

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2016] NZERA Auckland 147
5553787

BETWEEN FALEULU SUFIA
 Applicant

A N D LINCOLN ROAD FOOD
 WAREHOUSE LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Ina Sufia, Representative for Applicant
 Emma Butcher, Counsel for Respondent

Investigation Meeting: 13 May 2016 at Auckland

Oral Determination: 13 May 2016

Written Record Issued: 17 May 2016

ORAL DETERMINATION OF THE AUTHORITY

- A. The respondent’s decision to dismiss the applicant was justified.**
- B. Accordingly, the applicant has no employment relationship problem.**
- C. Costs are reserved.**

Employment relationship problem

[1] The applicant, Mr Faleulu Sufia, was employed by the respondent, Lincoln Road Food Warehouse Limited in Henderson t/a Pak’n’Save (Pak’n’Save) from 16 March 2009 until his dismissal on 23 December 2014.

[2] Mr Sufia was employed as a trolley returner and was dismissed by the director of Pak'n'Save, Mr Glenn Cotterill, on 23 December 2014. Mr Cotterill purchased Pak'n'Save in September 2013. Pak'n'Save says Mr Sufia was dismissed for failing to work at a required work rate despite repeated instructions to do so. Mr Sufia disputes his dismissal was justified and says Pak'n'Save discriminated against him and singled him out for disciplinary action.

[3] Mr Sufia seeks remedies including reinstatement to his former role, lost wages and compensation for hurt and humiliation. He says he suffered as a result of the unjustified dismissal.

[4] The parties attempted to resolve the issues between themselves by way of mediation but this was not successful. Mediation was attempted again on the morning of the investigation meeting but was not successful.

The investigation meeting

[5] The investigation meeting took almost one full day. Mr Sufia provided an email detailing why he believed he was unjustifiably dismissed. Mr Cotterill provided the Authority with his witness statement. Mr Sufia and Mr Cotterill both confirmed under oath that their evidence was true and correct.

[6] Mr Sufia and Mr Cotterill had the opportunity to provide any additional comments and did so.

[7] The evidence from Mr Sufia was on the scarce side. The Authority was provided with a 1½ page statement which was his witness statement and the other information was contained in the statement of problem.

[8] To assist the Authority, an interpreter proficient in the Samoan language attended the investigation meeting.

[9] As allowed under s.174 of the Employment Relations Act 2000 (the Act), this determination does not set out all of the evidence. Relevant facts and legal issues are set out along with the Authority's conclusions.

The Issues

[10] The issues for determination are:

- (a) Was Mr Sufia's dismissal unjustified?
- (b) If it was unjustified, what remedies is Mr Sufia entitled to?
- (c) Did Mr Sufia's actions contribute towards the situation that gave rise to his alleged unjustified dismissal?

First Issue:

Was Mr Sufia's dismissal unjustified?

[11] Mr Sufia was employed as a trolley returner by Pak'n'Save from 16 March 2009. The terms and conditions of Mr Sufia's employment were contained in an individual employment agreement dated 13 March 2009. Mr Sufia signed the employment agreement on 13 March 2009 and a representative from Pak'n'Save signed the agreement on 16 March 2009.

[12] There were business rules/agreements attached to the employment agreement. The rules include a description of behaviours which could amount to conduct for which disciplinary action may be taken.

[13] Clause 18 of the house rules state:

Causes for disciplinary action

The following offences are considered misconduct which may lead to the issuing of a written warning. In normal circumstances two written warnings will be given before dismissal. The warnings need not necessarily involve the same offence.

- (e) *Failure to achieve an acceptable quality of rate of work.*
- (h) *Being responsible for bringing the store into disrepute by any words, actions, or demeanour.*
- (i) *Disruptive behaviour, talking or preventing in any way, other employees from performing their duties.*

[14] Clause 19 states:

Causes for instant dismissal

Any occurrence of serious misconduct leaves an employee liable to instant dismissal. Although not comprehensive the following is a list of examples of behaviour which could result in an employee being instantly dismissed:

- (h) *Unreasonable refusal to carry out tasks assigned or walking off the job.*
- (p) *The use of aggressive intimidating or offensive language.*
- (x) *Any other offence that the employer may deem to be serious misconduct.*

Complaints about Mr Sufia's performance in January 2014

[15] In early January 2014, one of the trolley duty managers, Mr Safraz Saeed, complained to Mr Cotterill about Mr Sufia. Mr Saeed complained that Mr Sufia was inefficient and had not collected all the trolleys in his area in the carpark by 10.15pm. Mr Saeed said that when he asked Mr Sufia to collect the trolleys, he refused to do so and swore at him. Mr Saeed made a diary note of the discussion.

