

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

5271689
WA 92/09

BETWEEN PEDRO KILARNEY WEKO
Applicant

AND TEGEL NZ LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Jills Angus Burney for Applicant
Raewyn Gibson for Respondent

Investigation Meeting: Friday 10 July 2009 at Wellington

Determination: 10 July 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Weko has applied for interim reinstatement pursuant to s 127 of the Employment Relations Act 2000. His application was filed in the Authority on 30 June 2009. His Union has provided a signed undertaking for any damages.

[2] The application has been opposed by the respondent.

[3] Both parties agreed to attend mediation, which occurred on 8 July 2009. Urgency has been accorded the matter with the co-operation of both parties. Because of a number of commitments I have dealt with the matter quickly and can assure both parties I have considered their representative's submissions and indeed re-read their submissions and all of the documents after the investigation meeting. I have decided not to summarise their submissions, but referred to the matters as I have needed to. The Authority now must make a determination on the application and in doing so consider affidavits provided by Mr Weko, the union officials and from witnesses for

Tegel. A full substantive investigation meeting has been offered to the parties in New Plymouth on 6 August 2009, and this has been accepted.

The issues

[4] Is there an arguable case? Are there other remedies available? Where does the balance of convenience lie? What is the overall justice?

The facts

[5] Mr Weko was employed by Tegel NZ Limited as a chicken catcher. He is a member of the EPMU. His terms and conditions of employment are contained in a collective employment agreement. He commenced his employment with Tegel in the role on 7 January 2008. He was dismissed on 8 May 2009 by Mr Allen Robson, Tegel's human resources manager.

[6] On 4 May 2009 and upon Mr Weko returning to work from sick leave an issue arose between him and his supervisor/team leader, Cherie Raumati, over the provision of a medical certificate, her smoking and whether or not she meant for him to go home as he understood some comments that he says she made. I will refer to this as the incident, but I do not need to go into the detail at this stage, except to say there has been an allegation from Ms Raumati that Mr Weko was abusive and used offensive language at her.

[7] On 5 May 2009 Ms Raumati made a complaint to Paula Stieller, planning manager, that Mr Weko had been abusive and had used offensive language and had intimidated her. Ms Stieller deposed that she witnessed that Ms Raumati was upset and crying. Ms Raumati provided a signed statement.

[8] On 6 May 2009 there was a meeting with Mr Weko, Mr Robson and two union officials, Messrs Mike Dellow and Blair MacFarlane. Mr Weko had been informed that if the allegations proved to be true an outcome could be disciplinary action, including dismissal. The purpose of the meeting was to enable Mr Weko to provide an explanation about the complaint made by Ms Raumati. A copy of Ms Raumati's statement was presented to Mr Weko and the union officials. The

company rules were explained by Mr Robson, including again that if the allegation proved to be true the outcome could involve disciplinary action, including dismissal. Mr Weko denied the allegations. Both parties have relied on witnesses and their statements recalling the events at issue on 4 May 2009. Mr Weko was suspended without objection for two days, and a taxi arranged to take him home.

[9] Mr Robson contacted witnesses for more information. One witness did not want to get involved. At least one witness supported Ms Raumati's version.

[10] There was a further meeting on 8 May 2009. Mr Weko was informed that an investigation had been carried out and that statements had been made by some people and that other people did not want to get involved. Mr Weko challenged the information from one of the witnesses. The union officials asked for time to get further statements, but Mr Robson declined that request because he had already spoken to the witnesses identified by Mr Weko. One had refused to provide a statement and one had already told his side of the story. Mr Weko and the union officials were asked to make any further representations before the decision, and they declined. There was an adjournment and Mr Robson and Ms Stieller deliberated on the information. Mr Robson made the decision to dismiss Mr Weko as an appropriate form of punishment for serious misconduct. The union requested Mr Robson to change his mind and later produced further statements to help. One of the witnesses had not been identified before. One was consistent with the statements made by Ms Raumati and another witness. The last one was inconsistent with an earlier statement that had been made by the same person. Indeed the same person signed a statement that it was not his prior statement that had been attributed to him and produced by the union. Mr Robson was not prepared to change his mind. The decision was confirmed in writing on 29 May 2009.

