

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2012] NZERA Auckland 247
5367857**

BETWEEN TAMA TAUTARI
Applicant
AND SILVER FERN FARMS LIMITED
Respondent

Member of Authority: Eleanor Robinson
Representatives: Simon Mitchell, Counsel for Applicant
Tim Cleary, Counsel for Respondent
Investigation Meeting: 15 May 2012 at Rotorua
16 July 2012 at Auckland
Submissions received: 16 July 2012 from Applicant
16 July 2012 from Respondent
Determination: 24 July 2012

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant, Mr Tama Tautari, claims that he was unjustifiably dismissed by the Respondent, Silver Fern Farms Limited (SFF), following an incident on 2 November 2011.

[2] A few days prior to the incident on 2 November 2011, Mr Tautari had raised an issue regarding the pay rate of another employee. This issue was raised again on 2 November 2011 and a meeting had been held between Mr Tautari and Mr Dylan Marsh, Production Manager at SFF. During the course of the meeting which became heated, Mr Marsh alleged that Mr Tautari had threatened him.

[3] SFF had carried out an investigation into the incident and claims that Mr Tautari was justifiably dismissed for serious misconduct.

Issues

[4] The issues for determination are whether:

- a. Mr Tautari was unjustifiably dismissed
- b. There was disparity in the treatment of Mr Tautari such as to render the decision to dismiss him one which was not available to SFF as a fair and reasonable employer.

Background Facts

[5] SFF is a co-operative society involved in the procuring, processing and marketing of sheep, lamb, beef and venison. There are processing plants at various locations throughout New Zealand. Mr Tautari had been employed as a meat processing worker at the processing plant based in Rotorua (the Plant) for approximately 14.5 years at the time of his dismissal.

[6] Mr Tautari had been a member of the New Zealand Meat Workers Union (NZMWU) and had been a union delegate for approximately 12 years at the time of his dismissal.

Pay Rate issue prior to 2 November 2011

[7] On or about mid-October 2011 Mr Tautari had become concerned that a 'B' pay level rated employee, Ms Leanne Johnson, had been working in the feral area of the Plant where the normal pay level rate for employees working in this area was the lesser 'C' level rate. Ms Johnson had continued to be paid at the 'B' level rate whilst working in the feral area.

[8] Mr Tautari said he had been particularly concerned as Ms Johnson was not fully trained for the full range of jobs in the feral area, and he had made a complaint about the matter to both Mr Marsh and to Mr Jim Falconer, the Plant Manager.

[9] At the subsequent meeting held with Mr Marsh and Mr Falconer, Mr Tautari said that he had been told by Mr Falconer that it was his (Mr Falconer) prerogative to allocate employees to jobs within the Plant.

[10] Mr Marsh said it had been explained to Mr Tautari that employees were entitled to retain their existing pay rate when being moved to another job, and that it was management's role to allocate employees to jobs. However Mr Marsh said he had agreed to look into Mr

Tautari's concerns and he had subsequently generated a spreadsheet in respect of the employees working in the feral area and their pay rates.

[11] Mr Tautari said he had been dissatisfied with the response from Mr Falconer as he believed that there was preference being shown to some employees within the Plant, and he had decided to raise the matter with Mr Mike Nahu, President of the NZMWU, when he next visited the Plant.

[12] Mr Marsh said he had provided the spreadsheet to Mr Tautari. Mr Tautari said he had not regarded the spreadsheet seriously, although he had discussed it with some of the employees detailed on it and they had advised him that the pay rates noted on it were incorrect. Mr Tautari explained that one of these employees had produced a payslip which confirmed that he had been paid the incorrect rate, and as a result Mr Tautari said he had distrusted Mr Marsh.

[13] Mr Marsh said that when Mr Tautari had raised the incorrect payment issue with him he had felt Mr Tautari had been making an inference that there had been 'foul play' on his part, but said that he had investigated the complaint that the employee had been paid incorrectly, and it had been resolved.

[14] Mr Marsh stated that Mr Tautari had told him that Mr Nahu would be resolving the matter of the pay rates, however there had been no contact by Mr Nahu in the weeks following this incident.

