

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
OFFICE**

BETWEEN Soifua Tufuga
AND Sleepyhead Manufacturing Company Ltd
REPRESENTATIVES David Goldwater, advocate for the applicant
Richard Upton, counsel for the respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING Christchurch, Thursday 26 October 2006
DATE OF DETERMINATION 23 March 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

- [1] The applicant, Mr Tufuga, claims his dismissal by the respondent for removing company materials without authorisation was unjustified and sought reinstatement, lost remuneration, compensation for humiliation, loss of dignity and injury to feelings and costs.
- [2] The respondent denies the dismissal was unjustified on either substantive or procedural grounds and declines to grant the applicant the remedies he requires.
- [3] The parties attempted to resolve their difficulties in mediation but were unsuccessful.

What caused the problem?

The relevant events

- [4] Mr Tufuga started working for the respondent in November 1992 with a seven month break due to illness which required ongoing dialysis treatment. He recommenced his employment in November 2004. Mr Tufuga is Samoan and was employed under a collective employment agreement but, as he was not a member of the Union, the agreement applied to him as an individual.
- [5] The agreement, at page 26 sets out offences constituting serious misconduct. The relevant sections read as follows:

Note: *Conduct which falls within the following paragraphs is deemed to be serious misconduct and may result in dismissal WITHOUT NOTICE.*

... c) Possession or removal from Company premises of Company or another persons property without proper authorisation.

[6] On 28 October 2004 the applicant signed this document and Mr Michael Stewart, the Site Manager, signed on behalf of the company.

[7] On Friday 10 March 2006 at about 10am the applicant was seen by employees loading company materials into his station wagon on the work site and near the waste skip. The witnesses were Mr Clint Thornburn, the Maintenance Engineer and Mr Matthew Lisk, the Frame Shop Supervisor, who was the applicant's supervisor.

[8] Mr Thornburn thought it odd so went over to Mr Tufuga to talk to him. Mr Thornburn says the panels were not in the skip but were on the ground near it. He also says that he asked the applicant what he was doing and from whom he had obtained permission to take the fabric panels. He says the applicant told him he did not have permission. Mr Thornburn repeated his question and says Mr Tufuga said *no*. Mr Thornburn asked if the applicant understood what Mr Thornburn was telling him and that Mr Tufuga replied *yes*.

[9] Mr Thornburn says he could not work out why, having given these responses to questions, the applicant continued to load more panels into the vehicle. He then asked the applicant which particular managers he needed to get authorisation from and said Mr Tufuga identified Nick, Michael and Robert. Knowing the applicant was clear from whom he had to get permission, Mr Thornburn went on his way. He spoke to Jason Hewittson, one of the Union delegates, telling him about his discussion with the applicant. Mr Hewittson said he would speak to Mr Tufuga about it.

[10] Mr Thornburn went about his work and in the course of moving around the factory spoke with Mr Lisk, Mr Conlan and a manager named Robert about the matter. He then checked with Mr Stewart who confirmed he had not been asked for permission by Mr Tufuga.

[11] Mr Lisk says he also spoke to the applicant, reminding him that he needed permission to take the materials. He says the applicant told him he would do this before the materials were removed. Mr Lisk asked Mr Tufuga if he understood what he was being told and the applicant said he did. Mr Lisk says, *I even went so far as to name the relevant managers who could approve the removal.*

[12] Because Mr Lisk was concerned at the volume of the material and that Mr Tufuga had not sought permission before loading his vehicle, Mr Lisk took a photograph with his cell phone. It clearly shows the registration plate and the rear section of the station wagon full of fabric rather than bags.

[13] Towards the end of the shift, just before 2pm, Mr Thornburn went out of the building to check the applicant had received permission if he still intended to take the material he had loaded earlier. Mr Thornburn went to the main gate and says:

I deliberately stood near the gate so I could check to see whether Soifua's car had been emptied or not. I saw Soifua approaching the exit in his car so I attempted to stop him by waving and calling out. Although I was in full view of him, Soifua looked the other way and drove past me without stopping. Because of how close I was to him and how I was waving and shouting, I do not accept that Soifua did not see or hear me.

