

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 541  
5397691  
5397704

BETWEEN TONY NGAHOE TIOPIRA and  
RICKY TIOPIRA  
Applicants

A N D AULACK ENTERPRISES  
LIMITED  
Respondent

Member of Authority: K J Anderson  
Representatives: S Austin, Advocate for Applicants  
M Sharma, Counsel for Respondent  
Investigation meeting: 17 July 2013 at Whakatane  
Submissions Received: 14 August 2013 from Applicants  
22 August 2013 from Respondent  
Date of Determination: 26 November 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] The applicants, Mr Ricky Tiopira and Mr Tony Tiopira, say that they were both unjustifiably dismissed on 10 September 2012. The applicants ask the Authority to find that they have a personal grievance and award them the remedies of reimbursement of lost wages and compensation for hurt and humiliation.

[2] The respondent, Aulack Enterprises Limited (Aulack), denies the claims of the applicants and say that their dismissal was justified on the ground of serious misconduct. Aulack presents a counterclaim; alleging that the actions of the Tiopiras had a negative financial impact on the business to the extent that damages in the sum of \$30,000 is claimed.

## **Background**

[3] The applicants, Ricky and Tony Tiopira (the Tiopiras), were employed by Aulack in the position of kiwifruit pickers and pruners from April 2012.

### **The incident – 2 September 2012**

[4] On 2 September 2012, the Tiopiras were to carry out kiwifruit pruning and tying down work at an orchard on the Brown farm owned and operated by Mr Murray Brown, Mrs Marie Brown and their son, Michael Brown.

[5] The Tiopiras arrived at the farm in their car some time between 7:30 and 8:00a.m. It is common evidence that before the Tiopiras could obtain access to the orchard, it was necessary to lower an electric tape gate before driving on. It is also established that Mr Michael Brown observed the arrival of the Tiopiras at the gate, which was about 50 metres from the milking shed, and he took exception to Tony Tiopira lowering the gate as there were cows passing that would stray into the wrong paddock. It seems that Michael Brown required the Tiopiras to wait for a moment while the cows that were leaving the milking shed made their way past the gate before it could be opened.

[6] There are some inconsistencies in the evidence about how Michael Brown communicated his displeasure at the gate being opened by Tony Tiopira. Mr Brown's written witness statement states that the Tiopiras had left the gate open and he yelled at them to shut it. Mr Brown attests that he rode down on his quad bike to the gate in order to shut it to stop the cows from going into the wrong paddock. Mr Brown says that he went to the gate and told the Tiopiras that they had to shut it and that they should have "known the rules".

[7] However, Mr Brown subsequently made a statement to a Police constable and in that statement he records that he yelled out: "...wait for the f--king cows man". In his statement to the Police, Mr Brown goes on to say that Tony Tiopira yelled back at him and gave him the fingers and said: "... get f--ked you bald head c..., you f--king honky".

[8] The evidence of Tony Tiopira is that, upon arriving at the farm on the morning of 2 September 2012, he got out of the car to lower the gate so that his father (Ricky Tiopira) could drive the car through. Tony Tiopira says that he intended to close the

gate after this. He attests that as he was about to lower the tape, he heard Michael Brown “yelling and swearing” at him from the cowshed. Tony Tiopira says that he yelled back at Mr Brown to the effect that he should come over and talk to him “...like a human being”. It is established that Michael Brown rode down from the cowshed on the quad bike to where the Tiopiras were. It is from this point that the substantive evidence is at issue.

### **The evidence of Michael Brown**

[9] The evidence of Michael Brown to the Authority is that, upon approaching the Tiopiras, Tony Tiopira started yelling and swearing at him. Then Ricky Tiopira got out of the car and started yelling at him too. Mr Brown attests that Ricky Tiopira grabbed his shirt and punched him. Mr Brown says that Tony Tiopira jumped on him and started “laying into” him.

[10] The further written evidence of Mr Brown is that his mother, Mrs Marie Brown, saw what was happening and came to the scene and upon her arrival, the Tiopiras continued yelling. Mr Brown attests that Ricky Tiopira started trying to punch him again and then wrestled him to the ground and head butted him.

