

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**PERSONAL GRIEVANCE**

**BETWEEN** Patrick Earl Webb (Applicant)  
**AND** Works Infrastructure Limited (Respondent)  
**AUTHORITY** Neville Taylor  
**REPRESENTATIVES:** James S Mee, Counsel for Applicant  
Philip Roberts, Counsel for Respondent  
**INVESTIGATION MEETING** Invercargill, 4 & 5 March 2002  
**DATE OF DETERMINATION:** 12 April 2002

**DETERMINATION OF THE AUTHORITY**

***The Claim***

[1] The applicant claims that he was unjustifiably dismissed. He seeks multiple remedies but does not seek reinstatement. The applicant seeks compensation for humiliation, loss of dignity and injury to feelings, to an amount of \$55,000. He seeks actual lost wages that he has indicated amounts to \$6,500.39. The applicant additionally seeks compensation for loss of benefit pursuant to s.123 (c) (ii) of the Act as amounting to \$105,033.84. The latter amount includes loss of a company vehicle of \$8000.00, unused sick days amounting to \$17,237.70, the loss of future entitlement to the fourth week annual holiday after six years service to an amount of \$5,746.14, loss of redundancy entitlement amounting to \$72,625.00, and petrol and travel costs to an alternative employment position (since resigned from) amounting to \$1,425.00.

***Background***

[2] The respondent employed the applicant as a supervisor. The respondent terminated the applicant's employment on 20 June 2001. At that stage, the applicant had been employed for approximately twelve and a half years with the respondent or one or more of its former corporate entities.

[3] The applicant was employed in a senior position. His salary was \$49,800.00 at the time of the termination of his employment. His benefits included the provision of a vehicle and a cellphone.

[4] The respondent formerly worked for a company called Bitumix Limited. That company amalgamated with another called Works Civil Limited to form Works Infrastructure Limited towards late 1999. Bitumix formerly employed the applicant. The workforces of the two former entities had not been fully integrated in that, at the time of the material events in this matter, there were separate workplace facilities for the two groups.

[5] A key player in this case was a man I shall refer to as Mr T<sup>1</sup>. Mr T was a former employee of Works Civil. Mr T held a similar, albeit slightly higher, position than the applicant. There was some hostility between the two men over criticisms made by the applicant over the performance of a contract under the apparent control of Mr T. Mr T appears to have not found those criticisms to be acceptable to him. This is despite the respondent's Invercargill branch manager (Noel Eade) saying that the applicant's criticisms over the work were *valid*. Mr T's unhappiness at the criticisms seems to have been exacerbated by a comment made by the applicant to Mr Eade about the employment of too many *ten-dollar men*. This comment appears to have been conveyed somehow back to Mr T who seems to have seen the comment as an unjustifiable criticism and to have taken it very personally.

[6] On 15 June 2001, a Friday night function was organised by way of a celebration at the depot from which Mr T and his crew were based. It seems that a fair amount of alcohol was consumed. At one point when the beer ran out, Mr T apparently had an employee dispatched to obtain more. A number of witnesses deposed to Mr T being quite agitated about the applicant throughout the evening and apparently progressively so towards the end of the evening. He, by all accounts, constantly remarked to people about the applicant. Those remarks can be described as being uncomplimentary and showing a degree of hostility towards the applicant personally. It appears that, towards the end of the evening, Mr T became louder in his comments and that the applicant and others could hear them from across the room. The applicant says that he ignored the comments. All the witnesses before me confirmed that and in a later enquiry by the respondent, Mr T was the only one to claim that he was the subject of verbal *niggling* by the applicant.

[7] The applicant says that towards the end of the evening as he was leaving the function, Mr T made another comment to him. He said that the comment was uncomplimentary but he cannot remember the precise words. The applicant says that he walked a short distance on his way out to the door towards Mr T and asked him *what his problem was*. The applicant says that Mr T was holding a short beer bottle (commonly referred to as a *stubby*). He says that Mr T thrust the empty beer bottle in to the side of his face and said in a threatening and very direct manner *just fuck off*<sup>2</sup>. The applicant and others deposed to the pushing of the beer bottle into the side of the applicant's face as being quite forceful and that it was such that the applicant's head was knocked backwards.

[8] The applicant immediately then struck out with his left fist to Mr T's jaw. Other employees then intervened and separated the two. This was with the apparent exception of Mr Mohi (formerly employed by Works Civil) who appears to have immediately indicated that he wished to engage in a physical confrontation with the applicant and also apparently stated that he intended to *take out* the applicant.

