

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

Determination Number:
WA 166/07
File Number: 5091847

BETWEEN PAIA TAURARII
 Applicant

AND TYCO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Mario Esera for Applicant
 Campbell Clark for Respondent

Investigation Meeting: 20 November 2007 at Wellington

Submissions Received: By 11 December 2007

Determination: 12 December 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Paia Taurarii, who is legally aided, is claiming \$13,000.00 because he believes he was unjustifiably dismissed following his assault of someone outside of work hours. The respondent (Tyco/Wormald) considers that Mr Taurarii was justifiably dismissed for assaulting a member of the public at an informal work function while in company uniform.

The Facts

[2] Mr Taurarii was employed by Tyco as a trainee sprinkler fitter in its Wormald Group on 31 January 2007 under a collective employment agreement. The first three or four months of his employment went without incident. His work was of a good standard and he was never the subject of any disciplinary issues.

[3] On Friday, 11 May, Mr Taurarii attended a team meeting of the Wormald installation team, led by Mr Peter Wright (the Sprinkler Installations Manager) together with about 18 staff. While there was some question as to exactly what Mr Wright said at that meeting, it was clear from Mr Taurarii's evidence that he was told that there were going to be drinks after work because several employees were leaving Wormald and that it was to be held at a local tavern. It was clear to Mr Taurarii from the meeting that he was required to behave well at the function because people would be wearing work overalls and Wormald uniforms and that the group would be representing the company at the function. Unlike Mr Taurarii, other members of staff heard specific reference by Mr Wright to the fact that this was a work function. Deciding that issue is not vital for the purposes of this determination.

[4] The function was held in a separate function room upstairs at the tavern and only Wormald employees and their guests were allowed entrance into it. Wormald paid for all the expenses, including drinks.

[5] The following facts can be taken without dispute from the summary of facts prepared by the Police in relation to a later prosecution of Mr Taurarii for common assault. The facts state:

At about 8.50pm on Friday, 11 May 2007, the defendant, Taurarii was at the Speights Ale House on the corner of Jackson Street and Victoria Street Petone Lower Hutt. He had been drinking alcohol and was moderately intoxicated. Also at the Speights Ale House at the time was the victim in this matter ...

The defendant had been acting in a disorderly manner throughout the night. The victim asked the defendant to calm down. The defendant has then punched the victim with a closed fist connecting with the victim's top lip and left hand side of the face. As a result the victim was knocked unconscious, falling to the ground. The victim's front tooth was knocked out, he incurred a swollen lip, a graze on the top of his head and sore ribs.

When spoken to by Police, the defendant admitted the facts as outlined; he said in explanation that he thought he was going to be hit. Reparation is sought for medical expenses. The defendant is a 29 year old male who resides locally.

[6] Over the course of the weekend Mr Wright was made aware by different employees that the assault of one of the guests at the Wormald function had occurred. Mr Wright also discovered that Mr Taurarii had been arrested. He contacted the Police. The arresting officer told him Mr Taurarii had indeed been arrested and had admitted to assaulting the victim.

[7] Mr Wright determined to deal with the matter as soon as he got to work on Monday, 14 May. Of particular concern to Mr Wright at that point were the injuries to the victim's ribs, which indicated that he may have been kicked while on the ground. This was of particular interest because

Mr Wright knew by that stage that Mr Taurarii had admitted to punching the victim to the ground unconscious.

[8] Mr Wright spoke to a number of people that morning, including Mr Taurarii and Mr Sitaleki Mounga, who had been present at the time of the assault. Mr Mounga told Mr Wright that he was so intoxicated that he could not remember anything of what had occurred.

[9] As Tyco considered this to be an investigatory rather than disciplinary meeting, Mr Taurarii was not given the opportunity to have a representative, unlike later in the process. It was made clear to Mr Taurarii that the purpose of the meeting was to investigate what had happened in relation to the assault and otherwise at the work function. Mr Taurarii was told that he was not the only one being investigated. He was asked to explain what had occurred. Mr Taurarii was quite up front and admitted that he had punched the victim in the face and knocked him over and that he had then left the tavern and was later arrested by the Police. He told Tyco that he had been charged and was to go to Court that week. Mr Taurarii, as he has consistently done, denied ever kicking the victim. While up front about admitting the assault, I accept Mr Wright's evidence that Mr Taurarii was otherwise undemonstrative and uncommunicative throughout this and the later disciplinary meeting

[10] Mr Wright decided that Mr Taurarii's behaviour may well constitute serious misconduct and therefore Tyco decided to institute the formal disciplinary process. He therefore prepared Mr Taurarii a formal letter about this during the adjournment of their meeting. The letter presented to Mr Taurarii invited him to a formal disciplinary meeting the next afternoon. The purpose of the meeting was to discuss:

... allegations of bringing the company into disrepute by assaulting a member of the public. These allegations are serious. If the allegations are found to be true it could lead to summary dismissal. You are advised to bring a representative with you to the meeting. I have scheduled a meeting at the Wormald office at 1pm Tuesday 15 May ...