[11] But the statement that Mr Brown subsequently gave to the Police is that upon approaching the Tiopiras, Ricky Tiopira “...got right into my face and he was going ape shit”. Mr Brown states that he pushed past Ricky Tiopira in order to go and put the gate tape back up and then Ricky Tiopira grabbed him by the shoulders and lifted him off the ground and threw him against the side of the car. Mr Brown states that he then attempted to walk away and Ricky Tiopira “jump kneed” him in the forehead above his left eye. Mr Brown states that he was “...virtually unconscious standing up”. Mr Brown states that Ricky Tiopira then head butted him again in the forehead. Mr Brown then states that his mother attempted to ring Mr Murray Brown but could not make contact. Michael Brown contacted his father by cell phone and told him to bring his guns. Mr Brown states that he remembers that before his father arrived on the scene, Ricky and Tony Tiopira were on either side of him punching him to the head area.

[12] Subsequently, Michael Brown attended the local hospital and was diagnosed with concussion. He also required several treatment sessions with an osteopath who diagnosed a whiplash condition.

**The evidence of Mrs Marie Brown**

[13] The evidence of Mrs Brown to the Authority is that she saw Ricky Tiopira grab her son and hit him several times. Mrs Brown attests that she tried to intervene but “couldn’t stop them” so attempted to phone her husband without success. Mrs Brown says that the Tiopiras hurt her son quite badly and that he had whiplash and back injuries from the attack; and he could not perform his usual duties on the farm for several days.

[14] In her statement to the Police, Mrs Brown says that she saw the Tiopiras punching her son and he was covering his head with his hands. Mrs Brown stated that when she intervened, the Tiopiras stopped punching her son but there was some pushing and pulling. Mrs Brown records that Tony Tiopira “backed off” but Ricky Tiopira was swearing and yelling and was “wound-up”. Mrs Brown told him to leave. She saw that her son had a bloody nose and that his forehead was bleeding. Mrs Brown states that she told Ricky Tiopira to leave the property several times and at one stage he was up in her face “yelling and ranting” at her. Mrs Brown also states that Ricky Tiopira taunted Michael Brown and invited him to hit him.

**The evidence of Mr Murray Brown**

[15] The evidence of Murray Brown to the Authority is that he received a phone call from his son who informed him that there was “trouble” and to bring his guns. Mr Brown says that he thought the trouble must relate to dogs worrying stock. He took a rifle with him and went to see what was happening. Mr Brown attests that he saw Michael on his knees and the Tiopiras were “punching the shit out of his head”.

[16] In his statement to the Police, Mr Brown said that he made his way down from the cowshed and when he saw what was happening he put aside the rifle he was carrying. Mr Brown states that he saw Michael on his knees covering his head with his hands and two guys punching him. Mr Brown stated that there would have been 20 to 30 blows. Mr Brown states that he took Ricky Tiopira by the “scruff of the neck” and held him at arm’s length and asked Michael Brown what was going on. Mr Brown states that his son just looked at him blankly and was dazed and Mr Brown realised that his son was “in trouble”. Mr Brown states that he told the Tiopiras to leave the property but all they wanted to do was argue but they eventually left after Tony Tiopira recovered his cell phone from the ground.

### **The evidence of Ricky Tiopira**

[17] The evidence of Ricky Tiopira to the Authority is that upon the arrival of Michael Brown at the tape gate, he started to get out of his car to see what was going on. Mr Tiopira says that as he was getting out of the car, Michael Brown grabbed him by the collar and started to “rag doll” him and punch upwards into his jaw. Mr Tiopira says that his son tried to get him apart from Michael Brown and eventually did so. Mr Tiopira says that there was a heated discussion and he tried to explain that they just wanted to get access to the orchard. Mr Tiopira says that he “stood up straight” and said to Michael Brown: “Why don’t you just hit me if that’s what you want to do”. Mr Tiopira refers to Mrs Brown intervening and both her and Michael Brown yelling at him. Mr Tiopira says that Michael Brown stood over him to the extent that he was bent backwards over the boot of the car. But then Michael Brown moved off to one side out of his peripheral view, and Mr Tiopira says that he was then punched on his left ear by Michael Brown who then “seemed to lunge” towards him so: “I hit out and smacked him in the face to defend myself”. Mr Tiopira says that Michael Brown fell over and he jumped on him until he settled down. Mr Tiopira relates to Michael Brown phoning his father and telling him to bring a gun.

