

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Siale Talakai (Applicant)
AND Amcor Flexibles Limited (Australasia) (Respondent)
REPRESENTATIVES Siale Talakai, In person
Gretchen Stone, Counsel for Respondent
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 7 September 2005
DATE OF DETERMINATION 27 September 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mr Talakai submits he was unjustifiably dismissed from his employment with the respondent company. To remedy his alleged grievance he seeks lost remuneration and compensation.

The company submits that Mr Talakai was justifiably dismissed for serious misconduct.

Background

At the time of his dismissal Mr Talakai had been employed by the respondent for a period of nine years. He was employed as an Operator in the bulk packaging area of the respondent's business. He had previously been employed as a Setter in the same department. The evidence shows that Mr Talakai resigned from this job as a Setter on 1 May 2002. At that time he requested the company to find him an alternative position. The company offered him a position as a Grade 3 Operator at a lesser remuneration. Mr Talakai accepted the position as offered but clearly nurses a grievance over the reduction in remuneration that came with the new position.

The evidence also shows that Mr Talakai had been on restricted duties from August 2002 due to health issues. The company had been monitoring his health over the months prior to his dismissal.

The events that gave rise to Mr Talakai's dismissal arose in mid 2003.

Mr Talakai submits he suffered a work related accident (sprain of shoulder and upper arm) on 21 May (initially reported by him as having happened on 1 May 2003). He submits he reported the accident to the company nurse the same day.

The respondent says that on 6 June 2003 Mr Talakai (who was already working restricted duties due to health problems) reported new symptoms - tingling and numbness in two fingers. Over the next few months there were numerous meetings between Mr Talakai and relevant Amcor management personnel to monitor his health and to encourage him to undertake the necessary tests to assist the company to manage his health in the workplace. No information was provided by Mr Talakai.

On 6 October 2003 the company's Health and Safety/HR Coordinator received a letter from ACC dated 29 September which recorded that Mr Talakai had suffered a work related accident on 1 May 2003. This was the first the company had heard of the alleged accident.

The company carried out an investigation. Among other things it was revealed that Mr Talakai had been on annual leave on 1 May 2003. Following its investigation the respondent concluded that Mr Talakai had either falsified a work accident report or he had failed to report a work accident. Both are viewed as serious misconduct and following an investigation Mr Talakai was dismissed for serious misconduct on 15 October.

The evidence

Applicant

It is Mr Talakai's evidence that he suffered a work accident on 21 May 2003 and that he reported it to the company nurse the same day.

He submits that he again approached the nurse on 6 June due to the pain and discomfort he was experiencing. The nurse took him to the company doctor who recommended that his work be assessed. His work was not assessed as recommended and he continued to work normal hours.

In August 2003 he again visited the doctor and was given a medical certificate to take 3 days off work. Again it was recommended that his work be assessed but this was not done.

On 5 September he visited his own doctor who advised he take five days off work. He immediately advised his team leader of this.

Mr Talakai accepts there were numerous meetings with company personnel over this period where the question of his health and his fitness to undertake the tasks associated with his position was discussed. There is no dispute that Mr Talakai was reluctant to obtain and share with the company findings of the tests he undertook. This is because he was upset the company nurse had advised his team leaders in June that he had reported numbness and tingling in his hand and that his fitness for the tasks he undertook needed to be carefully monitored to assess them for impact on his health.

Mr Talakai's evidence was that on 29 September 2003 his situation had not improved so he went back to his doctor and asked her to lodge a claim with ACC because he believed his injury was work related. When he received a letter from ACC on 4 October he realised the date he had advised for the injury (1 May) was wrong and that it in fact had occurred on 21 May a fact he had recorded in his diary. He immediately rang ACC to advise of the change. He was told that he could not arrange an amendment to the record over the phone and that he needed to write to ACC. He faxed this information to ACC on 9 October.

Mr Talakai said there was a meeting with management on 7 October to discuss the ACC claim. He said everything was fine at the conclusion of this meeting.

Despite this Mr Talakai submitted that company personnel had a meeting on 9 October 2003 and resolved to dismiss him. Mr Talakai also submitted that the company arranged for a worker to replace him prior to going through the disciplinary inquiry which led to his dismissal.

On 13 October he received formal notice of the company's concerns that he had either made a false complaint of work-related injury or he had failed to notify the company of a work related injury. He was advised to attend a meeting on 14 October and invited to bring a representative. At the meeting on 14 October there was a discussion between the parties where Mr Talakai and his representative presented his explanations. No decision was made that day.

