards them. Mr Warhurst was accused of intimidation, use of abusive language, a confrontational approach and similar conduct. The letter asked for this conduct to stop. Wayne Bell, the electrician, organised the letter.

[24] Mr Stringer, Mr Barnes, Mr Brett and Mr Hampton met again on 17 July. Mr Hampton said that he had received the letter dated 16 July from Mr Stringer and others which he had considered along with the matters discussed during the disciplinary process. Mr Hampton referred to Mr Stringer's intimidating behaviour and manner in dealing with Mr Warhurst, the previous final warning, Mr Stringer's

use of language. Mr Hampton explained that the abusive language itself was not the issue but the overall context of Mr Stringer's relationship with Mr Warhurst. Given that and the final warning, Mr Hampton said that he had decided to terminate Mr Stringer's employment on 4 weeks notice. Mr Stringer and Mr Barnes objected to Mr Stringer having to work out the notice period and Mr Hampton said that SPM would pay him in lieu. The meeting ended.

[25] Mr Stringer last worked on 17 July but was paid until 15 August 2009.

Justification

[26] Whether the decision to dismiss Mr Stringer was justifiable must be determined on an objective basis by considering whether SPM's actions and how SPM acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[27] A fair and reasonable employer would give an employee at risk of dismissal access to relevant information and an opportunity to comment on that information prior to making any decision. There is a submission that SPM failed to give Mr Stringer access to relevant information. Mr Warhurst's notes of the incident, Mr Hampton's notes of his discussions with Mr Warhursts and Tom and Mr Brett's notes of the same discussions were not provided to Mr Stringer until his solicitor requested relevant file material after the dismissal. There is also a submission that SPM did not give Mr Stringer the detailed allegations in writing prior to the first meeting on 13 July.

[28] I reject the submission that there was some unfairness arising from Mr Stringer not having specific allegations in writing prior to the first meeting. Prior to the meeting, Mr Stringer knew that he would be asked for his account of the exchange with Mr Warhurst. He had already given Mr Brett a note detailing that exchange. The 10 July letter referred to *the altercation that occurred between yourself and Murray regarding misuse of the drop saw* and stated *The altercations are serious and may result in disciplinary action if you are found in the wrong.* At the outset of the 13 July meeting Mr Hampton said that the meeting was about *the incident that had occurred on 13 July ...where [Mr Stringer] had apparently sworn at Murray and*

acted inappropriately ... All that meant that Mr Stringer knew from the outset that he was being accused of responsibility for an altercation where he swore and acted inappropriately. Mr Stringer specifically denied any inappropriate conduct and said that he just walked away. During the second meeting Mr Hampton read out Mr Warhurst's written account and referred to the notes of his meetings with both Mr Warhurst and Tom. In hindsight, it would have been better for Mr Hampton to give Mr Stringer a copy of that material. Alternatively, Mr Stringer could have requested the material. However, the required standard is that of substantial fairness: see *NZ (with exceptions) Food Processing etc IUOW v. Unilever New Zealand Ltd* [1990] 1 NZILR 35. The information relied on by Mr Hampton for his conclusion that Mr Stringer had sworn at and acted in an intimidating manner towards Mr Warhurst was put to Mr Stringer in a fair manner for his comment before any decision was made. Mr Stringer actually agreed in the end that he had *lost the plot* but he blamed Mr Warhurst for that.

[29] There is a submission that the decision to dismiss Mr Stringer was predetermined. The evidence relied on is part of a letter dated 24 January 2009 to Mr Warhurst from SPM warning him following the January incident and telling him ... *a Final Written Warning has been issued to Andrew for this event. Any further repetition of this unacceptable behaviour will result in the termination of Andrew's employment from SPM.* There is a similar message in the warning letter sent to Mr Stringer as well. I am referred to *Gyenge v Clifford Lamar Limited* [2011] NZEmpC 1 and particularly a passage from paragraph [68]. It is helpful to cite a little more of the passage:

It was clear from the evidence that Emma's frustrations had arisen out of Candice's failure or inability to provide her with proper training. Mr Harris never gave Emma the opportunity, however, to explain any of this before he escorted her into his office and handed her the warning letter. His decision had been predetermined. He was not interested in listening ...

[30] Reading this part of the judgment that immediately precedes the passage cited to me shows how different the present case is. Mr Stringer was not *escorted into [the] office*, he was called to meetings with some notice. He was not *handed ...the [dismissal] letter*, he was given an opportunity to explain in several meetings before the decision was made. Overall the evidence indicates that Mr Stringer was given an opportunity to explain, his explanation was considered but ultimately it was rejected.

In the face of that evidence I am not prepared to accept that a sentence from a warning letter written some months earlier is sufficient to establish predetermination. If that was so, most final written warning letters would give rise to proven predetermination.

[31] There is a submission that SPM failed to take into account all the relevant information before deciding to dismiss Mr Stringer. The submission is that SPM did not take account of the 16 July letter from the trades staff making allegations against Mr Warhurst.