[18] In a subsequent statement to the Police, Mr Tiopira relates a similar version of events relating to the arrival of Michael Brown at the scene. Mr Tiopira stated that his son pulled Michael Brown off him and then Michael Brown and Tony Tiopira “wrestled around the vehicle”. Mr Tiopira stated that he pulled his son away and told him to “leave it alone” but Michael Brown came back at him again and stood over him and he ended up leaning over the car boot with Michael Brown standing over him with their noses almost touching. Mr Tiopira stated that he tried to stand up and in the process “our heads have clashed” and that this resulted in punches being exchanged.

[19] In his statement to the Police, Mr Tiopira relates to Mrs Brown intervening:

They were both standing in front of me and I could see the son was still angry. I put my arms down and held them behind my back and said “I can see you’re angry and if you want to hit me go ahead”.

[20] Mr Tiopira stated that Michael Brown moved away to one side out of Mr Tiopira’s sight and then he was punched on the left side of his face and jaw. The statement of Mr Tiopira regarding the arrival of Mr Brown is reasonably consistent with most other accounts.

**The evidence of Tony Tiopira**

[21] The evidence of Tony Tiopira to the Authority is similar to that of his father. In his statement to the Police, Tony Tiopira says that Michael Brown took hold of Ricky Tiopira's shirt collar area "...he was holding the shirt with two clenched fists" and was punching Ricky Tiopira's chin and that this lasted "for about 15 seconds" until he intervened.

[22] Tony Tiopira stated to the Police that Michael Brown "king hit" Ricky Tiopira on the left side of his head and his father responded with two punches to Michael Brown's forehead. In his statement, Tony Tiopira refers to the arrival of Murray Brown and says that Mr Brown was "calm" and queried what had happened.

[23] The respective evidence has been set out above largely for the purpose of establishing the issues that have come to the Authority for determination as they relate to the incident on 2 September 2012. And because of the substantial conflict in the evidence before the Authority, and the unusual manner in which this dispute evolved, it is necessary to examine in some detail the overall circumstances that prevailed.

**The investigation conducted by Aulack**

[24] After leaving the Brown farm on 2 September 2012, the Tiopiras drove to the home of Mr Hardeep Singh, the Managing Director of Aulack. The evidence of Mr Singh is that the Tiopiras explained to him that there had been an altercation at the Brown farm and that there had been a fight with Michael Brown and he had been injured.

[25] Mr Singh attests that he told the Tiopiras that violence at the workplace was not permitted and that this matter was serious and they could lose their jobs. Mr Singh says that he noticed that Ricky Tiopira's hand was swollen and he had a bleeding ear.

[26] Mr Singh then visited the Browns and he says that he was there about half an hour and listened to their version of events. Mr Singh then went back to his house and spoke further with the Tiopiras and explained to them what he had been told by the Browns. The evidence of Ricky Tiopira is that Mr Singh asked if Tony and Ricky wanted to go pruning on another property for the rest of that day but the Tiopiras decided not to and went home. Ricky Tiopira subsequently visited the accident and

emergency department of the local hospital and received some treatment for his ear and had x-rays of his right hand and jaw.

[27] Mr Hardeep Singh subsequently informed Mr Gurjeevan Singh, the Manager of Aulack, of the incident between the Tiopiras and the Browns. Gurjeevan Singh wrote to both of the Tiopiras on 3 September 2012:

This letter is to inform you that you have a disciplinary meeting on **7 September 2012 at 10am**. This will be held at the work base office.

This meeting is about 2 September 2012, an incident involving violence occurred on the Brown orchard. Offering violence at work is a breach of employment contract and it may result in dismissal. This matter is considered serious and is being investigated.

At this meeting you are able to express your viewpoints on the information provided. Based on the information from the investigation and the information at the meeting you may lose your job with the company.

If more time is required then please contact the office. There will be no more than three people at this meeting (excluding you).

You are able to bring a support person to the meeting. They can be whanau or a legal representative. If you have any questions about this letter or any other matter please feel free to contact me at any time.<sup>1</sup>

[28] The Tiopiras say that they did not receive this letter. But Mr Gurjeevan Singh is adamant the letter was posted to 266/B Hodges Road, Waimana. As the Authority understands it, Ricky and Tony Tiopira live further up Hodges Road and their mail goes to the mailbox of their sister, Sarndra Tiopira, and is collected from her.

