

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Donna Maree Tauhore (Applicant)  
**AND** Farmers Trading Company Limited (Respondent)  
**REPRESENTATIVES** D Vincent for Applicant  
P Swarbrick for Respondent  
**MEMBER OF AUTHORITY** G J Wood  
**INVESTIGATION MEETING** Wellington, 8 February 2007  
**FURTHER INFORMATION** Received by 18 April 2007  
**SUBMISSIONS RECEIVED** By 10 May 2007  
**DATE OF DETERMINATION** 25 May 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

1. Donna Tauhore claims that she was unjustifiably dismissed by the respondent (“Farmers”) for assaulting a co-worker outside of the workplace, especially given that she was subsequently acquitted in the District Court on a criminal charge based on the same events. Farmers claim that it conducted a full and fair investigation at the time, leading to its conclusions that Ms Tauhore had committed the assault and that dismissal was justified.

**The Facts**

2. Ms Tauhore started work with Farmers at one of their Masterton stores in November 2003. In 2004 she was appointed to a full time position. At the time of her dismissal she was paid a salary of \$20,816.00 per year and was eligible for commission payments on top of that. She was employed under an individual employment agreement and was subject to Farmers Work Rules and Disciplinary Procedures. They provided for a set of behaviours described as misconduct, “*which will result in disciplinary action and in the event of serious or repeated breaches are likely to result in summary dismissal*”.

3. Article 9 is headed Personal Behaviour. It states:

*“All team members are expected to conduct themselves in a socially acceptable manner. Specifically threats, abuse, physical violence, threatening behaviour or threatening/bad language to team members, customers or suppliers. Provocation will not be accepted as an excuse.”*

4. The Rules then provide for investigation and disciplinary procedures.

5. Ms Dorothy Coupe is the Home Manager for Farmers in Masterton and was Ms Tauhore’s supervisor. In the afternoon of 8 April 2005 Ms Coupe was called by a manager in the other store to attend on one of Ms Coupe’s staff, also a co-worker of Ms Tauhore’s, who had turned up there. She found that co-worker in a hysterical state, and when she went to comfort her she found she had a bump on her head. When asked what was wrong with her the co-worker questioned Ms Coupe about Ms Tauhore’s whereabouts that morning. Ms Coupe told the co-worker that Ms Tauhore had left the store for a time that morning (Ms Coupe had given Ms Tauhore authorisation to go home to change her clothing following an accident. Ms Coupe had noticed that on return, Ms Tauhore had not in fact changed her clothing).

6. The co-worker told Ms Coupe that the reason why she had asked that was because Ms Tauhore had come around to her place (she was on leave that day) and woke her up and started belting her in the head. When asked why that had happened Ms Coupe was told that it was because Ms Tauhore thought that she had been seeing a man who Ms Tauhore was also seeing. The co-worker told Ms Coupe that Ms Tauhore had said she felt betrayed by her, as she was her friend, and that after the assault she had walked out saying she was sorry.

7. Ms Coupe discussed the co-worker’s options with her and then went and told Mr Molisa Marupi, the stores’ manager, about the situation.

8. Ms Coupe was aware of some of the background to this issue because she had previously discussed with both Ms Tauhore and her co-worker friend that both were getting into difficult positions - Ms Tauhore for conducting a clandestine affair and the co-worker for acting as cover when explanations were required for Ms Tauhore’s absence.

9. Ms Coupe suggested to the co-worker that she take the matter up with Mr Marupi and the Police because the situation had now got quite out of hand. The co-worker decided to sleep on matters. The next day she received four text messages in a row in short order, which had been penned by Ms Tauhore as one message. Using swear words and abusive language she

accused her co-worker of betraying her and states, amongst other things (as amended from “txt shorthand”):

*“You’re lucky I don’t come round there and smash you good and proper bitch. I am warning you you had better stay the fuck out of my face or you will be sorry you mutt and you had the cheek to sit there and let me apologise and feel bad? Fuckin slut!?! Hope he was worth it? The only thing you have got in your favour why I’m not coming back around there because at least you had the decency to end it with him when you did instead of carrying it on?...  
So bitch don’t you ever fucking speak to me again! And I hope you feel good about yourself and hope he was worth it? Have a nice life.  
Oh and if anything gets back to Dave about anything from you or any of your so called mates like Matt or Hdz’ ex I will know where to come? Thanks for nothing.”*