The parties met at 1 pm the next day and Mr Talakai presented evidence that on 9 October he had faxed ACC to advise of the correct date the accident. In spite of this he was dismissed for serious misconduct. He submits the dismissal was unjustified.

Respondent

There were four witnesses for the respondent.

It was the company's evidence that its takes the health and safety of its employees very seriously. It is the company policy that all near misses and work accidents (however minor) are to be reported immediately to the relevant team leader who takes up the process of managing the incident and who is responsible for reporting the incident to the company nurse, the production manager and through to Head Office in Australia if appropriate.

Evidence was submitted that Mr Talakai had taken part in a re – induction process on 16 May 2003. During that process the company's health and safety and accident reporting process was covered. Also covered was the Company's Code of Conduct/House Rules, which describes as serious misconduct the falsification of company records and the failure to report accidents.

It was the respondent's evidence that Mr Talakai was already on restricted duties when he reported new symptoms to the company nurse on 6 June 2003. These were symptoms of numbness and tingling in his hand. The nurse and other company witnesses were adamant that Mr Talakai did not report that a work related accident had occurred on 21 May 2003. Neither did he visit the company nurse that day.

It was the evidence of the company witnesses that after Mr Talakai reported the new symptoms on 6 June it was constantly monitoring and managing Mr Talakai's condition and the work undertaken by him. Because he was already on restricted duties the process was adopted that Mr Talakai would report to his team leader every morning prior to commencing work and that he would immediately advise if any task caused or aggravated pain.

It was the evidence of witnesses for the company that managing and monitoring Mr Talakai's health was extremely difficult and frustrating. In the first place Mr Talakai did not arrange for the blood tests and nerve conduction tests that were recommended. He was also reluctant to report to his team leader every morning before the commenced work to advise how he was feeling and he would not undertake to provide the results of medical tests to the company to allow it to effectively manage his health. This was because he was concerned that the company nurse had reported his new symptoms (numbness and tingling in his hand) to his team leader on 6 June.¹

¹ This had been done to allow for the management and monitoring of tasks undertaken by Mr Talakai to ensure those tasks did not cause or aggravate any pain.

The evidence was that there were numerous meetings with Mr Talakai to assess and monitor his health over the months June – October 2003. On September 16 the company had a meeting with Mr Talakai in respect to his failure to attend work or notify the company of his absence the previous week. Mr Talakai advised that he had been to the doctor who had given him five days off work and that he hadn't notified the company because it was not work related.

By 6 October the company was so concerned about the lack of information available to assist it to manage Mr Talakai's health that it spoke to him of the possibility of requiring him to provide a doctor's certificate confirming that he was fit to do his job.

Immediately following this meeting the company's Health and Safety/HR Co-Coordinator found she had received a letter from ACC dated 29 September which recorded that it had accepted a claim from Mr Talakai relating to a work related injury on 1 May 2003. The injury was described as a "sprain of the shoulder and upper arm". The company witnesses submitted they were shocked to receive this letter from ACC. While Mr Talakai had spoken to the nurse on 3 October about an ACC claim for "work related gradual process" this was the first the company knew of an accident, which was alleged to have taken place on 1 May 2003.

The evidence was that the company commenced an investigation. It was revealed from a review of company records that Mr Talakai was on annual leave on 1 May 2003.

The company conducted an investigatory meeting with Mr Talakai on 7 October 2003. Mr Talakai was assisted by his work delegate. He explained to the company that he had made a mistake about the date of the accident and that in fact it had occurred on 21 May and he had recorded it in his diary. He said he had rung ACC to advise them of his mistake on 6 October. He said the injury occurred when he was "boxing out bags". He said he had not reported the accident to the company at the time it occurred. Mr Talakai confirmed that he understood the company rules relating to the reporting of accidents. Mr Talakai was told the company viewed the matter very seriously and that there would need to be a full investigation. He was told he would be invited to another meeting. He was advised of his right to representation and told that depending on the outcome his employment could be in jeopardy.

On 13 October the company provided Mr Talakai with written notice of the allegations against him and a detailed statement of its concerns. He was invited to a disciplinary meeting on 14 October and invited to bring a representative. He was formally advised that one of the possible outcomes of the meeting could be summary dismissal.