[16] Mr Cotterill spoke to the senior duty manager, Raymond, the checkout manager, Honoria, and the store manager, Mark, about Mr Saeed's complaint. Each confirmed Mr Sufia was not working at the required rate. Each said there were difficulties raising issues with Mr Sufia who became confrontational.

[17] On 15 January 2014, Mr Cotterill wrote a letter to Mr Sufia in which he set out the complaints received from Mr Saeed, requested a meeting with Mr Sufia to discuss the complaints and invited him to bring a representative or support person with him. The complaints were:

1. *Your inefficient rate of work.*
2. *Your inability to complete your duties of bringing in trolleys in the required time available as observed during the last two weeks.*
3. *Walking off the job and there are still trolleys to return.*
4. *The verbal abuse of the duty manager when he asked you to complete your duties.*

[18] The letter further recorded that the complaints were of a serious nature and may result in disciplinary action or termination of employment.

[19] A meeting was held on 16 January 2014. Mr Sufia's wife, Mrs Sufia, who also represented Mr Sufia at the Authority's investigation meeting, attended the meeting with him. Mrs Sufia is proficient in English. Mr Cotterill provided Mr Sufia with the details of the complaints. At the meeting, Mr Sufia said he was being picked on by the duty managers.

[20] Mr Cotterill spoke to Mr Saeed again after the meeting and was told the managers were trying to manage Mr Sufia and they were not picking on him.

[21] In a letter of 21 January 2014, Mr Cotterill recorded his expectations following the meeting on 16 January. The expectations included that Mr Sufia was to complete his work consistently and if he was unable to do so he was to inform the duty manager

and follow the duty manager's directions. Mr Sufia was also instructed in the letter that any further verbal abuse, swearing or rudeness could result in his dismissal. The letter ended by stating:

If the above expectations are not being met or if there has been any other instance of verbal abuse as described above I may then be considering termination of your employment.

[22] Mr Sufia's wife responded to the letter on 28 January 2014 and in the letter agreed to the expectations in respect of Mr Sufia's performance but raised issues about, among other things, duty managers picking on Mr Sufia and being rude to him.

[23] Mr Cotterill was of the view that the issue of being picked on had been investigated and was without foundation. That matter was not taken any further.

November 2014 complaint

[24] Further complaints arose in November 2014 regarding Mr Sufia's work performance and ability to take and follow directions from the duty manager. Mr Cotterill reviewed diary notes of complaints and discussed his concerns with those making the complaints.

[25] Mr Cotterill investigated the issues fully in my view. Mr Cotterill met with Mr Sufia, asked him to meet to discuss the complaints about his work performance and disregard of duty managers and suggested he obtain representation or seek a representative from the First Union.

[26] A meeting was held on 26 November 2014 to discuss the further complaints. At that meeting, Mr Bill Bradford from First Union represented Mr Sufia. Mr Sufia and Mr Bradford assured Mr Cotterill that Mr Sufia's work rate would improve.

[27] Later that evening, Mr Cotterill observed Mr Sufia and was disappointed at what he saw. Mr Cotterill described there being no improvement in the work rate despite the assurances that he had been given.

[28] Mr Cotterill spoke to Mr Sufia's representative, Mr Bradford, and confirmed what he had observed. Mr Bradford confirmed that Mr Sufia was aware of Pak'n'Save's requirements and would comply.

Assurances by Mr Sufia

[29] On 5 December 2014, Mr Cotterill received a letter from Mr Bradford dated 25 November 2014 which, as it transpired from the evidence, was incorrectly dated about the issues with Mr Sufia.

[30] In the letter from Mr Bradford to Mr Cotterill, he refers to the issues about the work performance and attitude of Mr Sufia and confirmed that Mr Cotterill had sought assurances about how these matters would be dealt with in the future. Mr Bradford states that Mr Sufia's:

... frustration about this has led him to restrict the amount he has done to his own section and to go home when that is done. Mr Sufia understands clearly now that this is not the way to deal with problems and that he is expected to work as part of a team and get the whole job done before finishing for the day regardless of what other workers are doing. He has made a commitment to do this in the future. He also accepts that his work performance on the night he was observed by you was not good enough and undertaken to improve his work rate throughout his shift in the future. Complaints have also been made about Mika [Mr Sufia] not following instructions and walking away when supervisors attempt to speak to him about how he is undertaking the duties. I have had a long conversation with Mika with an interpreter to assist. He apologises for this and realises this is not how to deal with his supervisors when they are trying to discuss his work with them and will ensure he follows instructions in future.