10. This message ensured that the co-worker did lay a formal complaint. A formal written complaint was filed with Ms Coupe on 12 April. Mr Marupi arranged for Mr Iain Robertson, the Regional Risk Control/Loss Prevention Manager, to assist him investigate the matter.
11. Mr Marupi then sent a letter dated 12 April over Farmers’ serious concerns about Ms Tauhore’s honesty and integrity and personal behaviour. Specifically, Ms Tauhore was made aware of an allegation that she had assaulted a member of staff at the time when she had asked to have time off to change her clothes. She was told that dismissal was a potential outcome of the investigation, and a stand down on full pay was proposed.
12. When Ms Coupe handed Ms Tauhore the letter the next day, Ms Tauhore was shocked and angry. She was not impressed that Mr Robertson was to be involved because she had had unsatisfactory dealings with him in the past. Then Ms Tauhore said words to the effect that her co-worker had got off lightly and that she should not have “narked”.
13. Ms Coupe counselled Ms Tauhore against taking matters further and getting herself into even more trouble.
14. Ms Coupe had already made a statement to Mr Robertson about what had occurred and then provided a supplementary statement to cover the further matters above.
15. Soon after Ms Tauhore received the disciplinary meeting notice the co-worker received another text, which again used abusive language and swear words, accusing the co-worker of making a big mistake. Mr Robertson found out that that text was sent from the phone of an acquaintance of Ms Tauhore, Mr Scott Wallace.
16. After receipt of that text message the co-worker made a formal complaint to the Police.

17. The first preliminary meeting with Ms Tauhore took place on 14 April. Ms Tauhore was told again of the particular allegations against her and of their seriousness. Ms Tauhore confirmed, in response to a question, that she would not be represented at the meeting.
18. Ms Tauhore denied assaulting the co-worker, but admitted sending all the text messages (in fact one text, which was only able to be delivered in four chunks), except the last one. Ms Tauhore claimed that in the texts she was just telling the co-worker that she didn't want to be friends with her. Ms Tauhore wanted to see the last text message, but instead of showing it to her Mr Robertson read it out. Ms Tauhore did not take that matter any further.
19. Ms Tauhore did make it clear, however, that her text did not prove that she assaulted the co-worker, but that, as she put in the text message, the co-worker was lucky that she was not going to assault her. She denied visiting the co-worker in work time, stating that while she did visit her that day, it was during her lunch break. Ms Tauhore told Farmers that she considered that what happened outside of work was nothing to do with her employer and that she didn't want to air her dirty laundry with Farmers.
20. Ms Tauhore accepted that she flew off the handle when she received the notice of a disciplinary meeting, but denied that her statements meant that she had previously assaulted the co-worker. Rather she told Farmers management that she meant that she should have given the co-worker a hiding, but that she hadn't.
21. After several opportunities for Ms Tauhore to make any further explanations, Farmers' management adjourned the meeting until the next day to further consider matters. Mr Robertson spoke to the co-worker's mother, who told him that she had visited her daughter at lunch time and was told of the events in question by her daughter. Mr Robertson therefore determined that Ms Tauhore's explanation about only going to see the co-worker at lunch time was not correct.
22. Mr Robertson did not, however, put that information to Ms Tauhore when they met the next day. After asking Ms Tauhore if she had anything further to add, which she did not, Mr Marupi then issued Farmers' disciplinary findings. Effectively these were that Ms Tauhore had seriously breached Farmers work rules and this had led to a breach of trust between her and Farmers. Farmers therefore decided to terminate Ms Tauhore's employment with immediate effect and to trespass her from both Farmers stores in Masterton for two years.
23. In coming to this conclusion Farmers relied particularly on the co-worker's mother's evidence, the timing of the text messages and Ms Tauhore's statement to Ms Coupe.