2 November 2011 Incident

[15] Mr Marsh said that as there was feral work requiring to be done on 2 November 2011 he had spoken to Mr Andrew Flavell and told him that an employee, Adrian, could work with him in the feral area. Mr Flavell had responded that he did not want Adrian to work with him, so Mr Marsh said he had told him to take Ms Johnson instead.

[16] Mr Tautari explained that when he had arrived at work he had been informed by a 'C' pay rated employee who usually worked in the feral area that he had no work to do in the feral area and he had come to work in the slaughter area. Mr Tautari said he had asked why this was, and had been informed that Mr Flavell and Ms Johnson would be working the feral area.

[17] Mr Tautari said he had felt aggrieved by this information as it was going to be a busy day in the slaughter area and he considered that losing Ms Johnson, a 'B' level rated

employee, would mean it would be difficult to achieve the 300 tally quota which had been set for that day.

[18] Mr Tautari said he had gone to see Mr Marsh in his office to discuss the situation and he had pointed out to Mr Marsh that Ms Johnson was not trained to work on the head and knuckles part of the work in the feral area.

[19] As Mr Marsh had disputed this, Mr Tautari said he had asked to see the paperwork supporting Mr Marsh's position; however Mr Marsh had refused to show it to him. Mr Marsh said at the Investigation Meeting that he believed that by the time he had found the paperwork, Mr Tautari had left the office.

[20] Mr Marsh said on checking the paperwork, he had discovered that although Ms Johnson had worked for a two year period in the feral area, Mr Tautari was correct, and so he had spoken to Mr Flavell and advised him that Ms Johnson needed to be trained to carry out the head and knuckles part of the work. On the basis that the head and knuckles work would take approximately one hour only, Mr Marsh said he had seen no necessity to move Ms Johnson back into the slaughter area.

[21] Mr Marsh said upon returning to his office he had been informed by Ms Joanne Kingi, Technical Supervisor, that Mr Tautari had gone to the feral area and verbally attacked Ms Johnson and Mr Flavell.

[22] Mr Tautari agreed when questioned at the Investigation Meeting on 15 May 2012 that he had spoken to Ms Johnson prior to the meeting with Mr Marsh on 2 November 2011, that he had been aggrieved because of the perceived favouritism being shown to Ms Johnson, and that he may have been the aggressor in the interchange.

[23] Mr Marsh said that during his conversation with Ms Kingi, Ms Johnston had arrived at his office, and she looked visibly upset.

[24] Mr Marsh said he had asked Mr Jason Kiel, Mr Tautari's Team Leader, to bring Mr Tautari to the boardroom to discuss his reported behaviour.

[25] Mr Tautari said he had been approached by Mr Kiel who told him what had happened and advised him to have the meeting and get the issue resolved, however Mr Tautari said that he had responded that he wanted to wait until Mr Falconer had returned and to have Mr Nahu deal with the matter.

[26] Mr Tautari said he had returned to the slaughter work when he was approached by another employee and asked to attend the meeting in the boardroom.

Meeting in the boardroom on 2 November 2011

[27] Mr Marsh explained that the boardroom was approximately 3 by 4 metres and most of the space was occupied by a large table. Mr Marsh said he had been sitting at one end away from the door and Ms Kingi was sitting next to him. Mr Tautari sat at the opposite side of the table to Mr Marsh and Mr Kiel was next to him.

[28] Mr Tautari said that when he had arrived at the boardroom, Mr Marsh, Ms Kingi and Mr Kiel were already there. Mr Tautari said he had not been aware of the purpose of the meeting, however when Mr Marsh had asked him 'what the problem was', Mr Tautari had replied "*You know*".

[29] Mr Tautari said he had stated that rather than moving one employee from the feral area to the slaughter area when that person had not been signed off to undertake to do all the jobs in the slaughter area and moving another employee from the slaughter area to the feral area and paying her at a 'B' pay rate to do a 'C' rated job for which she was not fully trained, was not correct and that the status quo should have been maintained

[30] Mr Marsh said he had tried to explain that Mr Flavell could train Ms Johnson; however Mr Tautari had responded that the issue was one of favouritism. All the witnesses agreed that from this point on the exchanges between Mr Marsh and Mr Tautari had become heated, with both men yelling and swearing at each other.

