IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland 205
5438431

	BETWEEN	JAN ZELINKA Applicant
	A N D	PETER GILLING FASTENERS (2004) LIMITED Respondent
Member of Authority:	T G Tetitaha	
Representatives:	J Cairns, Advocate for Applicant R Palmenter, Counsel for Respondent	
Investigation Meeting:	22 May 2014 at Auckland	
Submissions Received:	21 and 22 May 2014 from the Applicant 5 and 22 May 2014 from the Respondent	
Date of Determination:	26 May 2014	

DETERMINATION OF THE AUTHORITY

Orders:

A. **Jan Zelinka was unjustifiably dismissed by Peter Gilling Fasteners (2004) Limited.**

B. **An order that Peter Gilling Fasteners (2004) Limited pay Jan Zelinka $1,250 including a reduction of 75% for Mr Zelinka's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**

C. **Costs are reserved.**

D. **If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem

[1] The applicant, Jan Zelinka, was dismissed by Peter Gilling Fasteners (2004) Limited (GFC) following an altercation with a co-worker. GFC accepts the dismissal process was defective but this submits this had no consequence for Mr Zelinka which should be remedied.

Interpreter

[2] Prior to the start of hearing an issue arose regarding Mr Zelinka requiring an Czech language interpreter. He did not request an interpreter prior to hearing. No suitably qualified translator was available. He wished to use his ex-wife, Lanka Zelinkoea, as a translator for hearing purposes. The respondent did not object as it wished to continue and did not seek an adjournment.

[3] I am empowered by s160(f) to follow whatever procedure is appropriate, including the use of interpreters. If interpreters are required for hearing, Counsel must advise the Authority in advance. Mr Parmenter did so and one was provided by the Authority for his witness. Mr Zelinka did not. I need to consider whether to the exercise my discretion under s160(f) to allow the use of Mrs Zelinkoea as his interpreter or to adjourn the matter until a suitably qualified interpreter could be obtained.

[4] The role of an interpreter was explained to Mrs Zelinkoea by me. She confirmed she was competent in both English and Czech languages and would not be swayed by her personal relationship with the applicant to provide an inaccurate translation. She was prepared to take the interpreters oath.

[5] Given the respondent's consent, the unavailability of any alternative qualified translator and neither party seeking an adjournment, I am satisfied the use of Mrs Zelinkoea to provide interpretation for the applicant met the principles of natural justice and would not result in unfairness. This was subject to my ability to revisit this decision should any unfairness about the interpretation arise.

Issues

[6] The following issues arise:

(a) Could a fair and reasonable employer conclude Mr Zelinka's conduct was misconduct justifying dismissal?

(b) Was the process leading to dismissal of Mr Zelinka what a fair and reasonable employer could have done in all the circumstances?

(c) If the dismissal was unjustified, what remedies (if any) should be granted?

Facts leading to dismissal

[7] Mr Zelinka was employed in November 2005 as a general factory hand, initially on a casual basis then leading to permanent employment.

[8] In 2011 there was an incident between Mr Zelinka and a co-worker, Jessie Muyana Libo-on (Jessie). Mr Zelinka accepts he pushed Jessie but did so to get him out of his way.

[9] Daniel Ganley, director of GFC, interviewed Mr Zelinka and Jessie. Mr Zelinka was given a verbal warning about his behaviour. He had brought his son to provide translation services prior to the verbal warning.

[10] On or about 21 May 2013, there was a further incident between Mr Zelinka and Jessie. At hearing Mr Zelinka admitted telling another co-worker, Joseph Tauilli, he did not have to work very fast because Jessie worked slowly. Mr Tauilli had only started work two weeks ago on a temporary basis. He told Jessie what had been said.

[11] Jessie then made a note on a piece of cardboard stating *"Jan, stop gossip to your work mates. It is not good for you! Your mouth like a woman"*, or words to that effect. He placed the sign upon a pallet near where he worked.

