

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 21/10  
5166039

BETWEEN                      KEVIN YONG  
   Applicant  
  
AND                              THE O'BRIEN GROUP  
   LIMITED  
   Respondent

Member of Authority:      Dzintra King  
  
Representatives:            Richard Harrison, Counsel for Applicant  
   Nikki Dines, Counsel for Respondent  
  
Investigation Meeting:    19 November 2009  
  
Submissions Received:    27 November 2009 from Applicant  
   2 December 2009 from Respondent  
  
Determination:              19 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Kevin Yong, claims he has been unjustifiably dismissed by the respondent, The O'Brien Group Limited ("O'Briens" or "the company"). He seeks reimbursement of lost wages, compensation and reinstatement.

[2]     Mr Yong was employed as a finisher at the Auckland branch of O'Briens. O'Briens makes kitchen and commercial bench tops.

[3]     Prior to the incident leading to his dismissal Mr Yong had received two employment warnings for health and safety matters. The company does not rely on these warnings as justification for the dismissal. The company opposes reinstatement.

## **Accident history**

[4] On December 1 2008 a bench top fabricator suffered serious harm – amputation of a finger – using a sliding table dimension saw. Although the company had installed a new guard on the machine two years previously the Labour Department did not consider the guarding recommended by the manufacturer to be sufficient. The company fitted new guards in 2009.

[5] All factory staff were retrained on the use of table saws throughout December. This included Mr Yong who attended training on 2 and 4 December 2008. The training form, signed by Mr Yong, stated that employees were to ensure that guards were installed and working properly, the guards provided with the saws had to be used and to be kept in place while the saw was in use and the guard had to be high enough to cover the blade. Mr Yong had previously received the same training a month earlier.

[6] Mr Harrison contended that these instructions, coming as they do under the heading “Before Starting” applied only to that situation and not to the actual operation of the saw. I have no hesitation in rejecting this submission on the grounds that it makes no sense for safety instructions that are a prerequisite to safe operation cease to be necessary during the operation.

[7] Two months after this incident there was a further incident involving unsafe use of a table saw. The worker concerned was dismissed for using the saw without the guard being in place.

[8] After this incident staff were again retrained in the safe use of table saws. Mr Yong received this training on 17 February 2009 with a further competency assessment on 9 March 2009.

## **Incident leading to dismissal**

[9] Mr David Jackson, the Auckland manager, saw Mr Yong on 20 April 2009 carrying some thin pieces of timber into the factory after work had ceased for the day. He assumed Mr Yong was intending to carry out some private work as there were no timber jobs taking place in the factory that week.

[10] The following morning Mr Clendon Henare, Fabricator/Supervisor approached Mr Dave Roberts and told him he had found a bench saw which appeared to have been used in an unsafe manner. Mr Clendon was told to see Mr Jackson which he did around 9am

[11] Mr Jackson immediately arranged for the area to be taped off and photographed.

[12] The table saw had a wood blade and not a laminate blade fitted. The saw guard was propped up with two pieces of MDF so that it did not cover the blade. The saw table was covered in red sawdust which was consistent with the type of wood Mr Jackson had seen Mr Yong carrying the previous day.

[13] Mr Jackson said his main concern was that the saw appeared to have been used without the guard in place which he saw as a serious breach of the company's operating procedures for table saws.

#### **Investigation and disciplinary process**

[14] Mr Yong was absent that day. When he returned to work he was given a letter asking him to attend a disciplinary meeting.

[15] The meeting was attended by Mr Jackson, Mr Andrew Telfer, The Human Resources Advisor, Mr Yong and his support person, Mr Nelson Wong.

[16] The allegation regarding using the saw without a guard and not returning it to the safe status of putting the laminate blade back on and the safety guard in place over the blade was put to Mr Yong. Mr Yong accepted that he had worked on a private job and that he had not changed the wood blade back to a laminate blade but denied operating the saw without the guard in place and said he had put the guard down when he had finished.

[17] Mr Jackson said he had seen the size of the piece of timber Mr Yong intended cutting and that it would not have been possible to cut wood of that thickness without the guard being propped up with the fence being the way it was found. The fence guides the material being cut and runs parallel to the saw blade. It determines the width of board being cut. Mr Jackson told Mr Yong that in his view the only way he would have been able to cut wood of that thickness was if he had used a different

blade setting or by altering the fence or if he had propped the guard up. He said Mr Yong was not able to respond to this.

[18] Mr Yong was informed the meeting was adjourned to allow further investigations to be carried out.

[19] Mr Telfer drew up a questionnaire for all staff as Mr Yong had maintained that someone must have used the saw after him. While I accept the questionnaire was well intentioned it was headed up “Kevin Yong Investigation: and the staff knew of the problem It asked whether they had seen anyone use the saw or whether they had used it. It is extremely unlikely that if someone else had used it that that person would have admitted to that, realising that the result could well be dismissal.