[31] Mr Marsh said that Mr Tautari had stood up and looked as if he might come across the boardroom table at him and had said: "*I'm going to f...ing smash your head in you c...*". Ms Kingi and Mr Kiel agreed that Mr Tautari had made this statement to Mr Marsh.

[32] Mr Tautari said he had felt that Mr Marsh had been laughing at him and goading him, so he said to Mr Marsh: "*I'll f...ing do you, I'll get Mike down here*" and he had walked around the table in order to leave the room.

[33] Mr Marsh said that Mr Tautari continued ranting and had then stated that he was going home. However Mr Marsh said Mr Tautari had turned as he walked towards the boardroom door, and had run at him with clenched knuckles saying "*I'll f...ing do you*". Mr Marsh said he had jumped out of his chair and backed away.

[34] Mr Marsh said that he had believed Mr Tautari was going to strike him, and he had jumped up out of his chair and backed away from Mr Tautari. Ms Kingi said that Mr Tautari had been angry and had his fists clenched as he had moved towards Mr Marsh.

[35] Ms Kingi agreed that Mr Marsh had leapt out of his chair and acted as though he thought something might be going to happen, and agreed that she had thought Mr Tautari might be going to hit Mr Marsh.

[36] Mr Kiel said that his view of what happened had been blocked by Ms Kingi, however he agreed that Mr Tautari was still yelling and swearing at this point.

[37] Mr Tautari agreed at the Investigation Meeting on 15 May 2012 that Mr Marsh may have thought he was threatening him when he moved around the table although he was only leaving the room, and confirmed that Mr Marsh had left his seat at that point. Mr Tautari also agreed that he had thrown a dummy punch at Mr Marsh. Mr Tautari further agreed that Mr Marsh had not been threatening him, just laughing.

[38] Mr Marsh said after Mr Tautari had left the boardroom he had telephoned Mr Falconer who was off site in Dunedin, and Mr Falconer had advised him to write down what had happened.

[39] Mr Falconer said during the telephone call Mr Marsh had told him that Mr Tautari had 'come at him' in the boardroom and said he was going to 'do' him. Mr Falconer, who said he could tell that Mr Marsh was upset during the telephone call, had advised Mr Marsh to ensure Mr Tautari was off site and said he would investigate what had occurred on his return.

[40] Mr Tautari said that when he walked out of the office area he had seen Ms Johnson who had been waiting outside and they had had a heated exchange during which they were both swearing. Mr Tautari said Mr Flavell had also joined in and started swearing.

[41] Mr Tautari said that following the meeting he had returned to the slaughter area, and this was where he was when Mr Marsh had found him and instructed him to leave the Plant site.

[42] Mr Tautari said he had gone home and telephoned Mr Nahu, who had advised him to return to work if he had not been told he had been suspended; however Mr Tautari said he had

not done so as he had been still upset. Mr Tautari also said he had not returned to work as he had been advised by Ms Kingi to attend a meeting on 7 November 2011.

[43] Mr Tautari said he had written down some notes of what had occurred whilst he was at home and prior to the meeting with Mr Falconer on 7 November 2011.

Investigation and meetings

[44] On Monday 7 November 2011 Mr Falconer said he had met with Mr Tautari, explained the allegation that Mr Marsh had said he had been threatened by Mr Tautari in the boardroom, specifically that he had 'come at' Mr Marsh saying that 'he was going to do him'.

[45] Mr Falconer said he had informed Mr Tautari that he faced dismissal if the allegation was substantiated, that he was suspended on full pay, and had asked Mr Tautari for a response. Mr Falconer stated that Mr Tautari had refused to say anything, remarking that he would become angry again. Mr Tautari agreed this had been his response.

[46] Mr Tautari said he had explained to Mr Falconer that he had not been paid since the incident on 2 November 2011, and Mr Falconer had responded that this had been a mistake and he would be paid.

