

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 81
5325634

BETWEEN STEPHEN THOMAS
 Applicant

AND ASUREQUALITY LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: Peter Cranney, Counsel for Applicant
 Peter Zwart, Counsel for Respondent

Investigation Meeting: 21 April 2011 at Christchurch

Determination: 10 June 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Stephen Thomas worked as a meat inspector for different periods between 1975 and 1986 and then continuously from about 1990 until he was summarily dismissed on 26 October 2010 from his fulltime position with AsureQuality at Fairton in Ashburton. When employed by AsureQuality Mr Thomas was a member of the PSA and covered by a collective employment agreement. Mr Thomas says that he was unjustifiably dismissed and he is claiming reinstatement as well as compensation for distress and reimbursement of lost remuneration. However this determination, at the parties' request, is limited to consideration of whether Mr Thomas was unjustifiably dismissed.

[2] Mr Thomas was alleged to have been negligent in his viscera inspection, to have left the chain without permission and the plant without advising his supervisor and (by reason of these failings) to have conducted himself in a way that was likely to bring AsureQuality into disrepute. The allegations refer to events that occurred on

17 September 2010. Following some exchanges between Mr Thomas, his union representatives and the company (including a meeting that was recorded) AsureQuality determined that these allegations were proven, that they individually and in combination amounted to serious misconduct and that in the circumstances (including an earlier final warning) Mr Thomas should be summarily dismissed.

[3] Mr Thomas says that there was neither negligence nor conduct likely to bring AsureQuality into disrepute and certainly nothing that could justify his dismissal. He also denies abandoning his employment.

[4] To resolve this problem I must set out more fully what happened on 17 September 2010 and detail AsureQuality's investigation before applying the statutory test for justification. There is also a submission for the company that I must apply the statutory test that came into force on 1 April 2011 even though the dismissal occurred in October last year. It is convenient to start with that point.

The test for justification

[5] Prior to 1 April 2011 s.103A of the Employment Relations Act 2000 provided that the question of whether a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time of the dismissal. A new statutory test for justification came into effect on 1 April 2011. It also refers to the circumstances at the time of the dismissal but substitutes *could* for *would*, specifies several mandatory considerations and includes other changes.

[6] AsureQuality says that the new test not the old test must be applied. The argument for AsureQuality is that statutes apply to circumstances as they arise and that justification is assessed by the Authority rather than the employer; the Authority doing so in the instant case after 1 April 2011, the present (new) test must be used. The submission is supported by the absence of any transitional provision in the amending Statute compared to the inclusion of such a provision in the Employment Relations Amendment Act (No 2) 2004 which introduced the pre 1 April 2011 test.

[7] S.102 of the Employment Relations Act 2000 creates the right for an employee who believes he or she has a personal grievance to pursue that grievance under the Act. A personal grievance includes a grievance that an employee may have against their former employer because of a claim they have been unjustifiably dismissed: see s.103(1)(a). It is at the point of dismissal that the right to pursue a grievance claim arises. S.17(1)(b) of the Interpretation Act 1999 provides that *The repeal of an enactment does not affect ...An existing right ...* S.18(1) provides that *The repeal of an enactment does not affect the ...completion of proceedings that relate to an existing right* while s.18(2) provides that *A repealed enactment continues to have effect ...for the purpose of completing the proceedings that relate to the existing right...* All this indicates that the now repealed test for justification continues to apply for all grievance claims that have arisen prior to 1 April 2011.

[8] I also disagree with the submission that it is the Authority's rather than the employer's test of justification, to be considered at the point of the Authority's determination. The current and the former statutory test both explicitly refer to the circumstances *at the time of the dismissal*. Cases such as *Air New Zealand v Hudson* [2006] ERNZ 415 make it clear that the Authority's role is not to substitute its view for that of the employer. The Authority's task is to inquire into and judge the employer's actions against the objective standard of a fair and reasonable employer. It makes no sense to do that by ignoring the statutory test that applied at the time of the dismissal but instead applying a test that would later come into force. Other injustices and absurdities would arise from accepting AsureQuality's submission. For example, an employer who might have dismissed two employees for similar reasons on the same day might have these decisions tested against different standards depending on the ability to have the matter investigated and determined before or after 1 April 2011.