[29] It is established that the Tiopiras did not attend work on Monday, 3 September 2012. They attest that they went to work on Tuesday, 4 September 2012 but the evidence of Gurjeevan and Hardeep Singh is that the Tiopiras did not report for work. The work log book confirms that the Tiopiras were not at work on 4 September 2012.

[30] The evidence of Gurjeevan and Hardeep Singh (the Singhs) is that they visited the Browns again on 4 September 2012 to ascertain more about the incident on 2 September. Mr Gurjeevan Singh attests that the Browns' version of events was different from what the Tiopiras had described; therefore further questions would have to be put to them.

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<sup>1</sup> Separate letters with the same content were sent to Ricky and Tony Tiopira.

[31] On Wednesday, 5 September 2012, the Tiopiras returned to work and were briefed about the new orchard they would be working on due to the investigations taking place pertaining to the Brown incident. The evidence of the Singhs is that the Tiopiras were informed that a letter had been sent to them regarding a meeting to be held on 7 September 2012. The Singhs attest that the Tiopiras confirmed that they would be coming to work and would attend the meeting and that they understood why the meeting was required.

[32] The evidence of Hardeep Singh is that later on 5 September 2012 he stopped Ricky Tiopira and his sister Sarndra driving home after the day's work.<sup>2</sup> Mr Singh attests that Mr Tiopira was driving the car and he got out and talked to him in front of Mr Singh's truck. Mr Singh says that during his conversation he explained to Mr Tiopira what was happening in regard to the incident with the Browns and that "we were having a meeting" about the incident. Mr Singh says that Mr Tiopira indicated that he knew that there was "a process" and that he knew it would take some time to "sort out". Mr Singh attests that Mr Tiopira knew that his job was in jeopardy and stated that he was sorry and that he knew "it was not an easy situation to be in".

[33] The evidence of Ricky Tiopira is consistent with that of Hardeep Singh in regard to stopping on the road to talk. Mr Tiopira says that he got out of the car and stood at the passenger side of the car along with Hardeep Singh. Mr Tiopira attests that while his sister stayed in the car "it was like she was part of the conversation even though she did not say much".

[34] The evidence of Mr Tiopira is that Mr Singh asked how he was and "we chatted about that a bit". Mr Tiopira attests that Mr Singh informed him that he and Tony "should not worry and that he would sort things out about us".

[35] The evidence of Sarndra Tiopira is that upon being stopped on the road by Hardeep Singh, her brother got out of the car and walked around to the passenger side where he and Mr Singh could talk. Ms Tiopira says that she wound the window down to say hello to Mr Singh and "be part of things". Ms Tiopira attests in her witness statement that Mr Singh said to her brother "don't worry he would sort things out, I will look after you".

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<sup>2</sup> Sarndra Tiopira also worked for Aulack.

[36] Mr Singh has produced a diary entry for 5 September 2012: “meet Hoots<sup>3</sup> reminded him of the meeting”. A diary entry for 7 September 2012, records in large print, “meeting with Hoots @ 10am”. Mr Singh accepts that he did tell Mr Tiopira not to worry and that he would sort things out. But Mr Singh also attests that he told Mr Tiopira that:

... we had to work together to figure out what happened and that we need to sit down and discuss it. I told him that we have to follow the process. It was not just up to me.

[37] Mr Singh disputes Ms Tiopira’s version of the conversation he had with her brother. Mr Singh attests that Ms Tiopira was not part of the conversation and that it would not have been possible for her to hear everything that was said from where she was sitting.

### **Material matters – Thursday, 6 September 2012**

[38] There is a substantial conflict in the evidence from the parties pertaining to their respective actions on Thursday, 6 September 2012.

[39] First, there is disputed evidence regarding whether the Tiopiras attended work on this day. Their evidence is that they did not. The evidence of Ricky Tiopira is that he and his son did not attend work that day as it was their “usual shopping day” in Whakatane. The evidence of Tony Tiopira is similar.

[40] But the evidence of the Singhs is that the Tiopiras attended work on 6 September 2012. This is confirmed by the work log book entries for that day and the respective production figures for Ricky and Tony Tiopira. Further, the record shows that the Tiopiras regularly attended work on Thursdays and there does not appear to be a regular “shopping day” as Ricky Tiopira has attested to. I conclude that the Tiopiras did attend work on 6 September 2012 and their evidence to the contrary is not accepted. Indeed, I suspect that the evidence of the Tiopiras that they did not attend work on 6 September 2012, is a part of a fabrication of events designed to give credence to subsequent material matters pertaining to the disciplinary meeting that was scheduled.