[9] Strangely, the applicant and other colleagues then went to a hotel and continued drinking for a while. It appears that Mr T and some of his colleagues arrived at the same hotel. According to the applicant and a few other witnesses Mr T was intent on carrying on the confrontation at that hotel. The applicant (according to his evidence) told Mr T that he wanted no further trouble and that he would ask Mr Eade to sort matters out on Monday and then he left.

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<sup>1</sup> I so describe this person as he did not give evidence and was thus unable to speak for himself.

<sup>2</sup> Mr T later told the employer's representatives that he touched the applicant in the face with the stubby and told him to *cool off*.

[10] The applicant says that he punched Mr T in a defensive and protective response. When I asked him what he was protecting himself from he said it was *the unknown – I didn't know what he was going to do*. He said that he had never been in such a situation before and that it was just an instinctive reaction. He said that he had *seen it* at parties, by which I assume he is referring to people using bottles in physical altercations. The applicant also said that the incident involved him making a *split-second decision to defend* himself. People who spoke to the respondent's agents the next week claimed that the blow was sufficient to knock Mr T to the ground. None of the witnesses who were before me agreed with that, although I have to say that their evidence was vague and varying in degrees on that point. The clearest description came from one witness who said that Mr T may have been knocked back a bit so as to fall into people around him but that if they were not there Mr T would not have fallen to the floor because of the blow. The applicant said that it was not until *after* his dismissal that he became aware of the specific allegation that he had struck Mr T with such a degree of force so as to have *knocked [him] to the ground*.

[11] The next day, the applicant telephoned his manager, Mr Eade. He says that he told Mr Eade that there had been a confrontation at the social function and that he had struck Mr T in response to him having thrust a beer bottle into his face. The applicant also telephoned his immediate supervisor, Mr Corbin, and conveyed a similar description of events to him. Mr Eade said that he would sort the matter out on the Monday.

[12] On the Monday morning, Mr Eade held a preliminary meeting with both the applicant and Mr T. Neither man was suspended pending further enquiry by the respondent's agents.

[13] The next day, Wednesday, 20 June 2001, the applicant was called to a further meeting with Mr Eade and with Mr Mike Costello, the respondent's Otago/Southland manager.

[14] When the applicant attended the meeting on 20 June he was advised of his right to have a *support person*. He was told that the matter was a *serious matter*. The applicant provided his description of the incident to Mr Costelloe and Mr Eade. The applicant told them that Mr T thrusting the bottle into his face provoked him. Mr Costelloe replied that there were differing opinions as to how the bottle was used. The applicant then gave the men two names of other employees who saw the bottle being pushed into his face. They were a Mr Murray Brown and a Mr Pakira Tata. The applicant said that both of those gentlemen would verify his description of events. The meeting lasted approximately 15 minutes according to the applicant.

[15] The applicant said that when he left the meeting he felt that a decision had already been made to dismiss him. He felt that he had not received a fair hearing.

[16] At approximately 9.20 am on the same day, the applicant was telephoned and asked to go into one of the respondent's depots. The applicant says that he arrived there approximately 9.25 am. He says that Mr Costelloe and Mr Eade advised the applicant that a decision had been made and that his employment was being terminated immediately. The applicant said that he protested and asked them about Mr T's action of pushing the bottle into his face. He said that Mr Costelloe's reply was that there were *too many opinions as to how the bottle was used*. The applicant asked whether Mr Brown and Mr Tata had been contacted and was told that they had not been.

[17] Mr T was also dismissed although there is quite some contention about whether a dismissal was initially intended for him. The applicant says that when he enquired at his dismissal meeting as to the response to Mr T's actions he was told that Mr T would be facing a *severe warning*. It is clear that Mr Corbin, on being advised this by the applicant, met with Mr Eade and Mr Costelloe and protested in very strong terms as to the inequality of such a step. He resigned on the basis that

Mr T was not being dismissed. Mr T was subsequently dismissed. Mr Corbin's resignation was thus not actuated. Mr Costelloe told me at the investigation meeting that initially he thought that Mr T was not as blameworthy as the applicant. He did say that he had modified his view after reading correspondence from the applicant and after attending the investigation meeting.

[18] Approximately five weeks before the incident at the Friday night function, the applicant said that he was concerned about the apparent on-going animosity that he was experiencing from Mr T. He said that he spoke to Mr Eade and advised him that there seemed to be a problem between Mr T and he and that he wanted the matter sorted out. He specifically suggested to Mr Eade that he hold a face-to-face meeting with Mr T and himself. He says that Mr Eade said that was a good idea and that he promised to arrange the meeting. The applicant says that Mr Eade never arranged the meeting. Mr Eade says that whilst he agreed that he did not arrange a meeting he said that he had spoken to Mr T, advising Mr T that the applicant's criticisms were valid and that he was being *a bit precious over it*. Mr Eade said that he told Mr T to *put it behind him and get on with things*. Mr Eade said that he did not see the conflict between the two men as being a *major issue*.