24. The parties have been to mediation and, despite encouragement, have been unable to resolve the issues between them. It therefore falls to the Authority to make a determination.

### **Credibility**

25. The Authority is required to determine the facts on the balance of probabilities, not beyond reasonable doubt as occurs in a criminal case. In addition, while there can be no certainty as to what occurred many months, and often years earlier, the Authority must prefer one set of evidence to any other on any particular point in dispute.
26. I have preferred the evidence given on behalf of Farmers rather than that given on behalf of Ms Tauhore. Ms Tauhore claims that she gave a number of explanations at the disciplinary meeting, beyond those set out above, as to why her co-worker should not be believed over her. I do not accept this claim because the notes of the meeting do not refer to them and because all the other witnesses who were at the meeting denied that any such explanations were given.
27. Furthermore, I do not accept Ms Tauhore's claim that she was not given a proper opportunity at the meeting to have a representative. She was told in the letter of 12 April that she was entitled to a representative. I also accept that it is standard procedure for Farmers' management to require managers in conducting disciplinary investigations to cover that point at the outset of the meeting, as the notes and the other witnesses' evidence reflects.
28. In addition, while Ms Tauhore's explanations for what she wrote in her text message appears credible, so do Farmers interpretations of the text messages.
29. I do not accept that Ms Coupe, who is much older than Ms Tauhore and the co-worker, would have taken to using the expression "*give someone the bash*" as Ms Tauhore claims. Rather, I find it is more likely that the expression had to be explained to Ms Coupe when it came up in conversation, as Ms Coupe did not ever use it herself. In addition, Ms Coupe's reference to the detail of Ms Tauhore's clothing on the key date in question was convincing. Furthermore, I find it more likely than not that Ms Coupe was, as she stated, with the co-worker when the last text message arrived, and therefore it was most unlikely that the co-worker herself was responsible for the penning of the text message, as was alleged on Ms Tauhore's behalf.

30. Unlike Ms Tauhore and the co-worker, Ms Coupe had less to lose in giving free, frank and fair evidence and I have relied on her evidence accordingly. Ms Coupe's nervous demeanour simply strengthened her credibility.
31. I acknowledge that in the District Court the Judge had concerns about inconsistencies of the co-worker's evidence. I am sure from reading the transcript of the trial and the judgment itself that this was an important reason why the charge of assault against Ms Tauhore was dismissed. None of that is inconsistent with my conclusions above, as I have a different issue to determine and have made my positive credibility findings about other Farmers' witnesses, such as Ms Coupe, rather than Ms Tauhore's co-worker.

### **The Law**

32. As was held in *X v. Auckland District Health Board* unreported, Colgan CJ, AC1007, 23 February 2007, the Authority must determine in the case of a dismissal whether what the employer did and how it did it, was what a notional fair and reasonable employer would have done in all the circumstances, and it must do so on an objective basis.

33. The Court held at para.97:

*“... that there be two separate considerations, first of what the employer did (the substantive dismissal or justification and the grounds for it) and, second, how the employer acted (the process leading to those outcomes). In both cases, substance and procedure, the Court and Authority must be satisfied that what the employer did and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or disadvantage occurred ...*

*So even if relevant events may later come to light or the employer may consider that there were other grounds for the dismissal based on things known at the time, these cannot affect considerations of justification for dismissal.”*

34. The standard a fair and reasonable employer is to be held to as to how it acted is set out concisely in *NZ Food Processing ICW v. Unilever* [1990] 1 NZILR35 as follows:

- “1. Notice to the worker of the specific allegations of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
- 2. an opportunity, which must be real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct; and*
- 3. an unbiased consideration of the worker's explanation in the sense that consideration must be free from predetermination and uninfluenced by irrelevant considerations.*

*Failure to observe any one of these requirements will generally render the disciplinary action unjustified. That is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably*

*stringent procedural requirements are 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 overindulgent person.”*

35. Furthermore, as the Court held in *Unitec v. Henderson* unreported, Colgan CJ, AC12/07, 19 March 2007 at para 56:

*“...even if in some instances ...the employer might be found to have failed to meet all ideal standards of a fair and reasonable employer, this will not necessarily mean that the resultant dismissal that may itself have been justified, will thereby be declared to have been unjustified...”*

36. Finally, it is clear law that simply because a worker is dismissed for reasons later the subject of a criminal trial at which the worker is acquitted, it does not follow that the worker must have been unjustifiably dismissed (see for example *MacPherson v. Chloride Batteries New Zealand Ltd* [1983] ACJ 291 and *Airline Stewards etc IUOW v. Air NZ Ltd* [1983] ACJ 711. Rather the Authority must determine the question of unjustifiable dismissal by the tests set out above.