[20] Mr Jackson ascertained from Mr Roberts that no one else had been in the factory on the evening of 20 April.

[21] A further disciplinary meeting was held on 30 April. Mr Yong was given photographs of the work area and copies of the completed questionnaires.

[22] Mr Yong described the dimensions of the piece of wood he had been working on. Mr Jackson said those dimensions were consistent with the blade setting as it was found and reiterated that the guard would not have fitted over the saw when cutting timber that size with the fence setting as it was found. Mr Yong did not comment.

[23] There was sawdust on the saw and that if there had been another saw user the redwood dust would have disturbed. Mr Telfer said there was sawdust and no sign of disturbance. There was no line in the sawdust.

[24] All four men went to look at the saw and Mr Jackson demonstrated the effect of using the saw. The movement of the sliding table created a clear line in the sawdust. Mr Yong confirmed that the sawdust was from the wood he had been cutting.

[25] Mr Telfer explained why the company did not believe it was probable that someone had used the saw after Mr Yong. This was because:

- Mr Roberts had locked up on Monday night and there was no-one else in the factory at that time.

- Between 7 and 9am no-one had used the saw or seen anyone use it and there had been no need for anyone to use it before Mr Clendon had a job on it at 9am.
- The sawdust was the same as Mr Yong's wood and was undisturbed.
- There were no other wood jobs in the factory at that time.
- The blade and fence settings matched Mr Yong's job.

[26] Mr Yong was told the company was considering summary dismissal. After an adjournment, during which a staff member who had been on leave earlier was interviewed and Mr Yong given the result of that interview, Mr Yong was dismissed.

[27] Mr Yong maintained that a back injury he had suffered and loss of hearing incurred as a result of working in the factory influenced the company's decision to dismiss him.

[28] I am satisfied that Mr Yong's health had nothing to do with the decision to dismiss. It is clear that he was a skilled and well regarded worker, and that despite the two warnings, the company was reluctant to terminate his employment.

### **Decision**

[29] Section 103A requires that the question of whether a dismissal was justifiable must be determined objectively by a consideration of how the employer acted and its actions were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal took place.

[30] Issues of safety may be critical in considering whether the actions taken by an employer constitute the actions of a fair and reasonable employer in all the circumstances: *Fuiava v Air NZ Ltd* [2006] ERNZ 80

[31] Mr Harrison mounted a comprehensive argument regarding the justifiability of the dismissal. He submitted that the propping up of the guard for the purpose of cutting two 15mm strips of metre long pieces of wood, when it was accepted that Mr Yong had used a push stick, did not warrant instant dismissal and that that outcome was unduly harsh.

[32] Mr Harrison asserted that the manner in which Mr Yong had used the table saw did not pose a risk of serious harm for as long as a push stick was being used in accordance with the operating procedures there was no safety risk to the operator. The key point here is that the saw was not being operated in accordance with the Safe Operating Procedures because these required the guard to be down, not propped up.

[33] During the hearing Mr Yong maintained that, I accept for the first time, that the set up would not have cut the size of wood he had been cutting. Mr Telfer said if Mr Yong had raised that at the time then measurements would have been made. Mr Jackson said that when they were looking at the saw and the saw table the only thing discussed was the sawdust. There had been no mention of dimensions and inconsistencies regarding that setting..

[34] Mr Yong did not challenge Mr Jackson's views about the settings. I accept the respondent's assertions that if he had there would have been further investigation.

[35] As to the claim that the employer did not make a simple assessment regarding whether or not the set up found the following day was consistent with the cutting of timber into 15mm strips, the evidence was that the employer was told by Mr Yong the size of the wood that had been used. Mr Harrison submitted that I did not need to make a finding regarding what was said about this issue because the measurement could have been tested regardless. While I accept that the measurement could have been made, the issue is whether it needed to be made and in light of the fact that Mr Yong did not contest the employer's view about the set up, it did not need to be made.

[36] Mr Harrison submitted that the employer had not taken into account that Mr Yong had a hearing difficulty and that English was his second language. Mr Yong was represented and the employer checked details with Mr Yong, being aware of the difficulties with his hearing and language use.

[37] The Safe Operating Procedures required that the guards were installed and working properly, the guards provided with the saw had to be used and a guard high enough to cover the blade needed to be used. The conclusion that Mr Yong did not use the guard when operating the saw was one that the employer could reasonably have reached. Safety procedures exist for a purpose. Mr Yong breached the procedure and that constituted serious misconduct.

[38] Mr Yong does not have a personal grievance.

## **Costs**

[39] If the parties are unable to resolve the matter of costs the applicant should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of the Employment Relations Authority