At the meeting of 14 October Mr Talakai was assisted by his Union organiser. Mr McColl (Manufacturing Manager) submitted that he outlined the seriousness of the issue and recapped the previous discussions that had taken place between the parties. Mr Talakai presented a new medical certificate at this meeting. It was signed and dated 8 October 2003. It recorded the date of the injury as 1 May 2003. It also recorded that the injury was sustained when pulling a plastic bag out of the machine.²

Mr Talakai explained he had mistakenly reported the date of the accident as occurring on 1 May because this date was stuck in his mind as having been the date "the company took money off him and made him resign". Mr Talakai was advised the company did not agree it had made him resign and there no grounds for the date 1 May to be fixed in his mind on that account. Mr Talakai was asked why he had not reported the accident and he responded that he didn't report it because other employees did not report accidents either. Mr McColl challenged this statement by way of advising

² This is a different task to that of "boxing out bags"

him that the previous week he had said that the incident occurred when boxing out bags and it was so significant he had noted it in his diary. Mr Talakai said he had not reported the accident because he had been asked to leave and was fearful he would lose his job if he reported the accident. Mr McColl told him no-one had asked him to leave the company.

It was pointed out to Mr Talakai that a week prior to 21 May he had gone through a re-induction process where the company rules regarding the reporting of accidents had been stated. He had also had several meetings with management over health issues where the importance of reporting any pain was emphasised to him. Mr Talakai said he did not report the accident because he believed it was not worth bringing to the company's attention. He was asked why he had chosen to report it now and he responded that since June he had been trying to prove the pain he was experiencing was work related. Mr Talakai's representative added that Mr Talakai had in fact reported the accident on 6 June when he visited the nurse. The company accepted he had visited the nurse on 6 June to report numbness and tingling in his hand but he had not reported a workplace accident on 21 May.

There was an adjournment for the company to consider the information it had received. Management personnel then met with the company nurse (Vicki Robinson) to question her about the claims made by Mr Talakai that he had reported to her. Ms Robinson confirmed she had a consultation with Mr Talakai on 6 June where he reported numbness and tingling. She was clear that Mr Talakai did not report an accident occurring on 1 May or 21 May.

The parties reconvened the disciplinary meeting and Mr McColl reported the information provided by Ms Robinson. He also highlighted the company's concerns relating to the inconsistency of the information provided by Mr Talakai relating to the date of the alleged accident. He highlighted the fact that the new medical certificate dated 8 October also recorded the accident as occurring on 1 May. It was also pointed out that previously Mr Talakai had said the accident occurred when he was "boxing out bags" while the medical certificate stated it had occurred when he was pulling a plastic bag out of the machine. Mr Talakai's representative advised the information provided in the medical certificate was as accurate as possible and that it was apparent ACC had not updated their record in regard to the date of the accident. The company advised that it wished to consider the issue overnight and it was agreed that the parties would meet the next afternoon when the company would advise its decision.

The next day Mr Talakai submitted a fax header dated 9 October to show he had advised ACC of the correct date of the accident. The company noted he had previously told them he had advised ACC of the mistake on 6 October.

Mr Talakai was advised the company was not satisfied with his explanations. The company was satisfied from its inquiries that he had not reported an accident on 21 May as he was required to do under Amcor's policies. The company was also of the view he may have made a false work related injury claim to ACC. Either action amounted to serious misconduct justifying dismissal. Mr Talakai had nothing more to add and the company communicated its decision to dismiss him for serious misconduct.

He was paid two weeks notice.

Issues to be Decided

In determining this matter I have had to keep in mind the following legal principles (*W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448).

Was the decision to dismiss Mr Talakai one that a reasonable and fair employer could have taken?

For me to be able to answer this question in the affirmative the respondent must satisfy me, not that it can prove serious misconduct on Mr Talakai's part, but that it has conducted a full and fair investigation that disclosed conduct capable of being regarded as serious misconduct.

However, the employer's conduct of the disciplinary process is not to be put under a microscope or subjected to pedantic scrutiny nor are unreasonably stringent procedural requirements to be imposed.

"Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person" (New Zealand (with exceptions) Food Processing Etc IUOW Unilever NZ Ltd [1990] 1NZILR 35.

The issues to be decided are these:

1. Did the respondent carry out a thorough and fair investigation into the allegations against Mr Talakai?
2. Was the decision that serious misconduct had occurred a reasonable decision open to the employer on the basis of the investigation undertaken?
3. Was the dismissal of Mr Talakai justified in all the circumstances?

Discussion

Credibility

Sadly the evidence shows that Mr Talakai was not a credible witness. While Mr Talakai had settled on one story for the Authority that story did not match his own statements recorded the contemporaneous notes taken by company witnesses during the meetings held with Mr Talakai over the period when the company's concerns were raised with him at the investigation meeting (7 October) and the disciplinary meeting on 14 October. The weight of the evidence simply does not support the evidence given by Mr Talakai at the investigation meeting.