[9] S.7 of the Interpretation Act 1999 provides *An enactment does not have retrospective effect*. S.4 makes it clear that all enactments are subject to the Interpretation Act 1999 unless an enactment provides otherwise. Applying the new statutory test to this dismissal would be giving the amendment retrospective effect without that being expressly or impliedly provided for in the statute (as amended).

[10] I conclude that justification must be assessed in accordance with the law prior to 1 April 2011.

Events on 17 September 2010

[11] There are some differences in the respective accounts of what happened which can be resolved later if need be. For the time being it is sufficient to summarise events.

[12] There are five meat inspector positions on the ovine chain at Fairton: two viscera inspectors, two carcass inspectors and one detain inspector. Meat inspectors regularly rotate through these positions during the day. At about 10.30 am on 17 September Mr Thomas was on the detain. He had a discussion with a labourer about whether a particular carcass needed to be cut in half (as indicated by Jan, one of the carcass inspectors) and authorised excision of only part of the ribs. The carcass inspector then came up to Mr Thomas and told him not to override her instruction. Mr Thomas walked away rather than arguing and the other inspector instructed the labourer to cut the carcass in half, which he did. Mr Thomas returned to his work and soon after changed by rotation to one of the viscera positions.

[13] Sione Taiala isASUREQuality's Plant Supervisor (PS) at Fairton. He knew nothing of this exchange. Rather, Mr Taiala had received a report from the Vet who apparently had noticed Mr Thomas not properly inspecting product. The evidence and documents variously refer to *defective kidneys* or *a defective kidney* but nothing turns on the number. There had been an earlier exchange that day between the Vet and Mr Taiala about offal with defects and Mr Taiala had reminded the meat inspectors during the smoko break about being vigilant with their inspections. Upon receiving this second report Mr Taiala went to speak to Mr Thomas at one of the viscera positions.

[14] Mr Taiala's note reads *PS went up to slaughter floor and spoke to Steve Thomas about the VA's observation and instructed to do his job properly. Steve reacted and change the story and asked "Who is in charge of retain rail, the retain rail MI or CCS stand MI?* It is common ground that Mr Taiala said that the detain inspector had the final say. Mr Taiala then went off to another area. Jan, the

Inspector with whom Mr Thomas had had the earlier disagreement, was nearby. Mr Thomas turned to her and asked if she had heard Mr Taiala's response. Jan told another Inspector to stop the chain which he did. Jan said to Mr Thomas *Have you finished? I'm going to Richard.* That was a reference to Richard Dudley, AsureQuality's Area Manager. Mr Thomas then continued with his work for a brief period.

[15] There is some context important to an understanding of Mr Taylor's reaction. The final warning received by him on 1 October 2009 arose from interactions between him and several colleagues. The workplace relationships remained strained.

[16] Meantime, Mr Taiala was elsewhere and knew nothing of this exchange between Mr Thomas and Jan. Shortly after the exchange, Mr Thomas left his work station and approached Mr Taiala. He told him in a raised voice that he was stressed out about all this, that he was taking it to Richard Dudley and that he was trying to do his job properly but they were all ganging up on him. Mr Thomas told Mr Taiala he was going home. It is common ground that Mr Thomas was red faced and spoke in a loud and aggressive voice. He left without Mr Taiala responding. Mr Thomas went first to the wash up area and then called in to speak to the Vet before leaving the plant. Meantime, Mr Taiala covered Mr Thomas's work before organising another Meat Inspector to take over. When he went looking for Mr Thomas soon after he could not find him.

AsureQuality's investigations

[17] Mr Taiala contacted Mr Dudley and they spoke later on Friday 17 September. Mr Taiala explained what he knew of events at that point. The two men met on Monday 20 September. By that time Mr Taiala had received several other unrelated complaints about Mr Thomas from his work colleagues. Mr Dudley was briefed about those complaints as well as the Friday incident.

[18] Mr Dudley discussed these matters with Stephen Muscroft-Taylor, AsureQuality's Operations Manager. Mr Dudley's evidence is that he spoke to Mr Muscroft-Taylor on Monday 20 September while Mr Muscroft-Taylor's evidence

is that he was told of these events on Friday 17 September. I prefer Mr Dudley's evidence on this point.