[32] In response to the Authority's questions Mr Hampton said that he looked at the 16 July letter, considered it but thought it was the trades staff collaborating so he did not feel it had overall significance in his decision about Mr Stringer. Mr Stringer was also questioned by counsel on this point. He said that a lot of the issues in the staff letter had been raised previously especially by Mr Stringer and Mr Bell. He also said that he considered the letter to be the result of collusion between the trades staff. Mr Hampton agreed that he had to consider whether the behaviour of Mr Warhurst provoked the situation but Mr Warhurst was adamant that he had approached Mr Stringer appropriately. This evidence indicates and I find that Mr Hampton did take account of the 16 July letter but satisfied himself that Mr Warhurst had properly conducted himself during the 10 July incident. Accordingly I reject counsel's submissions.

[33] There are a number of circumstances mentioned by counsel in support of the submission that a fair and reasonable employer would not have dismissed Mr Stringer. It is correct that Mr Stringer had raised issues over his difficulties in working under Mr Warhurst from November 2008 onwards. He proposed that he report to the engineering manager (Mr Brett) rather than to the engineering supervisor (Mr Warhurst). The point is mentioned in a letter dated 11 November 2008 from Mr Hampton to Mr Stringer as follows:

For effective control of the day to day engineering functions, it is necessary that you report to the Engineering Supervisor, and not the Engineering Manager as you have requested. Despite there being some tension in your working relationship, both parties need to work together to achieve a satisfactory working relationship that is sustainable.

[34] For proper business reasons SPM rejected Mr Stringer's request about changing his supervisor and explained to him the need to achieve a satisfactory working relationship with Mr Warhurst. SPM's actions were those of a fair and reasonable employer with regard to this matter.

[35] About a month before the July incident Mr Stringer asked to remain on night shift where he had little or no contact with Mr Warhurst rather than rotate back to day shift in accordance with the standard seasonal adjustment to shift patterns. However I accept that SPM acted fairly and reasonably in setting Mr Stringer's working hours in accordance with its production requirements. As a result, Mr Stringer had to maintain his working relationship with Mr Warhurst, a situation that would have continued for some time but for the dismissal.

[36] There is a point made about the absence of any incidents between the two men between January and July 2009 and the occurrence of the July incident only two weeks after Mr Stringer recommenced day shift work. Mr Hampton's view about this was that Mr Stringer's attitude to working under Mr Warhurst remained the same despite the final written warning so that Mr Stringer was unable to work under Mr Warhurst's supervision henceforth. Any fair and reasonable employer would have come to that view.

[37] There is a submission that Mr Warhurst was picking on Mr Stringer and I am referred to evidence to the effect that other staff used the drop saw in the way that Mr Warhurst pulled Mr Stringer up for without themselves being chastised. There is also evidence to the effect that SPM has a lax attitude to safety issues. There are some difficulties with the submission. First, there is no evidence that Mr Warhurst deliberately turned a blind eye to the practice on these other occasions. Secondly, the real point is about how Mr Stringer reacted to what on its face was an entirely proper communication about an unsafe work practice. Any fair and reasonable employer would have raised the safety concern and then would have taken issue with Mr Stringer for the way he reacted in the circumstances.

[38] There is a submission that SPM had done nothing to address the problems with how Mr Warhurst communicated with staff. That is not a fair reflection of the evidence. I have already mentioned that Mr Warhurst received a formal warning for

his actions that contributed to the January incident. The warning included instructions to him about how to handle any future difficult workplace situation. There is also evidence that Mr Brett convened meetings with trades staff to improve communication. The submission is also predicated on the view that Mr Warhurst was to blame for how Mr Stringer reacted. However, there is a substantial amount of evidence to establish that the essence of the problem was Mr Stringer's opinion of Mr Warhurst. There is no evidence that any other person reacted to Mr Warhurst in the same aggressive manner. Mr Hampton had a number of discussions with Mr Stringer in an effort to have him change the way he responded when given instructions by Mr Warhurst. In addition the final warning included a clear message about Mr Hampton's perception of the root cause of the problem and what Mr Stringer needed to do to remedy things. In all this I accept that SPM took the steps that would have been taken by a fair and reasonable employer to address the problem in the relationship between Mr Stringer and Mr Warhurst.

[39] I should finally say a little more about the relevance of the final written warning. In January 2009 after giving Mr Stringer an opportunity to explain, Mr Hampton formed the view that Mr Stringer had behaved in a threatening and intimidating manner towards Mr Warhurst. I accept that any fair and reasonable employer would have reached the same view. Mr Hampton decided to give Mr Stringer a final written warning rather than dismissing him despite circumstances being such as to justify a dismissal. There was nothing unfair or unreasonable about that decision. The incident in July 2009 was no doubt less serious but as Mr Stringer acknowledged at the time, his actions were unsafe and he *lost the plot* in response to Mr Warhurst's intervention. In these circumstances, any fair and reasonable employer would have dismissed the employee on notice which is what Mr Hampton did.

[40] Accordingly I find that the dismissal was justified.

Conclusion

[41] Mr Stringer does not have a sustainable personal grievance against SPM.

[42] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

Philip Cheyne
Member of the Employment Relations Authority