[19] The applicant deposed to significant injury and hurt feelings over the dismissal. His long-term partner, Ms Smith, gave evidence that was compelling as to the description of the effects of the dismissal on the applicant.

[20] The applicant obtained casual and then permanent employment within a reasonably short period of time. He has since resigned from that permanent employment to take up a new position that appears to be a valuable position, certainly it is better remunerated than his position with the respondent was.

[21] The respondent has a Code of Conduct that defines *serious misconduct* from the respondent's point of view to include:

*Physical or verbal violence against any person on Company premises, or during working hours.*

[22] The applicant said that although he had *never fully read* the Code of Conduct, he nonetheless accepted that *scrapping* could be an offence that could result in dismissal. He took pains to depose that he was not a *scrapper* and that he had a good 12½ year work record. I note that the respondent's Code of Conduct makes employees facing serious misconduct allegations liable for suspension and that neither Mr T nor the applicant was suspended.

[23] Mr Costelloe said that he *would be very concerned if behaviour of this nature is considered insufficient to justify dismissal*. Mr Eade said that *where supervisors indulge in behaviour which is clearly outside of what can be reasonably expected in the workplace we had little choice than to dismiss both men....*

### ***Argument of Counsel***

[24] Mr Mee submitted that the respondent did not conduct a *full and fair* inquiry. He relies on the respondent's failure to interview the two persons named as appropriate witnesses by the applicant prior to his dismissal and alleged disparity of treatment. The latter is reference to the purported initial better treatment of Mr T by the respondent. Mr Mee also says that there were alternatives open to the respondent that were not applied, particularly given the applicant's past good record of employment. Mr Mee cites this case as being one where the applicant would have been entitled to representation. Mr Mee argued against any contribution by the applicant being considered.

[25] Mr Roberts submits that the respondent's process was fair and reasonable. He places some emphasis on the fact that the two persons involved in the altercation in this case were senior supervisory employees of the respondent. He says that they should have known better and that there was an onus on them to provide a better example. Mr Roberts said that unless there was *some patent unfairness* in the respondent's procedure, it would not be appropriate for the Authority to *substitute its judgement* for that of the respondent. Mr Roberts submitted that there was no disparity of treatment and that, if the Authority finds in favour of the applicant, he should be deemed to have contributed to his dismissal in the order of 100%. Mr Roberts strongly urged me not to send a message that *punching is OK in certain circumstances*.

[26] Both counsel helpfully referred me to a number of authorities. Mr Roberts wished me to particularly consider the unreported decision of Palmer J in *Killick v Feltex Carpets Ltd*<sup>3</sup>. Mr Roberts submits that this case is *factually similar* to the instant case.

### **Determination**

[27] I have carefully considered both the facts in this case and the applicable precedents. It is trite to say that each case turns on its own set of facts<sup>4</sup>. This is certainly a good example of why each case is determined according to its own facts – it is difficult to set a precedent as to facts such as these. One must be guided by the precedent **legal principles** as opposed to purported factually similar other cases. The cases indicate little examples of outright thuggery and purposefully directed violence and instead often illuminate sad and very personal vignettes of human failing - some understandable, some not – some forgivable, some not. I could not find a factually materially similar case to the instant one. Despite Mr Roberts' emphasis on *Killick* (supra), I find that there are significant distinguishing features between that case and the one before me<sup>5</sup>.

[28] Some of the principles that I have gleaned from the cases are:

- Generally, assault will be viewed as a type of an event that may amount to serious misconduct and constitute grounds for instant dismissal (*N Z Meat Processors etc IUOW v Richmond Ltd*<sup>6</sup>).
- Each case must be viewed in light of its own facts.
- A prohibition by an employer on *fighting* cannot be meant to include acts of *self-defence* (*Pilkington (New Zealand) Ltd v Sangha*<sup>7</sup>).
- Although *provocation* provides no defence to assault in criminal law, in employment law an inquiry should be made to determine whether an employee's conduct was *sufficiently inconsistent with the continuation of the worker's contract of employment so as to justify*

<sup>3</sup> Unrep. CEC 4/98.

<sup>4</sup> See: *Wishart v Armoured Freightways Ltd* [1982] ACJ 129, at 131.