[47] Mr Falconer said he had then started an investigation into what had occurred on 2 November 2011. Mr Falconer explained he had read the witness statements of Mr Marsh, and had interviewed him. Mr Falconer said he had also spoken to Ms Kingi and Mr Kiel but they had been reluctant to speak due to fears of intimidation.

[48] Following the interview with Mr Marsh, Mr Falconer said he had asked Ms Culligan to carry out the interviews with Ms Kingi, Mr Kiel, and any other employees who had seen Mr Tautari prior to the boardroom meeting. These employees were Ms Johnson, Mr Flavell, Mr Hayden Jones and Mr Rob Smith.

[49] Ms Culligan explained that Mr Falconer had provided her with a list of questions to ask the employees, and she had carried out the investigation interviews in accordance with the list of questions. Ms Culligan had provided a written record of what was said in the interviews and had given these to Mr Falconer.

[50] Mr Falconer said he had met with Mr Nahu at the Plant on Friday 11 November 2011 and they had discussed the situation regarding Mr Tautari. Mr Falconer said Mr Nahu had

informed him that Mr Tautari admitted threatening Mr Marsh, but stated that the NZMWU would support Mr Tautari in his desire to be reinstated.

[51] Mr Nahu denied that he had told Mr Falconer that Mr Tautari had admitted threatening Mr Marsh, and explained at the Investigation Meeting that he had taken Mr Tautari's statement that he was 'going to do' Mr Marsh as meaning that he intended to involve himself (Mr Nahu) in the matter.

[52] Mr Falconer said he had met with Mr Tautari on 15 November 2011. Mr Falconer said he had asked Mr Tautari at the beginning of the meeting if he wanted union representation, but Mr Tautari, who had Mr Kiel with him as his representative, had declined having union representation and had advised that he wanted the meeting to proceed as he did not want to have to wait any longer for a decision.

[53] Mr Tautari agreed that he had declined when asked if he wanted to have union representation at the beginning of the meeting on 15 November 2011 as he had previously stated that he did not want union representation, and because he had not wanted to have to wait any longer.

[54] Mr Falconer stated that he had advised Mr Tautari that the complaints about his having threatened Mr Marsh had been upheld, and he had again asked him if he wanted union representation but Mr Tautari had again declined. Mr Falconer said he had waited for an explanation from Mr Tautari, but when he had not provided one, he had advised Mr Tautari that his employment was being summarily terminated on the basis that he had made a threat of physical harm to a manager.

Determination

Was Mr Tautari unjustifiably dismissed?

The Law

[55] The decision to dismiss Mr Tautari on the basis of serious misconduct must be a justifiable decision in accordance with the test as set out in s 103A of the Employment Relations Act 2000 ("the Act") which states:

S103A Test of Justification

- i. *For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. *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 the dismissal or action occurred.*

[56] The new Test of Justification still requires that the employer acted in a manner that was substantively and procedurally fair. SFF must show that it carried out a full and fair investigation into the issue of whether Mr Tautari's actions constituted serious misconduct, taking into consideration the factors in s 103A(3), statutory good faith requirements and natural justice. SFF must also establish that dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

Did SFF have substantive justification for dismissing Mr Tautari?

[57] The collective agreement between SFF and the NZMWU (the Collective Agreement) stated at clause 19 that: "*All employees shall comply with rules, policies and procedures set by the company*". The rules and procedures are set out in the Employee Handbook which on pages 31 to 33 set out the Disciplinary Policy and Procedures.

[58] Included under the definition of serious misconduct on page 32 of the Employee Handbook is: "*Threatening, intimidating or harassing other employees*". Although the Employee Handbook stated that the usual outcome for serious misconduct offences would be: "*a period of suspension without remuneration and/or a final written warning and/or transfer to another position on the plant*", it did point out that: "*there may be occasions when the degree, nature or frequency of the serious misconduct warrants instant dismissal*".

[59] SFF is obliged to show that the action taken and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[60] Prior to the incident in the boardroom on 2 November 2011 Mr Tautari had been feeling upset by the decision to transfer Ms Johnston from the slaughter area to the feral area.