[41] Ms Sarndra Tiopira attempted to corroborate the evidence of Ricky and Tony. She says that at about 7:30a.m. on Thursday, 6 September 2012, she went into the

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<sup>3</sup> Apparently Ricky Tiopira is known as “Hoots” to Mr Singh

workplace office to see Gurjeevan and Hardeep Singh to get work details for the day. The evidence of Ms Tiopira is that Hardeep Singh said to her "...tell your brother and his son not to come back to work". Ms Tiopira says that she was a "bit surprised" but simply responded "okay".

[42] The further evidence of Ms Tiopira is that on the evening of 6 September 2012 she went to the home of Ricky and Tony Tiopira. The latter was not home but Ms Tiopira attests that she told Ricky Tiopira that Hardeep Singh had asked her to tell Ricky and Tony not to come back to work. I note that the evidence of Ricky Tiopira is that his sister came to his house "at about 7 to 8pm on 6 September 2012". Ms Tiopira told the Authority that it was "after work – about 5.30pm". I also note that neither Sarndra Tiopira nor Ricky Tiopira seemed to be particularly perturbed about the purported loss of Ricky and Tony Tiopira's employment. But I conclude that this is because most of what the three Tiopiras say about their actions on 6 September 2012 is, most probably, a fabrication. This is because I find that it is more probable than not that Ricky and Tony Tiopira actually attended work on 6 September 2012 and furthermore, they knew that they were expected to attend a disciplinary meeting the next day.

[43] It is established that the Tiopiras failed to attend the disciplinary meeting on 7 September 2012 and they say this is because they were told, by Hardeep Singh, via Sarndra Tiopira, that they were not to come back to work. However, I find that it is more probable than not that the Tiopiras decided they would not attend the disciplinary meeting on 7 September 2012 and then fabricated a scenario to provide an alternative reason to justify their failure to attend the meeting.

### **The disciplinary meeting scheduled for 7 September 2012**

[44] As noted above, it is established that the Tiopiras did not arrive at work or attend the meeting scheduled for 7 September 2012. The evidence of Hardeep Singh is that he thought this was "quite strange" as the Tiopiras had been at work the day before. In addition to Gurjeevan and Hardeep Singh, a representative of the company that Aulack contracted services to, was present.

[45] Upon the failure of the Tiopiras to arrive for the meeting, several attempts were made to contact them on the landline and mobile phone numbers that the

company had on record; with no response, as confirmed by the entry in Hardeep Singh's diary for that day.

[46] The evidence of Gurjeevan Singh is that on 8 September 2012, he attempted to contact the Tiopiras again on the landline and mobile phone numbers with no response, albeit voicemail messages were left.

### **The decision to dismiss the Tiopiras**

[47] On Monday, 10 September 2012, given that there had been no sign of, or contact from, the Tiopiras since 6 September 2012, Gurjeevan and Hardeep Singh gave consideration to what the Tiopiras had said about the incident on 2 September 2012 and the information received from the Browns. As a consequence of the consideration of that information, the following letter was sent to both Ricky and Tony Tiopira:

We regret to inform you that your position within our company will be terminated effective immediately.

Following the investigation of the incident that occurred on 2 September 2012, the company has decided that the actions warrant serious misconduct.

The incident on 02 September 2012 has left fellow co-workers concerned and fearful. The threat of violence seriously undermines the trust and confidence within you as an employee.

Thank you for your service.

[48] The evidence of the Tiopiras is that they never received the dismissal letter dated 10 September 2012, or the letter dated 3 September 2012 inviting them to a disciplinary meeting; until their advocate, Mr Austin, sent them to Ricky Tiopira on 8 October 2012. Given that the Tiopiras have had no problems receiving correspondence from Mr Austin relating to their grievance proceedings, and letters from the Police pertaining to the complaint that was made, I conclude that there is no good reason why they would not have received the correspondence from Aulack.

[49] The Tiopiras say that their dismissal was unjustifiable, essentially because they did not have the opportunity to be heard and respond to the employer before the decision was made to terminate their employment, on the grounds that serious misconduct had occurred.