[12] Mr Zelinka saw the sign and admitted becoming angry. An incident occurred where Jessie alleged he stood over him in a threatening manner, grabbed him by the front of his shirt and raised his left hand in a clenched fist. Mr Zelinka denies he grabbed Jessie. He says he grabbed the sign and tore it up.

[13] The incident was reported to the Administration manager whom told Mr Ganley later in the day.

[14] Mr Ganley interviewed Jessie, Mr Zelinka and Mr Tauilli. He discussed the matter with his Administration manager and prepared a letter.

[15] Mr Ganley then met with Mr Zelinka later that the same day. He handed Mr Zelinka the letter which stated his employment had ended due to the threatened violence against Jessie. Mr Zelinka asked *"am I finished?"* and he replied he was dismissing him for threatening violence to Jessie. Mr Zelinka then left.

[16] Three days following the dismissal Mr Zelinka suffered a heart attack. He had a pre-existing heart condition and was unable to work until January 2014.

[17] Mr Zelinka raised his personal grievance with the respondent by way of letter dated 8 August 2013. An application to the Authority was filed on 7 November 2013.

Could a fair and reasonable employer conclude Mr Zelinka's conduct was misconduct justifying dismissal?

[18] Mr Zelinka denies any form of assault against Jessie or that he made any threatening gesture or used threatening words. He refers to the previous incident between himself and Jessie. He submits he denied any wrongdoing when called to the disciplinary meeting. Mr Zelinka submits he should have received more consideration of his version of events.

[19] The test is whether there was sufficient evidence before Mr Ganley to determine the conduct that had occurred was serious misconduct justifying dismissal.

[20] At the time of the decision, Mr Ganley had Jessie's complaint corroborated by Mr Tauilli, that Mr Zelinka had grabbed Jessie and threatened him with a raised fist. He had Mr Zelinka's response which appeared to brush it off as a minor argument. At the time he was under the impression Mr Zelinka understood and did not contest the incident occurred.

[21] Serious misconduct *"... will generally involve deliberate action inimitable to the employer's interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty."*[1] It is conduct which *"deeply*

[1] *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."[2]

[22] Every employment relationship has an implied duty of trust and confidence. Threats of violence are serious misconduct. They constitute a breach of the trust and confidence an employer has in their employees to behave appropriately and safely in the workplace. This type of behaviour was serious misconduct which an employer could have dismissed Mr Zelinka.

Was the process leading to dismissal of Mr Zelinka what a fair and reasonable employer could have done in all the circumstances?

[23] At the beginning of hearing the respondent accepted there were defects in the process. These included the failure to allow Mr Zelinka an opportunity to get legal representation. However, it submitted there were no consequences. The applicant disagrees. He submits in addition there was insufficient written notice and evidence from all parties obtained with the assistance of a translator. He also referred to other defects such as failure to provide a safe workplace, failure to monitor the noticeboard and prevent provocation, failure to ensure the parties were separated in the workplace during the two years since the previous incident. The decision making process was inconsistent with that employed two years ago.

[24] A failure to meet any of the s 103A(3) tests is likely to result in a dismissal or disadvantage being found to be unjustified.[3] There is no absolute right to an interpreter.[4] The right to the assistance of an interpreter is a flexible one which will depend on the circumstances.[5]

[25] The initial investigation of the concerns was minimal. The meetings with Mr Zelinka were short and overshadowed by his apparent lack of English language ability. Mr Ganley was aware Mr Zelinka was not necessarily fluent in English. He gave him a rating of 6 on a scale of 1 to 10 with 1 being no English language ability and 10 being fluent. A rating of 6 indicates a diminished capacity for understanding

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2 *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

3 *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160; (2011) 9 NZELC 94,015; [2011] ERNZ 466 (EMC)

4 *Zinck v Sleepyhead Manufacturing Co Ltd* [1995] 2 ERNZ 448

5 *Alwen Industries Ltd v Collector of Customs* (HC, 24/04/96) [1996] 3 NZLR 226; (1996) 14 CRNZ 136

what was a serious incident resulting in dismissal. This was exemplified by Mr Ganley's offer for Mr Zelinka's son to be present.