When he drove past I would have been a metre away from his car, at the most. I could quite clearly see that the boot of his car was absolutely packed with bed panels. It was far more full than when I had talked with Soifua earlier in the day.

I am very clear that what Soifua had in his boot was bed panels. I could see these through both the side windows of his car and through the back window. I work with panels most days and am very familiar with what they look like. These were bed panels. It was certainly not household rubbish or dialysis rubbish as I am aware Soifua has now claimed.

[14] Mr Stewart says:

The alarm then rang, signalling the end of the shift. Clint left my office and went out to the driveway. I moved through into the showroom, which looks directly out onto the driveway. Nick Conlan was with me, but was closer to the car. Our employees started leaving work via the driveway. In the course of this happening, Soifua came driving up to the gate in the stationwagon. Clint began waving and shouting at Soifua, asking him to stop. Soifua did not stop and he drove out of the gate and down the road. As he drove past, I could see the boot of Soifua's car quite clearly. It was obvious that the boot of Soifua's car was full of some white materials. From where I was, I couldn't make out clearly what this was. However, it was clear that his boot was really full up. Soifua then drove out the gate, checked for traffic and headed off down the road. He definitely did not turn around or do a U turn.

[15] On Monday 13 March 2006 Mr Stewart convened an investigation meeting regarding the events of the previous Friday and in the meantime had contacted the Human Resources Manager for advice. Mr Stewart asked Mr Conlan to advise Mr Tufuga of the meeting scheduled for 1pm that day. Mr Conlan says that in asking the applicant to attend the meeting he:

- Spoke to Mr Tufuga about what had happened;
- Mr Tufuga told him that he, the applicant, had *done wrong*;
- Was told by Mr Tufuga that he understood what Clint and Matt had told him and that he had failed to get permission;
- Explained the issues to be discussed were serious and Mr Tufuga should bring a representative;
- Told the applicant that there was a possibility he could be dismissed.

[16] Mr Conlan then went and spoke to Jason Hewittson, a Union delegate who works alongside the applicant, to advise him of the meeting. Mr Conlan says Mr Hewittson was unsure whether the applicant belonged to the Union but he would speak to Mr Tufuga about representing him at the meeting.

[17] Mr Hewittson's evidence was that he asked the applicant whether he, Mr Tufuga, wanted him to represent him *Nick (Conlan) did give me a heads up on what was happening. However, I asked Soifua if he wanted me to represent him and he said that he did. Nick did not tell me to represent him ... I asked Soifua if he wanted me to be his representative. Soifua agreed he did need assistance and asked that I be his representative.*

The respondent's investigation

[18] The investigation meeting began at 1pm as scheduled. Mr Stewart and Mr Conlan represented the company and the applicant and his representative Jason Hewittson also attended.

[19] It is clear from the evidence of the company representative, which is not contradicted by that of Mr Hewittson, that the applicant was told of the seriousness of the matter and that his employment could be at risk. None of these witnesses gave any evidence that Mr Tufuga was confused or did not understand what he was being asked. All three said the applicant answered questions put to him clearly and in a considered manner. The applicant says he became confused when Mr Stewart *started talking quickly and saying things I could not keep up with or understand.* He says this was after he had told the meeting that he was going to send the panels to Samoa. He says that after he was told he was dismissed he told the meeting *but I put them back.*

[20] After this, the applicant says, *Michael then told Jason and me to leave the room for a moment. He goes on to say I was desperate by the time Michael called us back into the room. I apologised for causing trouble and I asked for my job back. They said no.*

[21] Mr Hewittson put the sequence somewhat differently. He says:

After Soifua had answered the various questions that Michael had put to him an adjournment was called. Soifua and I then spent 15 minutes discussing matters between ourselves in private.