[61] There were several reasons for Mr Tautari's feelings of discontent with the decision:

- he considered that there was favouritism being shown to Ms Johnson on the basis that she would retain her existing higher rate of pay whilst carrying out what he considered to be a less demanding role;
- Ms Johnston had not been fully trained to carry out all the roles in the feral area, a fact he had pointed out to Mr Marsh, and which he considered Mr Marsh had chosen not to act upon;
- The transfer of Ms Johnson from the slaughter area would place additional pressure on the other employees in that area in order for them to fulfil the tally quota for that day.

[62] Mr Tautari had had a discussion with Ms Johnson on the subject of her transfer prior to the boardroom meeting in which from Mr Tautari's own admission at the Investigation Meeting, he may have been the aggressor.

[63] Following this discussion Mr Tautari had returned to his work in the slaughter room having decided to leave addressing the issue until Mr Falconer returned to the workplace and Mr Nahu was able to deal with it. However Mr Marsh had summoned Mr Tautari to the meeting in the boardroom.

[64] The discussion at the meeting in the boardroom on 2 November 2011 took place immediately after Mr Tautari's discussion with Ms Johnson, and I consider that it is reasonable to assume that Mr Tautari was still agitated by the issue of her transfer to the feral area when he entered the boardroom.

[65] I consider it is also reasonable to assume Mr Marsh was also in a somewhat agitated state on the basis that:

- Following the initial raising of the concern by Mr Tautari at the transfer of Ms Johnston to the feral area on or about mid-October 2011, and the subsequent provision of a spreadsheet to Mr Tautari, he had felt that Mr Tautari had made aspersions that he was guilty of 'foul play';

- Mr Tautari had been informed at the meeting with him and Mr Falconer on or about mid-October 2011 that the allocation of employees to jobs within the Plant was a management prerogative;
- Despite being informed that allocation of employees was a decision within management purview, Mr Tautari had again raised the issue of Ms Johnston's transfer with him on 2 November 2011;
- Immediately following this discussion, he had been informed by Ms Kingi that Mr Tautari had gone to the feral area and verbally attacked Ms Johnston and Mr Flavell, and Ms Johnston had been visibly upset when she had come to his office prior to the boardroom meeting.

[66] In these circumstances Mr Marsh had decided that he needed to address the situation before it escalated by having a meeting with Mr Tautari. That meeting by all the witness accounts degenerated into a heated altercation between Mr Marsh and Mr Tautari, and culminated in Mr Marsh considering he had been threatened physically by Mr Tautari.

[67] I find that Mr Marsh's belief that he was about to be struck by Mr Tautari to be upheld by the evidence.

[68] Threatening behaviour is considered by SFF to be a serious misconduct offence as set out in the Employee Handbook, the outcome of which could be dismissal given the degree or nature of the serious misconduct.

[69] Mr Falconer had concluded that Mr Tautari had committed an act of serious misconduct by threatening Mr Marsh with physical harm, as alleged, and I find that a fair and reasonable employer could have acted in respect of that allegation as SFF had done by dismissing Mr Tautari.

[70] I determine that SFF had substantive justification for dismissing Mr Tautari.

Did SFF follow a fair procedure in dismissing Mr Tautari?

[71] The decision to dismiss must be procedurally justifiable. Section 103A of the Act states:

3 In applying the test in subsection (2), the Authority or the court must consider –

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(a) Investigation

[72] Mr Falconer embarked upon the investigation initially by interviewing the witnesses himself. However, having found that they were intimidated and reluctant to speak to him, he had asked Ms Culligan to carry out the interviews using a set of questions which he had drawn up for her to use.

[73] Whilst this may have been a little unorthodox, I find that the questions were uniform, drawn to Mr Falconer's specifications, and were aimed to provide the specific information he required in order to assess the veracity of what Mr Marsh had alleged.

(b) Notice of the specific allegations

[74] The fair and reasonable employer will make the employee aware of the nature of the allegations against him or her.

[75] Mr Falconer met with Mr Tautari on 7 November 2011 at which time Mr Falconer said he had advised Mr Tautari of the allegation that Mr Marsh had made of being threatened by him on 2 November 2011. Mr Falconer said he had referred specifically to the nature of the threat. Mr Falconer also said that he had advised Mr Tautari that dismissal was a potential outcome.