<sup>5</sup> The grievant was a foreperson who assaulted a non-foreperson; the grievant responded to an alleged *threatening gesture*; and there were none of the particular background circumstances that existed in the instant case.

<sup>6</sup> [1991] 2 ERNZ 566 at 571 (note also the useful summary of previous cases attached as an appendix).

<sup>7</sup> [1999] 2 ERNZ 263 (contains references to some interesting overseas cases). See also: *NZ Amalgamated Engineering etc IUOW v Fletcher Construction Co Ltd (t/a Mecon)* [1989] 3 NZILR 279, where the Court ordered the reinstatement of a grievant who pushed a foreman as a *response in the nature of self defence* to a *vigorous approach* by the foreman. Cf.: *McGregor v Armour Creations Ltd and Anor* [1990] 1 NZILR 610 at 615 where the Court held that, a grievant who struck a co-worker twice, even when faced with provocation, *it would only be in the most extreme cases of self defence that such actions could be justifiable*.

*dismissal* and that provocation may mitigate the significance of an assault (*Central Clerical Workers Union v E V McConnell Ltd (t/a Bridge Service Station*<sup>8</sup>).

[29] I consider that, according to the evidence before me, Mr T assaulted the applicant. It seems clear that the applicant's reaction was defensive rather than an intrinsically violent act<sup>9</sup>. Before it was amended, the *Crimes Act 1961* made reference in the *self-defence* justification of force, to a *reasonable apprehension* of grievous bodily harm. As I understand it and applying logic, this is still an ingredient in determining a plea of self-defence. The amended form in s.48 of the *Crimes Act* says:

***Self-defence and defence of another –***

*Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.*

[30] I consider that the respondent's inquiry was quite inadequate. There seems to have been an almost automatic conclusion that there was little alternative but to dismiss the applicant. The Court has recently expressed a concern about such a rigid and inadequate approach in *Zinck v Sleepyhead Manufacturing Co Limited*<sup>10</sup>. That case also emphasises the importance of a full and fair inquiry by an employer. It is clear to me that the respondent could not have conducted a full and appropriate inquiry under the circumstances. The two witnesses offered up by the applicant should have been interviewed. The respondent's material officers seem to have reached conclusions about certain matters (whether Mr T was struck with sufficient force as to knock him to the ground and what words were uttered by Mr T when he thrust the stubby into the face of the applicant) without an adequate inquiry. Other, critical, aspects seem to have been not subject to any conclusion, apparently on the basis that the contested account made it too difficult to determine (the actual use of the stubby by Mr T and the comments throughout the evening by Mr T that preceded the *stubby* incident<sup>11</sup>). The failure to make a determination on critical issues indicates either a lack of reasonable application of an employer's duties in such circumstances or intransigence on the part of the officers concerned. The Court in *Zinck* described similar conduct as being:

*... reminiscent of the practice of child classroom management whereby all were penalised for the failure or refusal of one culprit to own up. It is inherently unfair in an employment relationship that an employee should lose his or her job because another employee may have failed or refused to give a true account of an event. That is what, in effect, such a practice sanctions.*

[31] *Serious misconduct* warranting summary dismissal must be the type of misconduct that goes to the very *heart and root* of the employment relationship<sup>12</sup> so as to *deeply impair* the essential confidence that should exist between and employer and employee<sup>13</sup>. Although dealing with a wrongful dismissal case, the Court of Appeal (*Board of Trustees of Marlborough Girls' College v Sutherland*<sup>14</sup>) recently considered the application of a contractual provision for summary dismissal for serious misconduct and, per Keith J at 617, said:

*It is the fact of serious misconduct which is a prerequisite to summary dismissal — was there a breach of trust so serious and of such a nature as to warrant a fair and reasonable employer deciding that the employee should be dismissed? That is an objective factual inquiry*

<sup>8</sup> [1990] 3 NZILR 1048 at 1070.

<sup>9</sup> See *Sangha* (supra) at 272.

<sup>10</sup> [1999] 2 ERNZ 448 at 461.

<sup>11</sup> Although at the investigation meeting, Mr Roberts was asserting that the terms used was *cool off*, thus indicating that the respondent had in fact formed a view on that matter.