If you are unavailable for this meeting please contact me as soon as possible. At the meeting you will be asked for an explanation and given every opportunity to have your say. Whatever you say will be considered before any decision is made.

[11] Mr Taurarii did not consider that it was at all possible that he would be dismissed for this matter, despite the comments in the letter and the interview earlier in the day. It was his personal view that the matter could only have justified a warning at best because he only hit the person once and that the assault took place outside of work hours and outside the work function, namely on the pavement just outside the tavern.

[12] He therefore elected not to take any steps to seek representation, but rather to attend the meeting the next day and await the outcome. I accept that had Mr Taurarii sought an adjournment of the meeting, for whatever reason (including a desire to get a representative), this would have been accommodated by Tyco, as can be implied from the disciplinary letter.

[13] At the disciplinary meeting the next day, Mr Taurarii was not represented, although his supervisor did attend along with several company managers. At the meeting, which lasted only about 20 minutes, Mr Wright set out the details of the allegation, including his view that what happened after the drinks was a work-related event, with Mr Taurarii wearing his work gear. Mr Wright also reminded Mr Taurarii about how at the team meeting on the afternoon before the function he had told everyone that they were representing the company, even though the drinks were out of work time and away from the office, and that they had to be on their best behaviour. It was made clear to him that due to all the circumstances Tyco was of the view that Mr Taurarii was seen to be representing it at the function.

[14] While later scrutiny has shown to my satisfaction that Mr Taurarii could not have been immediately identified as a Wormald employee (because his uniform with the company logo was covered over by a hooded sweatshirt at the time) and that Mr Taurarii did assault the person on leaving the function and outside the function room and even the tavern, Mr Taurarii did not make these points in his own defence. Rather, he apologised for what had occurred and stated that he was prepared to “*accept the punishment*”. As noted above, Mr Taurarii was again non-communicative and undemonstrative throughout that meeting.

[15] The punishment Mr Taurarii expected was a reprimand or warning. In fact after giving Mr Taurarii another opportunity to add anything that may mitigate the circumstances of his involvement, Mr Wright was soon to decide to summarily dismiss him.

[16] During an adjournment after Mr Taurarii had had his say, Mr Wright decided that Mr Taurarii had committed serious misconduct by the assault and that this had brought Tyco into disrepute. He determined that the appropriate punishment in these circumstances was dismissal. Mr Wright relied on the Tyco Guide to Ethical Conduct, which expressly prohibits abusive language, physical aggression, deliberately causing injury to another or any disorderly conduct or malicious disturbance. The Guide clearly states that the policy applies to both work-related settings and activities outside of the workplace.

[17] From Mr Wright’s perspective, this was a serious unprovoked assault on a person who had been invited to a Tyco function by a Tyco staff member and that this behaviour simply could not be

tolerated by it. Mr Taurarii was accordingly told after the adjournment that he was to be summarily dismissed. As stated in Mr Taurarii's dismissal letter:

Following the evidence presented at the disciplinary hearing I can confirm that it was established that on Friday 11 May 07 you assaulted a member of the public while working as a sprinkler fitter based at Wormald Wellington. This was at an informal work function and you were wearing your company uniform at the time of the assault. These actions constitute serious misconduct and as confirmed during the disciplinary meeting I have no alternative but to terminate your employment with the company with immediate effect.

[18] On 17 May Mr Taurarii pleaded guilty to a charge of common assault, an offence with a maximum penalty of one year's jail. He was fined \$600, together with payment of reparations of \$104.25 to his victim and court costs of \$130. He has made no effort to pay any reparations to the victim, or any other of the sums owing, claiming that he has forgotten to do so.

[19] Mr Taurarii sought interim reinstatement but the parties agreed to go to mediation. Following mediation, the claim for interim reinstatement was withdrawn. Mr Taurarii got a new job some 6½ weeks after his employment was terminated. As the parties have been unable to resolve their employment relationship problem, it falls to the Authority to make a determination.

The Law

[20] A disciplinary hearing is normally required where the factual position is dependent on a subsequent investigation designed to ascertain what happened and with what motives people acted: *FINSEC v. AMP* [1992] 1 ERNZ 280. Employers are, however, entitled to conduct investigations into alleged misconduct before formal disciplinary processes are invoked, otherwise they would never be able to get information to a sufficient degree of certainty to decide whether an employee should be burdened with the seriousness of a formal disciplinary investigation. If an employee admits to conduct that constitutes serious misconduct then in some cases no further investigation or disciplinary hearing whatsoever may be required, because the facts are obviously apparent and summary dismissal is justified: *Murphy & Routhan v van Beek*, unreported, Goddard CJ, 3 June 1998, WC33/98.

[21] Furthermore, any procedural unfairness that may occur during a preliminary investigation which may have a disciplinary nature can be cured by a later proper disciplinary hearing in which the full protections of the law, such as notice of the allegations, a real opportunity to respond and an unbiased consideration of the worker's explanation, are provided to the worker (*Auckland Local Authority Officers IUW v. Northcote Borough Council* [1989] 2 NZILR 67).