[19] Ken Lloyd works for AsureQuality at Belfast and is also a PSA national delegate. In that role he assists union members such as Mr Thomas with disciplinary matters. There is also regular dialogue between him and AsureQuality managers. Mr Dudley called in at Belfast and spoke with Mr Lloyd on either Tuesday 21 September (Mr Dudley's evidence) or Wednesday 22 September (Mr Lloyd's evidence). There is also a dispute about what was said. In particular, Mr Lloyd says that he specifically asked and was told by Mr Dudley that Mr Thomas would not be dismissed. Mr Dudley denies saying that and says that the matter was with Mr Muscroft-Taylor for investigation. I will return later to that issue. However I should note for present purposes that Mr Lloyd sent an email to a PSA union organiser based on his understanding of the discussion while Mr Dudley responded soon after to clarify the outcome of their discussion to the effect that *On Thursday I will be conducting preliminary interview to discuss the more serious issue of leaving the plant without authorisation. In light of the situation that Steve Thomas is currently in (on final warning) I will be taking advice from Steve Muscroft-Taylor on what course of action to take. We will let you know what level of action we will take. At this stage all investigations are preliminary.* These emails bear the date stamp of 21 September 2010. Mr Lloyd then had an exchange of emails dated 22 September 2010 with Mr Muscroft-Taylor who also made the point that there would be an investigation. The emails confirm that, whatever the content, the initial exchange between Mr Lloyd and Mr Dudley occurred on 21 September.

[20] Mr Dudley continued with his investigations over the next several days. It is not necessary to detail those matters.

[21] On Monday 27 September Mr Thomas received a letter of that date bringing to his attention an allegation of serious misconduct that he had been negligent in his viscera inspection, had left the chain without permission and the plant without advising his supervisor and that his conduct was likely to bring AsureQuality into disrepute.

The disciplinary process

[22] It is helpful to set out more of the 27 September letter:

ALLEGED FACTS IN SUPPORT OF THE ALLEGATIONS

- *On 1 October 2009 you were sent a letter advising you that you had been placed on a final warning. This letter is attached.*
 - *AsureQuality has recorded that you attended the annual site induction on 1 July 2010 where you were advised of AsureQuality's standards of behaviour.*
 - *On Friday 17 September 2010 during morning smoko you were advised by Sione Taiala that you along with other employees needed to be more vigilant with your viscera inspection.*
 - *On Friday 17 September 2010 after morning smoko you were observed by Maureen Gatenby, VA, that you were non-compliant with your viscera inspection.*
 - *On Friday 17 September 2010 you left your workstation on the chain and then left SFF Fairton with out authorisation.*
 - *A copy of your statement dated 17 September 2010 is attached.*
 - *A copy of Sione Taiala's statement dated 17 September 2010 is attached.*
- Your actions could represent a fundamental breach of duty of trust and fidelity owed by an employee to their employer and risked AsureQuality being able to supply a compliant meat inspection service to Silver Fern Farms.*

[23] There was a disciplinary meeting on 30 September 2010 which by agreement was recorded. I have listened to the recording but it is not necessary at present to describe the discussions. Mr Thomas returned to work the day after the interview.

[24] Mr Thomas next received a letter dated 7 October 2010 from Mr Muscroft-Taylor conveying some further information from Sione Taiala about events on 17 September. It was said that Mr Thomas had gone up to Mr Taiala with a *red face and in a really loud and aggressive voice said he was going home* and left without giving Mr Taiala an opportunity to respond. In response Mr Thomas did not accept that he had raised his voice.

[25] By letter dated 19 October 2010 Mr Muscroft-Taylor conveyed his finding of serious misconduct in that Mr Taylor was negligent in his viscera inspection after being advised of the expected standard, that he left the chain without permission and the plant without advising his supervisor and without authorisation and that his conduct was likely to bring AsureQuality into disrepute. Mr Taylor was given an opportunity to make further submissions about whether he should be dismissed. That was done by letter dated 21 October 2010.

[26] On 26 October Mr Taylor was told to see Mr Dudley after work. After work he got changed and noticed a cardboard box by his locker. He went to Mr Dudley's office. Mr Dudley handed Mr Taylor a letter dated 26 October 2010 from Mr Muscroft-Taylor advising of the decision to terminate Mr Taylor's employment for serious misconduct especially in light of the final written warning from 1 October 2009.

Justification

[27] Whether the decision to dismiss Mr Thomas was justifiable must be determined on an objective basis by considering whether the employer's actions and how the employer acted were what a fair and reasonable employer would have done in all the circumstances at the time.