### **Determination**

37. It therefore follows that Farmers must be taken to have dismissed Ms Tauhore for the reasons it set out at the time, which were those first read out to her and then contained in the letter of 18 April. While it is not explicit in the letter, it is apparent that Farmers rejected Ms Tauhore’s explanations and concluded that she had assaulted her co-worker during work hours, that she sent threatening texts to her co-worker and that she made threatening statements about her co-worker to Ms Coupe.
38. Ms Tauhore gave many explanations at the Authority’s investigation meeting that were not given at the time and therefore can not be taken into account in determining whether what Farmers did was justified. For example, Ms Tauhore did not refer at the time to the alibi evidence of her sister, evidence that was first formally provided at the Authority’s investigation meeting.
39. While the letter refers to serious misconduct, close reading of the employment agreement describes the behaviours as misconduct, but still potentially warranting summary dismissal. Therefore summary dismissal was a penalty open to Farmers if serious breaches of the code were found.

40. Ms Tauhore gave few of the explanations about the situation that she relied on in the Authority, as set out above. The explanations she did give, such as that the matter took place outside the workplace, and that her comments were meant light heartedly, were rightly rejected, relying on the evidence in particular of Ms Coupe.
41. It follows from all my findings of fact above that a fair and reasonable employer would have concluded on the evidence available to it at the time that Ms Tauhore had, on the balance of probabilities, but taking into account the seriousness of the allegations, made threatening comments about the co-worker to Ms Coupe when given the disciplinary notice and that the text messages were also likely to have been seen as threatening by the co-worker. It would also therefore have concluded that Ms Tauhore did assault the co-worker as alleged. All these actions constitute conduct that may justify summary dismissal.
42. Turning to how the employer acted, I am satisfied that there was no predetermination or bias here. While Mr Robertson clearly had an adverse view of Ms Tauhore's alleged actions from the time of his second discussion with Ms Coupe at least, this was based on reports from employees whom he had no reason to doubt, particularly in Ms Coupe's case. Furthermore, he did follow Farmers' guidelines for disciplinary actions throughout, was not the ostensible decision maker and gave evidence that I have accepted that he had no personal animosity toward Ms Tauhore. In any event, an employer's representative is not required to approach his or her task untainted by preconceptions (see for example *Peters v. Collinge* [1993] 2 NZLR 554). I find that Mr Robertson's views went no further than that.
43. Similarly, an employer is not required to run an investigation in the nature of a criminal trial, or to adopt the criminal standard of proof, although the level of proof must match the seriousness of the allegations. Given that Ms Tauhore was given a clear indication of the allegations against her, was offered representation, which she declined, and was allowed to make a full explanation, it follows that how the employer acted was how a fair and reasonable employer would have acted in all the circumstances, except with respect to the issue of the co-worker's mother's statement.
44. The failure to put the co-worker's mother's statement to Ms Tauhore was not what a fair and reasonable employer would have done. In all the circumstances of this case, however, I find that this was a minor breach, because having already denied that she was at the co-worker's home during normal working hours it would not have demonstrably assisted Ms Tauhore to know that another person was questioning her version of events. I conclude therefore that Farmers' failure to put the material it received from the co-worker's mother to Ms Tauhore

for comment was, for all the reasons given above, not sufficient to lead to a finding that the way the employer acted was not substantially fair (*Unitec* applied).

45. I therefore dismiss Ms Tauhore's claim.

**Costs**

46. Costs are reserved.

**G J Wood**  
**Member of the Employment Relations Authority**