[76] Although Mr Falconer had not followed up this verbal statement with a written statement of the allegation, there was no submission by Mr Tautari that he had not understood the nature of the allegation against him.

[77] It is also clear from Mr Nahu's evidence that when he arrived to meet with Mr Falconer on 11 November 2011, he had understood the nature of the allegation against Mr Tautari from the discussion he had had with him.

[78] I find that Mr Tautari was aware of the nature of the allegation against him following this initial meeting.

[79] Prior to the meeting on 15 November 2011 Mr Tautari had not been shown any of the written witness statements which Mr Falconer had obtained, although he was informed that the allegation made by Mr Marsh had been upheld. Mr Tautari had also not been advised by Mr Falconer of the alleged statement made by Mr Nahu that he (Mr Tautari) had admitted threatening Mr Marsh.

[80] I consider that this deprived Mr Tautari of an opportunity which the fair and reasonable employer would have provided, to fully address these allegations. Moreover Mr Falconer said that he had based his decision on what Mr Tautari had admitted to doing in the boardroom, however this admission was the alleged admission made to Mr Nahu, which Mr Nahu had denied had been made.

(c) Reasonable Opportunity to respond

[81] Mr Falconer said he had asked Mr Tautari for an explanation at the meeting on 7 November 2011, but Mr Tautari had refused to provide one, stating that he would become angry again.

[82] Mr Tautari had also not provided an explanation at the meeting on 11 November 2011. Mr Tautari said that he had not been asked to provide one prior to Mr Falconer advising him that he had been dismissed.

[83] Mr Falconer said he had waited for an explanation from Mr Tautari which did not come. I accept this statement as credible, particularly given the fact that Mr Tautari as an experienced union delegate would have been aware of his right to provide an explanation during a disciplinary meeting.

[84] I accept that Mr Tautari had been advised of the right to have representation present at the meeting on 11 November 2011, and that he had chosen not to do so, although as an experienced union delegate he would have been conversant with his rights in this area.

(d) *Genuine consideration of the Employee's explanation*

[85] Mr Falconer did not consider Mr Tautari's explanation because he did not provide one, and although Mr Tautari said he had made his own notes of what had occurred following the incident on 2 November 2011, he had not provided these to Mr Falconer for him to consider.

[86] As already observed, I find that Mr Tautari, a union delegate for some 12 years, would have been aware of his right to provide an explanation. Mr Tautari would have been aware of the provisions of the Collective Agreement and that the allegation that he had threatened Mr Marsh was deemed to be serious misconduct and dismissal was a potential outcome.

[87] In the situation in which an employee refuses to provide an explanation despite being given the opportunity to provide one, and as in this case being fully aware of their right to do so, the employer cannot be held to be at fault in not considering it.

[88] Mr Tautari was an employee of long service, a factor Mr Falconer said he had taken into consideration in making the decision to dismiss. Mr Tautari had not had any formal warnings. Mr Falconer said he had also considered the fact that both men had become heated and had used coarse language during the course of the meeting, and that the meeting could have been better handled by Mr Marsh.

[89] However Mr Falconer said that having considered these factors, he had considered them outweighed by the fact that there had been a threat of physical harm to a manager. This he had held to be totally unacceptable.

[90] Mr Falconer said that he had considered that Mr Tautari had lost all respect for management, he had shown intimidating behaviour towards not only Mr Marsh, but Ms Johnson, and as a result SFF had lost all trust and confidence in him.

[91] Mr Falconer said in reaching his decision he had relied on what Mr Tautari had admitted he had done in the boardroom meeting on 2 November 2011, however this admission had allegedly been made to Mr Nahu which Mr Nahu denied in his evidence and the alleged admission had not been put to Mr Tautari.

[92] I have found there were procedural defects in the process, these were more than minor and may have resulted in Mr Tautari having been treated unfairly.

[93] I determine that Mr Tautari has been unjustifiably dismissed.