[28] S.4(1A)(c) of the Employment Relations Act 2000 provides that an employer who is proposing to make a decision that is likely to have an adverse effect on the continuation of an employee's employment must give that employee access to relevant information and an opportunity to comment before the decision is made.

[29] Mr Dudley kept a file note of his involvement in the investigation. The file note was not disclosed to Mr Thomas or his representative although it was part of Mr Muscroft-Taylor's file. However, there was nothing significant in the file note that was not conveyed to Mr Thomas by Mr Muscroft-Taylor either through his correspondence or during the disciplinary meeting. Accordingly there was no breach of s.4(1A)(c).

[30] Mr Muscroft-Taylor formed the view that Mr Thomas had been negligent in his viscera inspection. That amounted to serious misconduct in Mr Muscroft-Taylor's view because Mr Taiala had told the inspectors at morning smoko to be more vigilant with their inspections.

[31] To support Mr Muscroft-Taylor's view, I am referred to a number of cases to demonstrate that a fair and reasonable employer would conclude that such a failing amounts to serious misconduct.

[32] In *Click Clack International Ltd v James* [1994] 1 ERNZ 15 the employee, an experienced die setter/moulder, using a punch and a hammer repeatedly struck and damaged a die while trying to remove a moulding. That was found to be such a serious lapse in judgement that the company properly concluded it could not trust the employee not to make a similar error of judgement in the future. The die was an expensive piece of equipment and the damage to it caused significant production problems. In the present case, Mr Thomas was guilty of a momentary lapse in concentration which resulted in no negative consequences for AsureQuality. The seriousness of his error (including with regard to the consequences) is significantly less than the employee's fault in *Click Clack*.

[33] I am also referred to *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 (CA). In that case a journalist failed to properly ensure that a photographer photographed the correct person at court resulting in the newspaper printing a photo of the wrong person under the caption *Gang Chief*. The Court affirmed the principle that a single act of negligence, when sufficiently serious, can impair trust and confidence and referred approvingly to the *Click Clack* case. I have already explained why the employee's misconduct in *Click Clack* was much more serious than that of Mr Thomas here. The second difficulty with applying *Oram* in the present case is that the Court held that it had to be satisfied that the decision to dismiss was one that a fair and reasonable employer *could* have taken; whereas the statutory test is expressed differently, probably in a legislative response to *Oram*.

[34] In *Ballylaw Holdings Ltd v Ward* unreported, 13 November 2001, WC45/01 a caregiver twice failed to correctly administer medication and failed to properly record and report these incidents. Her explanations for these failures were unsatisfactory to her employer. The employer also reasonably concluded that the employee had attempted to conceal her error. In those circumstances the employee was justifiably dismissed. I note in particular the Court's comments that the medication errors alone were unlikely to have resulted in her dismissal. In the present case Mr Thomas's default was no more serious than these medication errors and there was no suggestion that he attempted to conceal anything.

[35] In *Health Waikato v Tebbutt* [2003] 2 ERNZ 398 the employee failed to properly document her contacts with a large number of patients over a long period of

time. The Court found that the dismissal for serious misconduct was justified. The nature of the employee's misconduct in that case was far more serious than that of Mr Thomas.

[36] A review of these cases supports the contention that a fair and reasonable employer would not have regarded Mr Thomas's error as sufficiently grave so as to amount to serious misconduct. That view is reinforced by reference to the *Code of Ethics For AsureQuality Limited* which lists *negligence* as an example of simple misconduct and *gross or deliberate negligence* as an example of serious misconduct. I acknowledge that the *Code* also says that listed items of misconduct could constitute serious misconduct in certain circumstances. However, there is nothing about Mr Thomas's actions in letting past a defective kidney or kidneys that could cause any employer to treat his conduct as serious misconduct.

[37] For AsureQuality it is submitted that Mr Thomas's *walkout* from the slaughterboard and from the workplace amounted to serious misconduct as a fundamental breach of contract. Again, the *Code* lists *Being absent from the assigned place of work during working hours without authorisation* and *Failure to report to the Manager/Supervisor when leaving ...work premises* as examples of misconduct; and as with all the listed examples in *certain circumstances* it could constitute serious misconduct. The circumstances relied on are Mr Thomas's failure to give Mr Taiala as opportunity to authorise his departure or deal with his concerns, Mr Taiala's surprise that Mr Thomas then left the plant, the lack of good reason for Mr Thomas to leave the slaughterboard or the plant and the potential disruption to the chain.