[11] The EPMU, on Mr Weko's behalf, has challenged the dismissal in that the original investigation was flawed and a fair and reasonable employer would not have reached the conclusion to dismiss Mr Weko.

Determination

Is there an arguable case?

[12] There is an arguable case given the nature of the evidence available. Tegel's position is that it acted fairly and came to a decision that would be open to a fair and reasonable employer. It is not the purpose to determine the merits of the case at this stage, except that it is common ground that there has been a dismissal and the employer is required to justify it where the applicant has denied any serious misconduct and has denied the version of events that are relied upon by Tegel. There are also procedural issues concerning the investigation being properly carried out, and whether or not the applicant had a proper opportunity to provide his input to the investigation and the findings. There is an issue about whether or not Mr Weko had a proper opportunity to mitigate his involvement in the complaint made by Ms Raumati and whether or not Tegel gave proper consideration to any lesser penalty. There are issues about the veracity and significance of the statements made by the different witnesses the parties have relied upon. This also includes subtle differences in the deposed evidence from Mr Robson and the union officials about the process. Also there is an issue about what a fair and reasonable employer would be expected to do when it was requested to change its mind? If there is a personal grievance any contributory conduct will need to be investigated and there may be an issue about whether or not it is practicable to reinstate Mr Weko.

[13] I accept Ms Angus Burney's submissions that the arguable nature of the case is based on the use of contrary evidence, a changed witness statement, a disagreement about the evidence, that it is claimed that the penalty was too harsh and whether or not other options were available.

[14] Although I have not accepted Ms Gibson's submissions that the applicant does not have an arguable case the detail she referred me to will be relevant in the consideration of the overall justice of the matter, and I will turn to that later.

Are there alternative remedies and where does the balance of convenience lie?

[15] The next issue is whether or not there are alternative remedies and where does the balance of convenience lie? I accept that Mr Weko's right to work is of paramount importance and that the assumption is that he will be able to prove his case as a starting point. The right to work is not easily compensated in monetary terms if he is right and has to wait for reinstatement to be ordered because of the extent of the range of compensation awards and the losses he would have incurred. There is compensation available for lost wages if he has a personal grievance, but subject to a finding of whether or not there was any contributory fault. The company accepts that it is in a position to meet any financial remedies.

[16] There is a direct conflict between Mr Weko and Ms Raumati, and she is supported by other witnesses. There is some conflict about the reliability of at least one of the witnesses and how the witnesses view the conduct of both Ms Raumati and Mr Weko in the work place. Ms Raumati has deposed a fear about having to work with Mr Weko again and the impact on her authority in the work place and her emotional wellbeing if he was reinstated. The deposed evidence suggests nothing had happened like this before and the alleged incident was grave enough to cause their relationship to break down at work. Mr Weko deposed in reply that their relationship socially did not involve any conflict or tension, but this evidence was new at the time of the Authority's investigation meeting, and Ms Raumati has not had an opportunity to reply. Another witness has also deposed a concern about returning to work should Mr Weko be reinstated. Mr Weko deposed in reply that he has socialised with that person too, since his dismissal, but that witness has not had an opportunity to reply either.

[17] I have also considered any delays after the time that Mr Weko was dismissed on 8 May 2009. The dismissal decision was confirmed in writing on 29 May. The EPMU raised the personal grievance in writing on 22 June 2009, although one of the union officials did allude to a grievance being raised and asked for reinstatement prior to this date. The employment relationship problem was filed in the Authority on 30 June 2009. There has been a delay, which the union explains was caused trying to get further statements from witnesses and to get Mr Robson to change his mind.

However, I find the delay was unfortunate given that the law only requires any justification to be based on the information available and used at the time by the employer.

[18] There are a few weeks before an investigation meeting will be held on the full substantive issues. For such a short time it would be unreasonable to expect Tegel to take back Mr Weko especially when there is a risk, linked to the possibility of his contribution to the situation giving rise to the grievance and possibly involving other witnesses who are still employed.