## Analysis and conclusions

[50] In determining, on an objective basis, whether a dismissal was unjustifiable, the Authority must apply this test:

... 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.<sup>4</sup>

[51] Then, in applying the test, the Authority 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.<sup>5</sup>

[52] Therefore, when considering whether the dismissal of the Tiopiras was what a fair and reasonable employer could do in the circumstances, there is a statutory requirement for the Authority to consider the criteria set out in s.103A(3)(a)-(d) of the Employment Relations Act (the Act). The evidence is that Hardeep Singh met with the Browns on 2 September 2012, shortly after the incident, then on 4 September 2012, Hardeep and Gurjeevan Singh both met with the Browns and ascertained from them their perspective of the incident. But this was only part of the investigation required by criterion (a) above.

Via the letter dated 3 September 2012 to the Tiopiras, Aulack informed them of an allegation being:

Offering violence at work is a breach of [sic] employment contract and it may result in dismissal.

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<sup>4</sup> Section 103A(2) of the Employment Relations Act 2000

<sup>5</sup> Section 103A(3)

[53] The Tiopiras were informed that a meeting was to take place on 7 September 2012 and: "...at this meeting you are able to express your viewpoints on the information provided". I have concluded that it is more probable than not that the Tiopiras were aware of the requirement to attend this meeting, but for reasons only known to them, they chose not to.

[54] Under the second and third criteria (b) and (c) under subsection (3), the Authority is required to consider whether Aulack raised its concerns about the Tiopiras' actions before dismissing them, and whether the Tiopiras were given an opportunity to respond to the concerns of Aulack before they were dismissed.

[55] It is commonly accepted that these two criteria were not met. However, Aulack says that the failure on the part of the Tiopiras to attend the meeting on 7 September 2012 and their failure to make any contact on 8, 9 or 10 September 2012, left Aulack in a position whereby the company was left with no option but to make a decision, based on what the Browns had told them in regard to the incident on 2 September 2012.

[56] It is submitted for the Tiopiras that Aulack did not make reasonable efforts to contact them following their failure to attend the meeting scheduled for 7 September 2012. It is submitted that as the Tiopiras lived only about 15 minutes' drive away from the workplace, Aulack could easily have delivered an "appropriate notice" to the Tiopiras, or alternatively, Aulack could have requested that Sarndra Tiopira deliver an appropriate communication. For the applicants, reference is made to *Irvines Freightlines Ltd v. Cross*<sup>6</sup> where the Employment Court emphasised that an employee's right to be heard in a disciplinary setting is "a fundamental precept of natural justice".

[57] On the other hand, the submissions for Aulack refer the Authority to *Amaltal Fishing Company Ltd v. Morunga*<sup>7</sup> where the Court cautioned against subdividing the question of justification into the separate components of substantive and procedural fairness. Rather it is the overall justice of the case that must be looked at. Nonetheless, given that in *Amaltal* the Court found that the defendant was one of four employees, who between them were guilty of some "atrocious" conduct, the facts of that case must be seen to be somewhat exceptional. And of course this case was

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<sup>6</sup> [1993] 1 ERNZ 424

<sup>7</sup> [2002] 1 ERNZ 692

before the introduction of the Employment Relations Act and the subsequent amendments to s.103A. Nonetheless, ss(3) is effectively a codification of established common law.<sup>8</sup>

[58] And of some relevance to the matter before the Authority is that in *Amaltal* Chief Judge Goddard stressed the need to:

... weigh in the balance the nature, quality, and consequent effect respectively of any failure by the employee to act with due regard for his or her own interests and the employer's acts or omissions.

[59] Applying the above to the circumstances of the Tiopiras, while it could be said that Aulack omitted to take further appropriate steps to ensure that the Tiopiras attended a meeting to address an allegation of serious misconduct and give their perspective of the events of 2 September 2012, this has to be weighed against what was, more probably than not, a deliberate strategy on their part not to participate in the disciplinary process, particularly given that they knew that their continued employment was in jeopardy. It has to be said that by avoiding the disciplinary process, the Tiopiras failed to act with due regard to their own interests. The effect being that Aulack was left to reach a decision about the termination of their employment without any contribution or further explanation from the Tiopiras.

[60] Further, there is a duty of good faith under s.4(1A)(b) of the Act which:

... requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; ...