*which, if in issue between the parties, falls to be decided in the ordinary way. If the conduct in question can be so classified, then dismissal is available. If it cannot, then the basis for the exercise of the power does not exist and a dismissal would be wrongful.*

[32] Did the respondent act fairly and reasonably by taking *into account all the relevant circumstances of the conduct and the particular employment relationship in determining that the necessary confidence and trust had been deeply impaired?*<sup>15</sup> I find that the respondent in this case did not. Apart from the inadequate investigation referred to above, I cite the following material special features of this case that, in my opinion, were not given adequate consideration or weight by the respondent:

- That the applicant had requested the respondent (Mr Eade) to assist him in his relationship with Mr T and that the promised meeting had not eventuated.
- The applicant's good record and lack of previous conduct of such a nature.
- Objectively, a person having a beer bottle thrust into his face is likely to reasonably apprehend violent harm and to respond accordingly.
- That the applicant did not attack Mr T, but rather struck him once in self-defence.
- That the applicant promptly reported the matter in reasonable terms.
- That Mr T's actions not only constituted an assault but were also very provocative.
- That there was little likelihood of a recurrence of the applicant's conduct.
- That the events occurred outside of work hours after the consumption of alcohol provided by the respondent.
- That, within a range of reasonable responses open to the respondent, there were alternatives to dismissal. A final warning accompanied by a general statement to the workforce that openly communicated the respondent's stern view of such events and imposing strict guidelines for future social events could have been one option.

[33] Although I consider that there is some basis for the respondent's concerns about the conduct of two supervisors in this case, I determine that in all the circumstances of this case and for the above reasons, the applicant was unjustifiably dismissed by the respondent.

### ***Remedies***

[34] Pursuant to s. 123 (b) of the Act, I order (subject to a following order), the reimbursement of lost wages by the respondent to the applicant of \$6,500.39.

[35] The evidence given by the applicant and his partner about how the dismissal personally affected him struck me as being a very real indication of distress. Pursuant to s.123 (c)(i) of the

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<sup>12</sup> See: Court of Appeal in *North Island Wholesale Groceries Ltd v Hewin* [1982] 2 NZLR 176.

<sup>13</sup> See: Court of Appeal in *BP Oil Ltd v Northern Distribution Workers Union* [1989] 3 NZLR 580.

<sup>14</sup> [1999] 2 ERNZ 611.

<sup>15</sup> Court of Appeal in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448, per Gault J at 458.

Act, I order (subject to a following order), compensation for humiliation, loss of dignity, and injury to feelings to an amount of \$15,000.00.

[36] I determine that, save for the loss of the use of a vehicle, there should be no award for the various other claims for loss of benefit outlined in para. [1], above. I so determine because, apart from the loss of a vehicle, the other claims are not matters that the applicant had a realisable contractual entitlement to at the time of his dismissal. I also consider that entitlements such as sick leave are there as a form of insurance to employees. If an employee has not had to call on that entitlement then she or he is blessed with good fortune. There are also significant policy implications in making such an order as employers could justifiably see same as a significant extension to agreed terms of employment. To make such an order the Authority, in my opinion, would be *fixing new terms and conditions* and that is prohibited by the Act<sup>16</sup>.

[37] The applicant had a contractual entitlement to a vehicle. I do not necessarily accept that the loss of the company vehicle amounts to a nominal \$8,000.00 as claimed by the applicant. In any event, such a claim can only reflect the private use of such a vehicle<sup>17</sup>. Pursuant to s. 123 (c)(ii) of the Act, I order (subject to a following order), that the respondent pay the applicant the amount of \$500.00 as compensation for the loss of the vehicle.

[38] I have considered whether there should be a deduction in remedies because of the applicant's contributory conduct. I determine that there should be. Such contributory conduct must be causally related to the events giving rise to the dismissal. The factors that I consider appropriate here are that the applicant walked towards Mr T as he left the social function and that he struck Mr T rather than electing to push him away. I do not, in consideration of the totality of the applicant's actions, consider that the reduction for contributory conduct should be too significant. I put the portion at 25% and deduct that amount accordingly from the orders made above to give the following amounts that the respondent is hereby ordered to pay to the applicant:

(a) Reimbursement of lost remuneration	\$ 4,875.30
(b) Compensation for humiliation etc.	\$11,250.00
(c) Compensation for loss of vehicle	\$ 375.00

### ***Costs***

[39] I would welcome the parties attempting to settle the matter of costs amongst themselves. If that is not successful Mr Mee shall, within 14 days of the date of this decision, provide the Authority with a brief memorandum on the matter with a copy to Mr Roberts. Mr Mee shall then have 14 days within which to provide a reply.

***Neville Taylor***  
***Member of Employment Relations Authority***

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<sup>16</sup> See: s. 161 (2).

<sup>17</sup> See: *Mackintosh v Carter Holt Harvey Ltd*, unrep. AC 2A/01.