When the disciplinary meeting reconvened Michael asked if there was anything further that we wanted to add or any other people we should speak to. Soifua and I both said that we had nothing further to raise. Upon hearing this, Michael moved on to his decision about what would occur. He told Soifua that he was going to be dismissed for what had occurred. ... Almost immediately after Michael said that Soifua was going to be dismissed, Soifua said that the property had actually been returned to the workplace. This came out of the blue and I was very surprised. He had not mentioned this to me in our discussions or during the meeting.

Michael asked Soifua if there any witnesses to this. Soifua said 'no'. Michael repeated that question a couple of times but Soifua said 'no' each time. Based on this, Michael said that the company's position wouldn't change and that Soifua was being dismissed.

[22] In relation to the adjournment, Mr Stewart says *we agreed that we would adjourn the meeting for about 15 minutes. Nick Conlan and myself discussed what had happened and I rang Human Resources in Auckland to make sure our process was being fair. Nick and I agreed that this seemed very serious and that dismissal was likely.*

[23] Mr Stewart also said *It is worth highlighting that this meeting probably took almost an hour – it was not a rushed meeting. We deliberately took things quite slowly to make sure Soifua understood what was happening and had time to consider what was being said and to respond.*

The issues

[24] In order to determine this matter the Authority needs to make findings on the following matters.

- Was the applicant aware of the company's policy regarding the removal of company goods including waste from workplace.
- Did the applicant return the panels.
- Did the applicant request Mr Hewittson to act as his representative at the employer's investigation meeting.
- Was the respondent investigation full and fair.
- Was the applicant unjustifiably dismissed.
- If so, what, if any remedies are due to him.

The investigation meeting

[25] The Authority was assisted by evidence from the applicant and from Mr Misiona Uliano, Mr Tifa Avia, Mr Taulauniu Mafua, Mr Satoka, Mr Kevin Goldwater and Mr Paul Fallen. Two character references on behalf of Mr Tufuga from Father Paulo Filoialii, the applicant's parish priest were presented.

[26] For the respondent the Authority heard evidence from Mr Stewart, Mr Thornburn, Mr Hewittson, Mr Conlan and Mr Lisk.

[27] The Authority was considerably aided by Mr Fidow, who acted as sworn interpreter during the investigation meeting. I thank him particularly for his assistance.

Analysis and discussion

[28] The test to be applied in this matter is set out on s.103A of the Employment Relations Act 2000 and its amendments. It reads:

For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action 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 the dismissal or action occurred.

[29] The leading case in the matter of the test of justification is *Air New Zealand v. Hudson* AC30/06, 30 May 2006 Shaw J. Adopting the guidelines set out in this case, Travis J in *Fuiava v. Air New Zealand* AC51/06, 12 September 2006 summarised the principles as follows:

The Court in Hudson found that the new s.103A did not give the employment institutions the unbridled licence to substitute their views for that of the employer. Their role was instead to ask if the actions of the employer amounted to what a fair and reasonable employer would have done and to evaluate this objectively. Shaw J found that the effect of s.103A was to separate out the employer's actions for consideration and required the institutions to consider those actions against what a fair and reasonable employer would have done. The Court concluded that although the amendment does not expressly prevent employers from having recourse to a range of options from which they can chose, Parliament has legislated for the institutions to evaluate the employer's choices against the specified objective standard of what a fair and reasonable employer would have done in the circumstances. [119]

[30] At para.[70] Judge Travis says:

Section 103A does not limit the test of justifiability to the determination of whether the misconduct in question was sufficiently serious to warrant a dismissal but also whether the actions of the employer was what a fair and reasonable employer would have done in all circumstances. The circumstances may include whether the hypothetical fair and reasonable employer would have been persuaded by mitigating factors to impose a penalty that was less than a dismissal. Thus if it could be determined on an objective basis that the mitigating factors were so strong that a fair and reasonable employer would not have dismissed, notwithstanding the finding of serious misconduct, the dismissal may well be held to be unjustifiable.