[26] Mr Ganley believed Mr Zelinka accepted the incident had occurred but minimised the consequences. Mr Zelinka said he merely agreed with whatever was being said because he was shocked and unable to accurately communicate his denial. He denied assaulting or threatening to assault Jessie. He did not recall Mr Ganley's offer of waiting for his son to act as a translator prior to dismissal. The speed that matters progressed from investigation to dismissal was unwarranted in the circumstances.

[27] The opportunity to seek legal advice prior to dismissal is imperative in cases where the employee has diminished understanding of English. This opportunity was well within the resources of the respondent to grant prior to dismissal. It would have cost them nothing more than time. The failure to provide an opportunity to seek legal advice was unfair and did not allow Mr Zelinka a reasonable opportunity to respond (s103A(3)(c). This also tainted Mr Zelinka's understanding of the concerns (s103A(3)(b) and Mr Ganley's genuine consideration of his responses (s103A(3)(e).

[28] These failures were not minor and did result in Mr Zelinka being treated unfairly (s103A(5). Jan Zelinka was unjustifiably dismissed by Peter Gilling Fasteners (2004) Limited.

What remedies should be granted?

[29] At the start of hearing Mr Zelinka withdrew his claim for lost wages (s.123(b) because he has been unable to work since dismissal due to his health. He received a sickness benefit until January 2014. He seeks an award of damages for hurt and humiliation under s123(c)(i). The grounds are the effect of the dismissal upon his personal health.

[30] The amount of compensation for an injury to feelings or other distress must be referable only to the harm done by the employer's behaviour.[6] There was no medical evidence filed supporting the damages claim.

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6 *New Zealand Institute of Fashion Technologies v. Aitken* [2004] 2 ERNZ 340 at 344 [64]

[31] Where there is no medical evidence, the highest award justifiable was $7,000.[7]. That award was supported by substantially more evidence than was filed here. An award of $5,000 is appropriate in these circumstances.

[32] I am required to consider the extent to which the employee's actions contributed towards the situation that gave rise to the personal grievance and if those actions require a reduction in remedies accordingly (s.124). This requires an assessment of whether there was sufficient evidence Mr Zelinka threatened Jessie.

[33] Evidence was given by Jessie, Mr Tauilli and Mr Zelinka about the incident. Mr Zelinka believed Jessie and Mr Tauilli had colluded and lied so he would be dismissed and replaced by Mr Tauilli. This proposition was not put to Jessie or Mr Tauilli for comment by Applicant counsel. I can give little weight to this proposition as a result.

[34] Jessie's evidence was largely corroborated by Mr Tauilli. Mr Tauilli had a clear unobstructed view of the events. Mr Zelinka admitted he was angry. He demonstrated at hearing how he reached towards Jessie to grab the sign. It is possible both Jessie and Mr Tauilli interpreted those actions as threatening violence. Mr Zelinka admitted none of his work colleagues would speak to him following the incident. This indicated something serious had occurred. In my view of the evidence, it was more probable than not Jessie was threatened by Mr Zelinka.

[35] Given my finding, there was sufficient evidence Mr Zelinka had threatened Jessie, a reduction for contributing behaviour is appropriate. His behaviour was both causative and blameworthy. His actions were serious.

[36] Despite the findings of procedural unfairness, threats of violence cannot be tolerated in the workplace. A 75% reduction of the remedies is appropriate in these circumstances. Although I considered making a 100% reduction in remedies, this has been tempered by Jessie's and the respondent's contribution towards the incident.

[37] There is an order that Peter Gilling Fasteners (2004) Limited pay Jan Zelinka $1,250 including a reduction of 75% for Mr Zelinka's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

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7 *NCR (NZ) Corp Ltd v. Blowes* [2005] ERNZ 932 (CA)

[38] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply

T G Tetitaha
Member of the Employment Relations Authority