Was there disparity in the treatment of Mr Tautari such as to render the decision to dismiss him one which was not available to SFF as a fair and reasonable employer?

[94] Having found that Mr Tautari was unjustifiably dismissed, there is no need to address this issue.

Remedies

[95] Mr Tautari has been unjustifiably dismissed and he is entitled to remedies.

Reinstatement

[96] Mr Tautari is seeking reinstatement. Reinstatement is no longer the primary remedy, but may be provided in accordance with s125 of the Act if it is practicable and reasonable.

[97] In *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*¹ the Court of Appeal stated:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. ... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully.

[98] In a full Employment Court decision in the recent case of *Angus v Ports of Auckland*² the application of s 125 was examined and in relation to reasonableness the Court stated:

The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer

[99] Mr Tautari had been dismissed for physically threatening a manager. Although I have found procedural defects sufficient to render the decision to dismiss unjustifiable, I have nonetheless found that SFF had substantive justification to dismiss Mr Tautari on the basis of serious misconduct.

¹ [1994] 2 ERNZ 414

² [2011] 9 NZELC 94,015; [2011] NZEmpC 160

[100] Mr Tautari physically threatened Mr Marsh. There had been no apology on the part of Mr Tautari, and I accept as credible Mr Marsh's evidence that it will be difficult for him to manage Mr Tautari in a situation in which there would be regular on-going contact between the two men. There is the evidence that Mr Tautari had a distrust of Mr Marsh as indicated by the spreadsheet issue. I also accept Mr Marsh's evidence that he would fear for his safety.

[101] I further take into consideration the reluctance Mr Tautari had in accepting the management decision to assign Ms Johnson to work in another area of the Plant. This culminated in a verbal attack on Ms Johnson in which Mr Tautari admitted that he might have been the aggressor, and which had shaken her. Mr Tautari had additionally had a further heated exchange with Ms Johnson that same day following the boardroom meeting.

[102] I take into consideration the fact that Mr Tautari had had a long period of satisfactory employment, indeed this was referred to on the dismissal notice. However I find that taking all of these factors into consideration; SFF is entitled to take account of health and safety concerns and the duty it owes to its employees, namely Mr Marsh and Ms Johnson, to keep them safe in the workplace.

[103] I determine that in the circumstances it is not practicable or reasonable for SFF to reinstate Mr Tautari.

Reimbursement of Lost Wages

[104] Mr Tautari is to be reimbursed for lost earnings for a period of 3 months from the date of his dismissal pursuant to s 128 (2) of the Act. Mr Tautari said that his weekly payments varied between \$800.00 to \$1,000.00. The amount to be paid to Mr Tautari is to be based on the weekly average level of remuneration in the 6 weeks preceding his dismissal. I would anticipate that the parties can resolve the amount. If not, leave is reserved to return to the Authority

Compensation for Hurt and Humiliation under s 123 (1) (c) (i).

[105] Mr Tautari is also entitled to compensation for humiliation and distress. Mr Tautari said that he had suffered emotionally as a result of his dismissal, and financially the family circumstances have been adversely affected.

[106] SFF is ordered to pay Mr Tautari the sum of \$5,000.00, pursuant to s 123(1) (c) (i) of the Act.

Contribution

[107] I am required under s. 124 of the Act to consider the issue of any contribution that may influence the remedies awarded.

[108] Mr Tautari was an experienced union delegate who would have been familiar with the terms of the Collective Agreement, and the disciplinary process. Mr Tautari was aware of the allegation and the possible consequence, however he chose not to provide an explanation and although he said he had made his own notes of what had occurred, he did not present these to Mr Falconer or the Authority.

[109] Mr Tautari did not offer an apology for his behaviour and there was no evidence that he was remorseful about what had occurred which might have ameliorated the severity of the outcome.

[110] I find a significant level of contribution on the part of Mr Tautari and reduce the remedies awarded by 60%.

Costs

[111] Costs are reserved. Given the extent to which both parties have been successful, I am of a mind that costs should lie where they fall. However in the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, the Applicant may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any rely submissions by the Respondent to be lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Eleanor Robinson
Member of the Employment Relations Authority