[31] Employing the guidelines set out in both these leading cases I turn my mind to the conduct of the applicant. It is common ground between the parties that the applicant loaded panels into his vehicle and that those panels while near the rubbish skip, were the property of his employer. Two senior employees had checked personally with the applicant as to whether he had permission and one confirmed that the applicant knew from whom that permission could be obtained. The applicant confirmed that he would seek permission. However, he later admitted that he had not sought the permission and drove from the workplace with panels clearly visible to witnesses. It was only after being advised of his dismissal that the applicant claimed to have returned the goods but made it clear at the time of the employer's investigation that he had no witnesses to that fact.

[32] Turning to the actions of the employer I am satisfied that the respondent, through Mr Conlan advised Mr Tufuga of the meeting to be held at 1pm that afternoon, advised him that the issues were serious and could result in his employment being terminated and that he should bring a representative with him to that meeting.

[33] I am also satisfied that Mr Hewittson offered to represent the applicant at the meeting but in no way was he directed to act in that capacity by the respondent. His evidence was that he asked the applicant if he wanted Mr Hewittson to represent him and that Mr Tufuga said that he did. On that basis I accept that Mr Hewittson, who is a Union delegate on the work site, made an offer to assist the applicant and the applicant accepted that offer. The fact that in the course of the meeting Mr Hewittson was in the payment of the respondent, in no way connotes that he was attending as an agent of the respondent.

[34] While Mr Goldwater is critical of the quality of Mr Hewittson's advocacy on behalf of the applicant, there is no gainsaying that he was present as representative at the request of the applicant.

[35] I have already noted the discrepancy between Mr Tufuga's evidence and that of the other three people at the employer's investigation, and in particular, the timing of the advice of dismissal and the adjournment. On this matter I prefer the evidence of the three witnesses for the respondent on both of these issues.

[36] Standing back from the investigation process I find it to be a full and fair inquiry into the actions of the applicant and that the respondent was at pains to ensure that Mr Tufuga understood what was being asked of him and was given sufficient opportunity to reply. I am confirmed in that view because following the announcement of the applicant's dismissal following a 15 minute (or thereabouts) adjournment, when the applicant surprisingly announced that he had put the items back, the respondent through Mr Stewart, asked Mr Tufuga whether there were any witnesses to the return of the stock and to each of those questions the applicant replied *no*. Only after considering that reply did Mr Stewart confirm that the company's position would not change.

[37] I have considered the issue of mitigation. However, no mitigating factors were established which might have rendered the decision to dismiss unfair or unreasonable. Mr Tufuga's employment had been one of a sound and reliable employee. However, his decision to remove the goods after having acknowledged that his employment could be at risk if he did not have authorisation, outweighs other mitigating factors the employer might have considered. In short the actions of the applicant, who had been clearly warned of possible consequences of removing material without authorisation and who, on two previous occasions, had sought and received permission to take such goods, was a blatant disregard of the company's policies which I find were known to him.

Determination

[38] Returning to the issues set out above I find as matters of fact that:

- The applicant was aware of the company policy regarding removal of company property without permission and had, on two previous occasions, sought and received permission.
- The applicant did accept Mr Hewittson's offer to act as his representative in the respondent's investigation of the allegations. For the avoidance of doubt, Mr Hewittson was not an agent of the company nor was he directed by the respondent to undertake the representative role.
- On the evidence available to the Authority and in the face of no reliable evidence to the contrary from the applicant or his witnesses, I find the panels were not returned to the workplace as asserted.
- In assessing the respondent's conduct of the investigation into the incident, I find the process adopted was fair and full. Further, I do not accept that language difficulties were a significant factor in the investigation.
- I find that having undertaken a fair inquiry and investigation of the applicant's actions, viewed objectively, a fair and reasonable employer would have dismissed the applicant. Mr Tufuga I find does not have a personal grievance and the Authority is unable to assist him further.

Costs

[39] Costs are reserved. The parties are urged to attempt to resolve the issue of costs between themselves. If this is not possible leave is reserved for an application to the Authority on the matter of costs.

Paul Montgomery
Member of Employment Relations Authority