In *Radius Residential Care Ltd v McLeay*<sup>9</sup> in reference to the good faith obligations under s.4(1A)(b) of the Act, the Employment Court stated that the duty to be responsive and communicative “extends throughout the entirety of an employment relationship, including during the course of any disciplinary proceedings”. I find that in failing to be responsive and communicative in regard to the disciplinary process activated by Aulack, the Tiopiras breached their duty of good faith towards their employer.

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<sup>8</sup> For example: *New Zealand (with exceptions) Food Processing IUOW v Unilever New Zealand Ltd* (1990) Sel Cas 582

<sup>9</sup> [2010] ERNZ 371 at 384. See also *George v Auckland Council* [2013] NZEmpC 179 regarding the obligation of responsiveness.

**Was the dismissal of the Tiopiras something that a fair and reasonable employer could do in all the circumstances?**

[61] Before determining the above question, the matter of whether Aulack could reasonably conclude that the Tiopiras had been involved in serious misconduct must be considered. Notwithstanding the failure of the Tiopiras to engage in the disciplinary process, I am satisfied that on the basis of two meetings with the Browns, Aulack was entitled to conclude that both Ricky and Tony Tiopira had been involved in serious misconduct, namely unacceptable violence against Mr Michael Brown. I have set out the evidence of both parties earlier in this determination and must emphasise that it is not the role of the Authority to place itself in the shoes of the employer in regard to its decision-making process, providing the evidence available to the employer is capable of supporting the conclusions reached in a disciplinary setting. In *Airline Stewards & Hostesses of New Zealand IUOW v. Air New Zealand*,<sup>10</sup> the Court of Appeal held that:

What are reasonable grounds for a belief of misconduct must depend on the facts of each case. But at the time when the employer dismissed the employee the employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable inquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault.

[62] In summary, I find that on the basis of a reasonably conducted investigation, whereby Aulack obtained evidence from the Browns related to the incident on 2 September 2012, and given the failure of the Tiopiras to participate in the investigation/disciplinary process, Aulack was entitled to conclude that the Tiopiras had engaged in visiting uncalled for violence upon Mr Michael Brown. Apart from the obvious conclusion that such action can never be accepted under any circumstances, let alone in the setting under which it occurred, the actions of the Tiopiras also constituted serious misconduct under clause 13.2(vi) of their employment agreements, for which the sanction of summary dismissal is available.

[63] It follows that I find that the dismissal of Ricky and Tony Tiopira was an action that a fair and reasonable employer could take in the circumstances. The dismissal of Mr Ricky Tiopira and Mr Tony Tiopira was justifiable and their claims to the contrary are dismissed.

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<sup>10</sup> (1990) ERNZ Sel Cas 985

[64] In conclusion, I must add that even if I had found that the dismissal of the Tiopiras was unjustified on procedural grounds, pursuant to s 124 of the Act, the blameworthiness of their actions pertaining to the assault on Michael Brown and their failure to act in good faith towards their employer in regard to the disciplinary process, would have nullified any remedies that may have been applicable.

### **The counterclaim**

[65] The counterclaim from Aulack against the Tiopiras is that because of their actions, the company lost the orchard work on the Brown farm due to the reputation of Aulack being seriously damaged. The sum of \$30,000 in damages is sought. But the evidence produced to the Authority in support of this claim is rather sparse. While there is a summary of amounts invoiced to the Brown farm in regard to the past work carried out, and there is a comparison of the gross returns of Aulack for the 2011/2012 and 2012/2013 financial years, I find that there is inconclusive proof that the actions of the Tiopiras resulted in Aulack incurring the financial loss claimed. And while I accept that the reputation of Aulack would certainly have suffered because of the actions of the Tiopiras on 2 September 2012, the evidence available to the Authority is of insufficient weight to allow the counterclaim to succeed.

### **Determination**

[66] For the reasons set out above, I find that:

- (a) The dismissal of Mr Ricky Tiopira and Mr Tony Tiopira was justifiable.
- (b) The counterclaim of Aulack Enterprises Limited is unsuccessful.

### **Costs**

[67] Costs are reserved. The parties are invited to resolve this matter if they can. In the event that a resolution is not possible, the respondent has 28 days from the date of this determination to file and serve submissions. The applicants have a further 14 days to respond.

**K J Anderson**  
**Member of the Employment Relations Authority**