[22] Clearly, whatever Mr Taurarii may think, assault constitutes serious misconduct justifying summary dismissal unless serious elements of provocation and/or self-defence are involved.

[23] Behaviour by employees at informal work functions may be dealt with by a company under its disciplinary procedures depending on the circumstances. What is vital to determine is the connection between the behaviour and the employee's work. Thus it is important whether employees are invited in their capacity as employees, whether the function is readily identifiable as a company function to employees and outsiders, the degree of misconduct and whether or not a reasonable person would understand that, having been invited as an employee, any misconduct could have ramifications for their employment. For example, conduct such as skylarking may be unacceptable practice in the workplace, but it may well be more acceptable in an out-of-work hours informal work function.

[24] Where the Authority determines that an employee has a personal grievance it must, in deciding remedies, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. Thus, for example, in *Auckland Rest Care Trust v. Woods* (unreported, Travis J, AC75/98, 29 September 1998), the Employment Court held that while the employee (a nurse) had volunteered information admitting that he had slapped an elderly patient because she was being very difficult and had persisted in hitting him around the face, but elements of the employer's inquiry were unfair, a 100% reduction in remedies was made, reducing remedies therefore to nil.

Determination

[25] As highlighted above, it was reasonable for Tyco to conduct a preliminary investigation (where representation is not required) about what occurred before commencing disciplinary proceedings against Mr Taurarii. There was no unfairness, including predetermination, for at least two reasons. First, I am satisfied that Mr Wright was open to any explanation Mr Taurarii may have given. Second, given Mr Taurarii's admission there was in fact little factual material missing about the incident and thus Tyco's representatives were entitled to take the view, for the reasons given below, that serious misconduct appeared to have been established. In any event, Mr Taurarii later had a full opportunity to explain himself. It is not Tyco's responsibility that he chose not to be represented and chose not to provide any information to try and mitigate the effect of his behaviour on his employment.

[26] This is not a case like *Craigie v. Air New Zealand Ltd* [2006] 1 ERNZ 147 where it was held that the assaults committed by Mr Craigie had no links to his employment. Here Mr Taurarii would

not have been in contact with his victim were they both not in the process of leaving an informal Wormald work function. Furthermore, Mr Taurarii clearly understood that he was to behave responsibly as he was representing Wormald. In these circumstances there can be no doubt that Mr Taurarii's behaviour was extremely closely connected with his employment, even though he was not wearing an identifiable uniform. Mr Taurarii's later excuses to the Authority that he had already left the function and that he "*only hit him [the victim] once*", which were never given to Tyco, do not qualify as excuses at all, and are not even credible pleas in mitigation. In this case, there was no serious claim of self-defence, as demonstrated by the disciplinary inquiry and by Mr Taurarii pleading guilty to assault and the Police's summary of facts. The summary, accepted by Mr Taurarii, speaks for itself in this regard, even although he claimed that he thought he was going to be hit by the victim.

[27] All this shows that Mr Taurarii's actions were extremely serious and, even despite his intoxication, he knew that, as his admission to the Police soon afterward demonstrates. Given the seriousness of his behaviour and the clear link with his employment, I conclude that he clearly should have known that such behaviour would have ramifications for his employment and that it was serious misconduct accordingly, as it at least deeply impaired (and more likely destroyed) the trust and confidence Tyco needed to have in him.

[28] While it was submitted by Mr Esera that Mr Taurarii's actions did not bring Tyco into disrepute, that is certainly not so in the eyes of the victim and his friend who was leaving that day. That there has been no publicity to date over the circumstances of the assault is merely happenstance – the conviction took place in open court, Tyco had to deal with the Police over the matter and it was well known to the staff and thus would likely have been the subject of their conversation with friends, family and acquaintances. In these circumstances it was entirely reasonable for Tyco to conclude that the assault, taking place as it did at the conclusion of a work function, would bring it into disrepute, at least if it did not take strong action against Mr Taurarii. Ironically, Mr Taurarii's pursuit of his grievance clearly demonstrates that the parties' actions are open to public scrutiny, as the Authority conducts its investigations in public.

[29] There is no disparity of treatment here. The other worker involved could not remember the incident because of his drunken state, and was disciplined because of that drunkenness. He did not admit to assault, nor was he so charged. Therefore the lack of comparability in the seriousness of both men's proven behaviour makes it unnecessary to pursue the issue any further, as any disparity could be justified on this ground alone anyway.

[30] I therefore conclude that Tyco not only investigated the matter fairly, but summary dismissal was also the option that a fair and reasonable employer would have come to in these particular circumstances. Even if I were wrong in this assessment, given the seriousness of the assault in employment terms (however the criminal law might characterise it) Mr Taurarii could expect no financial remedies whatsoever. People attending work functions are entitled to expect to be able to leave such functions safely. Therefore I would, if necessary, have concluded that Mr Taurarii was totally responsible for his actions, particularly as the Authority must act in equity and good conscience (*Woods* applied).

Costs

[31] Costs are reserved.

G J Wood
Member of the Employment Relations Authority