Findings

1. I find that Mr Talakai had been on restricted duties since August 2002 due to health problems. He reported new symptoms on 6 June 2003. He did not report that he had suffered a work related accident on either 1 May or 21 May.
2. Between June and September 2003 there were numerous meetings between Mr Talakai and Amcor personnel including (at various times) his team leader, the company nurse, the company's health and safety and HR coordinator and the manufacturing manager. All of these meetings were directed at encouraging Mr Talakai to undertake the recommended tests and submit the results to the company in order to assist it to appropriately assess and manage his health. Mr Talakai consistently failed to cooperate with the process adopted by the company to assist him.
3. I find that Mr Talakai took 5 days sick leave from 5 September 2003. He did not report his absence to the company.

4. On 29 September Mr Talakai visited his own doctor and requested her to submit an ACC claim relating to a work related accident which occurred on 1 May 2003.
5. The company was extremely surprised to receive this claim. Its preliminary inquiries revealed that Mr Talakai was on annual leave on 1 May. The company commenced an investigation and disciplinary inquiry.
6. The company's concerns were formally put to Mr Talakai i.e. that he had made a false injury claim to ACC or that he had failed to report a workplace accident. The company advised it viewed the matter seriously and that Mr Talakai's employment could be in jeopardy. He was invited to a disciplinary meeting and advised of his right to representation.
7. I find the company carried out a thorough and fair inquiry as a result of which it was established:
 - Mr Talakai knew of the rules relating to reporting workplace accidents.
 - Mr Talakai confirmed he had not reported the accident.
 - That while Mr Talakai advised he had made a mistake in reporting the accident occurred on 1 May and stated that he had advised ACC of the correct date on 6 October a medical certificate provided by Mr Talakai and signed by him on 8 October continued to report that the date of the accident was 1 May 2003.
 - On 7 October Mr Talakai said the accident occurred when he was "boxing out bags" – a task he did not undertake because he was on restricted duties. The medical certificate dated 8 October recorded that the accident had happened when he was "pulling a plastic bag from the machine".
 - Mr Talakai's representative advised that Mr Talakai had reported the accident to the company nurse on 6 June 2003.
8. There was an adjournment and the company representatives met with the company nurse to ascertain if Mr Talakai had in fact reported a work place accident. She confirmed he had not done so.
9. After an overnight adjournment to consider the information before the company met with Mr Talakai the next day. At that meeting Mr Talakai submitted a fax header dated 9 October to support his statement he had advised ACC of the mistaken date of the accident. The company considered this was evidence of further inconsistency in Mr Talakai's position as he had previously advised them he had advised ACC of the mistake on 6 October³. The company dismissed Mr Talakai. The reasons given at the time were that he had either made a false claim to ACC or that he had failed to report a workplace injury. Both situations amounted to serious misconduct and the company had decided to dismiss him.

³ Information provided to the Authority that Mr Talakai had indeed contacted ACC by phone on 6 October was not made available to the respondent at the time it was investigating the matter. It was not therefore before the employer as a matter to be considered at the time it made its decision.

Conclusions

In answer to the questions set out above (p.6) I conclude on the evidence that the company undertook a thorough and fair investigation into the concerns that were raised by the ACC claim submitted by Mr Talakai. The process adopted by the company and its treatment of Mr Talakai throughout the process was a model of transparency and fairness and in particular I find there is no evidence that would support a finding that the company predetermined the dismissal as claimed by Mr Talakai.

I conclude that following a fair and thorough enquiry the employer was entitled to arrive at the view (given the admissions made by Mr Talakai and the obvious inconsistencies in his account) that he had made a false ACC claim or he had failed to report a workplace accident in full knowledge of the company rules which required that all accidents or near misses be reported however minor. Taken overall the company's investigation revealed conduct on Mr Talakai's part that was capable of being seen as serious misconduct. This entitled the company to exercise the option of dismissing Mr Talakai.

Determination

The respondent has demonstrated that the decision to dismiss Mr Talakai was an option open to it following a thorough and fair investigation. I therefore decline Mr Talakai's application. He is not entitled to remedies in this matter

Costs

Costs are reserved. The parties are directed to attempt to resolve the question of costs between them. If they cannot do so they are to file and serve submissions on the subject and the matter will be determined.

Janet Scott
Member of Employment Relations Authority