[19] Also, Mr Weko has put in place arrangements to help cover his financial situation, albeit that he is incurring some debt. It was submitted that he is a resourceful person and has applied for work and has his name down with an employment provider. He has received some earnings since his dismissal.

[20] I accept the loss of earnings will have had an impact on him, but can be covered by his arrangements and in the consideration of any compensation and lost wages later.

[21] Mr Weko has not produced sufficient evidence in regard to any issue of prejudice, continuity of employment, stress and damage to his reputation to assist him in the balance of convenience. This conclusion is supported by the fact that the dismissal is recent and a substantive investigation will be held on 6 August.

[22] The availability of an early hearing is a compelling factor in support of Tegel.

[23] Finally Mr Weko has applied for reinstatement and not garden leave. Garden leave is not a practicable solution. Mr Robson has deposed evidence that there are no redeployment options and that make up work would have to be arranged that would add no value to the business. In such circumstances the only option would be for Mr Weko to be reinstated to his previous role and the difficulty with this is that he and the other witnesses are directly involved in an event where they have different views, and in particular his team leader. Whilst this does not necessarily impact on the safety in the work place and the assertion that there has been a loss of trust and confidence in Mr Weko, it does leave a lingering impression that the interactions will be fraught and

require further management, despite Mr Weko's assurance to work according to the company's procedures and rules.

[24] It is my conclusion that the balance of convenience falls in favour of Tegel.

The overall justice

[25] One factor here is the strength of Mr Weko's case. Mr Weko has some real difficulties in his claim because witnesses do not totally support him in their recollection of the incident involving Ms Raumati's complaint. Also, his allegation that Ms Raumati was the aggressor when she asked for a medical certificate and he asked her to go outside to smoke was not supported by one witness, and another, Ms Stieller, deposed that Ms Raumati was visibly upset when she made her complaint. Furthermore there had been no prior complaints and issues about Ms Raumati's behaviour, except for one matter on smoking.

[26] This is not a matter where it can be taken for granted that the applicant can expect to be reinstated. Although it is the prime remedy there may well be some contributory fault and an issue about whether or not it is practicable to reinstate him. In this regard the issue of the interaction of Mr Weko and the witnesses in the work place including Ms Raumati and at least one other witness has the potential to impact on whether or not reinstatement will be practicable. Tegel raised the issue of the seriousness of the matter and the possible safety risks and loss of trust in the applicant. The latter two remain assertions, but there is a very real issue about what happened in the incident between Mr Weko and Ms Raumati and whether or not the incident involved abusive language and intimidation to met the requirements of the company's code of conduct for serious misconduct, and whether or not Ms Raumati acted appropriately or not.

[27] The company's reply and affidavits indicate that a fair process was carried out where the applicant was represented and had an opportunity to know the nature of the allegation, the grounds the company could rely upon, the information being relied upon and the possible outcome if the allegations proved to be true or that the employer was able to form an honestly held belief about what happened. The law supports the company in its right to rely upon reaching an honestly held belief. Also

the law supports the company that even if there was some minute failing in the process it would not render an otherwise justified dismissal unjustified. A fair and reasonable employer is obliged to consider other options or a lesser penalty and there are differences in the evidence about the extent to which this actually happened. Furthermore Mr Robson deposed that the union officials declined to make further representations before the decision. There was no objection to Mr Weko's suspension from the work place during the investigation.

[28] Mr Weko relies heavily on the claim that the company's investigation was flawed because two witnesses were not interviewed and the sanction was too severe for a minor issue. Mr Weko has to face that Mr Robson gave plausible reasons for not further considering that information and that such information was not raised at the time by Mr Weko and his representatives, when the opportunity existed to raise it. When a person refuses to be involved, as one of the witnesses did, the employer is entitled to rely on the information that it had at the time. That information will have to be assessed as to whether or not it was enough to enable a fair and reasonable employer to come to a fair decision.

[29] I find that the overall justice of the matter favours the respondent, Tegel NZ Limited.

Conclusion

[30] The claim for interim reinstatement is declined.

[31] Costs are reserved.