[31] On 8 December 2014, Mr Cotterill, Mr Sufia and Mr Bradford met. Mr Cotterill told Mr Sufia he was issuing him with a final written warning and this would be confirmed in writing.

[32] Further observations were made by Mr Cotterill on 12 December 2014 and video footage was taken which demonstrated to Mr Cotterill that there had been no improvements made.

[33] On 15 December 2014, Mr Cotterill sent a letter to Mr Sufia in which he states:

*Mika,
I was going to issue you with a final warning in relation to the matters spoken about i.e. your work rate and insubordinate behaviour towards your supervisors. However given this new information I have decided that I need to meet with you again, show you the surveillance footage from over the weekend and ask for a further explanation of what I have seen. I would like this meeting to take place on 18 December at 1.30pm in the board room. Bill or another support person is entitled to be present to support and/or represent*

you. I will be considering termination of your employment due to the fact that it appears I cannot trust you to act as required, honour your agreements with me or work to the required standard regardless of the formal measures taken.

[34] There were further discussions between Mr Cotterill and Mr Sufia's Union representative. A meeting was held on 19 December 2014 which was attended by Mr Cotterill, Mr Sufia and his wife, Mrs Sufia, and Mr Anderson . At the meeting the video footage was viewed and Mr Anderson, who was Mr Sufia's representative from the Union, told Mr Cotterill he would be instructing Mr Sufia to make his best efforts over the weekend.

[35] Further observations were made which Mr Cotterill was very unhappy about. Mr Cotterill was of the view that Mr Sufia was not honouring the agreement that he had reached with him to conduct himself and work at the rate which was expected of him.

[36] A decision was made to terminate Mr Sufia's employment and that was communicated to his representative on 22 December 2014. A letter confirming this was issued on 23 December 2014.

The law

[37] Section 103A of the Act sets out the test of justification and subsection (2) states that the test is 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 of the dismissal or action.

[38] Section 103A(3) sets out factors to be considered by the Authority when applying the test in s.103A(2). These factors deal with the procedure undertaken by an employer before issuing disciplinary action or dismissal.

[39] Section 103A(5) says that the Authority must not determine a dismissal to be unjustifiable because of defects in the procedure if the defects were minor and did not result in the employee being treated unfairly.

[40] One of the issues that Mrs Sufia raised related to the house rules. The house rules are couched in wording which states that certain conduct listed may lead to the issuing of a written warning. One warning was issued to Mr Sufia in January 2014 following complaints about his work performance and verbal abuse of a duty

manager. Further incidents occurred in November 2014 which related to the acceptable work rate but in my view also related to Mr Sufia's refusal to take instruction from his duty managers.

[41] The records of the meetings held with Mr Sufia, his wife and Union representatives confirm in my view that Mr Sufia was well aware of what was required of him. He promised to improve but did not do so.

[42] There were also concerns about the way in which Mr Sufia took direction from duty managers or rather did not take direction. Despite assuring Mr Cotterill that this would not continue and this was provided in writing by his Union representative, Mr Cotterill observed this conduct continuing.

[43] In my view there were a number of opportunities prior to dismissal which would have allowed Mr Cotterill to perhaps take a different view than the final view he did take. However, it is not the Authority's role to usurp the decision-making powers of an employer. In my view the action of dismissal was what a fair and reasonable employer could have done in the circumstances at the time.

[44] I am satisfied that Pak'n'Save properly investigated the complaints in compliance with s.103A of the Act and came to a decision that a fair and reasonable employer could have come to in all the circumstances.

[45] If I am wrong in this finding, my view would be that the remedies sought by Mr Sufia would be reduced considerably if not completely by the contribution which he made to the situation which led to his dismissal.

[46] The evidence provided in relation to reinstatement would not have persuaded me that that was a remedy open to the Authority. Mr Sufia's employment was terminated well over a year ago and the evidence from Mr Cotterill that he could no longer trust him was not contradicted at all by Mr Sufia.

[47] Further, the other remedies which were requested had very little evidence in support of them. No evidence was provided to the Authority of lost wages and the evidence of mitigation was minimal.

[48] In all the circumstances, it is my finding that the dismissal was justified and accordingly there are to be no remedies awarded.

Costs

[49] Costs are reserved

Anna Fitzgibbon
Member of the Employment Relations Authority