[38] There are slight but immaterial variations in Mr Taiala's account of his exchange with Mr Thomas immediately before Mr Thomas left. Mr Taiala's dairy note reads:

Steve came to me with voice raised "I'm stressed out about all this. I'm taking this to Richard. I try to do my job properly but they all ganging up on me." I tried to talk to him but he was gone 11am

[39] Mr Taiala's written report reads:

...Steve came to me, raised his voice and said, "I'm stressed out about all this. I'm taking it to Richard. I try to do my job properly but they all ganging up on me. I'm going home." I tried to talk to him but he was gone at 11am.

[40] Mr Taiala is recorded as telling Mr Dudley:

Steve confronted him he aggressively said I'm stressed and I am being picked on. Sione tried to reason with him but he said I'm going to talk to Richard and said he was going home. ...Sione went to the smoko room and the locker room but Steve had gone.

[41] Later, Mr Taiala apparently told Mr Muscroft-Taylor:

He came up to me with a red face and in a really loud and aggressive voice said he was going home. ...as soon as he said what he had to say he immediately went to the apron wash and I had to find someone to fill his position on the chain.

[42] Mr Muscroft-Taylor concluded that Mr Taylor left the chain without permission and then left the plant without advising his supervisor and without authorisation. Mr Taiala's account was that Mr Taylor told him he was taking it to Mr Dudley and was going home. In light of that, no fair and reasonable employer relying on Mr Taiala's account would have reached the conclusion that Mr Taylor left the plant without advising his supervisor. Mr Muscroft-Taylor also distinguished between Mr Taylor leaving the chain without permission and leaving the plant without permission. On the account given by Mr Taiala, no fair and reasonable employer would have made that distinction. Mr Taylor absented himself from his assigned place of work without permission in order to go home. He told Mr Taiala what he was doing but neither sought nor obtained permission. Any fair and reasonable employer would have concluded that Mr Taylor's misconduct was less serious than if he had left work without advising his supervisor.

[43] A further point about Mr Muscroft-Taylor's analysis is that he did not accept it was reasonable for an employee to become stressed and leave work in response to the inspection disagreement. Rather, he thought that Mr Taylor should have stayed at work to discuss the situation with his supervisor. I accept that this is what a fair and reasonable employer would have concluded.

[44] The final point is that Mr Muscroft-Taylor concluded that Mr Taylor's conduct was likely to bring AsureQuality into disrepute *as a result of leaving the chain without permission and risking a labour failure*. That references an example of serious misconduct in the Code: *Conduct likely to bring the employee or AsureQuality into disrepute, whether in the course of employment or in personal time*. AsureQuality's investigation unearthed no information to support that allegation other than the admitted fact that Mr Taylor left work. It is difficult to see how conduct

which is expressly categorised as simple misconduct can at the same time, without more, also be serious misconduct. I do not accept that any fair and reasonable employer would have so concluded.

[45] It follows from this analysis that a fair and reasonable employer would not have concluded that Mr Taylor's misconduct, considered separately or together, was such as to amount to serious misconduct.

[46] In his evidence Mr Muscroft-Taylor made clear his view that each aspect of Mr Taylor's conduct separately amounted to serious misconduct capable of justifying dismissal and that he approached his decision making on that basis. Given the finding that no fair and reasonable employer would have reached such a conclusion it follows that Mr Taylor must have been unjustifiably dismissed.

[47] As noted earlier there is a dispute between Mr Lloyd and Mr Dudley about the content of their discussion on 21 September 2010. Mr Lloyd's account is that they resolved the matter on the basis that *Richard will follow up with an arse kicking for Steve and that will be the end of the matter*. On Mr Dudley's account, he gave no indication that the matter was not one that might result in dismissal. Later on 21 September 2010, having received a copy of Mr Lloyd's email to his union organiser, Mr Dudley explained by email to Mr Lloyd that the level of action to be taken by AsureQuality remained undetermined. It is unlikely that Mr Lloyd misunderstood the discussion with Mr Dudley. However, it is not necessary to take this dispute any further in light of the above finding about a personal grievance.

Conclusion

[48] Mr Taylor has a personal grievance of unjustified dismissal.

[49] As noted, I am asked to and accordingly do reserve the question of remedies for further investigation.

[50] I also reserve the question of costs.

[51] The Authority will contact the parties shortly to make arrangements for a further investigation.

Philip Cheyne
Member of the Employment Relations Authority