Determination Number: AA 2/01
File Number: AEA 46/00

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE

BETWEEN Asotasi Eniata, Applicant

AND Amcor Kiwi Packaging, a division of Amcor Packaging (New Zealand) Limited, Respondent

REPRESENTATIVES Ms A-M Hendra for Applicant
Mr R M Harrison for Respondent

DATE OF DETERMINATION 11 January 2001

DETERMINATION OF THE AUTHORITY

Mr Asotasi Eniata was dismissed by Amcor Kiwi Packaging, his employer, on 6 December 2000. The dismissal was the culmination of events which began on 23 November 2000 when a piece of glass broke. The glass, a touch screen which formed part of electronic testing equipment being operated by Mr Eniata as part of his job, shattered at the same time as Mr Eniata applied force to it. Mr Eniata, who was familiar with the operation of the equipment and had been using it for some time on the day the glass broke, told the employer that he had merely tapped the screen with his fingernail. His employer, however, concluded from its enquiry into the breakage that because of the relative strength of the glass screen, much greater force must have been used for it to break.

Early on in a series of meetings held with Mr Eniata to enquire into the circumstance of the breakage, it was put to him by the employer that he must have used "excessive" force. The employer also advised him that wilful damage to company property was regarded as serious misconduct that could lead to his dismissal. Express provision to that effect is made in the company Handbook, which appears to incorporate the employment contract and conditions of employment as well as setting out the main work rules and policies applied by the company.

Following the dismissal of Mr Eniata the employer wrote him a letter confirming the termination. The letter began with the following paragraph:

> *Further to and following extensive enquiries with respect to the damaged MD Shear Tester we have concluded that your actions were in fact wilful and for this reason your employment has been terminated effective 6 December 2000 at 3p.m.*

The letter was signed by Mr Tim Slade, the North Island Operations Manager of Amcor.

On 11 December, through his representative, the New Zealand Engineering Printing & Manufacturing Union, Mr Eniata lodged an application with the Authority. He has asked the Authority to resolve his employment relationship problem, it being he states, that he was unjustifiably dismissed by Amcor. Mr Eniata asks to be reinstated to his job. He also asks that Amcor be made to reimburse him for any lost wages and pay him compensation for humiliation, distress and injury to feelings caused to him by his dismissal.

Mediation through the Department of Labour was undertaken by the parties on 13 December 2000 but this unfortunately did not produce any resolution of the problem. Consequently an investigation meeting was commenced on 15 December. It concluded on 19 December after I had looked at the Shear Tester equipment in operation at Amcor's factory. The investigation meeting was conducted on the basis that a final determination would be given by the Authority and accordingly an application for interim reinstatement was not required to be determined.

The primary focus of the investigation by the Authority is not on whether Mr Eniata in some way applied excessive force to the touch screen causing it to break and thereby wilfully damaged the employer's property. That question was for the employer. As stated by the Employment Court in *Drummond v Coca Cola Bottlers NZ* [1995] 2 ERNZ 229 at 234:

> *The initial question for the* [Tribunal] *is solely this: On the basis of the enquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgement about the quality of the enquiry and the quality of the decision based upon it.*

Primarily therefore in this investigation the Authority is concerned with the scope and thoroughness of the investigation or enquiry conducted by the employer. The focus of the Authority, at least in considering whether the dismissal was or was not justified, is the reasonableness of any conclusions the employer reached from its enquiry. The question of whether Mr Eniata did or did not use excessive force and wilfully damage company property, arises only in connection with the apportionment of any remedies he might become entitled to should the Authority find that he was unjustifiably dismissed. In that event his contribution, if any, to the situation that gave rise to his personal grievance must be assessed and for that purpose the Authority may make findings as to what actually took place when the equipment was damaged.

Also of relevance to this investigation by the Authority are principles of law stated by the Court of Appeal in the leading case of *Airline Stewards & Hostesses of NZ IUOW v Air New Zealand Limited* [1990] 3 NZILR (CA) 584 at 590 – 591, as follows:

> *…an employer could not justify dismissal of the employee if he had closed his eyes to available evidence or not given the employee an opportunity to be heard in his own defence. However, the employer is not required to continue his investigations indefinitely, only to carry out enquiries to a reasonable extent in all the circumstances…*
>
> *The employer must have more than mere suspicion but need not have proof beyond reasonable doubt… At the time the employer dismissed the employee, the*

> *employer must have either clear evidence upon which any reasonable employer could safely rely or have carried out reasonable enquiries which left him on the balance of probabilities with grounds for believing and he did believe that the employee was at fault…*

Ultimately the issue comes down to the question of whether, as a result of a full and fair investigation, Amcor was reasonably entitled to conclude and did conclude that there had been serious misconduct by Mr Eniata on 23 November 2000 in the form of wilful damage to the employers property.

A consequence of the damage was the cost of $A1,000 for a new screen, which was replaced within a few days. The company also became concerned whether it could maintain the production run for a major client. However, it is the conduct itself and not the consequences of that conduct which is important when determining whether there has been serious misconduct. In this regard in an employment context the Court of Appeal has warned against the danger of confusing an act with its consequences; see *Honda NZ Ltd v NZ Shipwrights Union* [1993] NZILR 23.

In relation to the enquiry carried out by the employer into the damage, I find as follows:

1. When interviewed Mr Eniata maintained that he had done no more than tap the glass with his fingernail at the moment it shattered. No one else had observed what happened. The employer was aware that Mr Eniata had been troubled before the breakage by family matters and that he became disturbed immediately afterwards because he regarded the breaking of glass as an omen towards the wellbeing of his family. However Mr Eniata did not offer these matters as an excuse for his conduct in connection with the breakage and this was consistent with his explanation that he was not at fault at all.

2. After a meeting with Mr Eniata and his representative on 1 December, Mr Slade rang a Mr Murray Singleton in Australia. Mr Singleton is the Technology Transfer Engineer at Amcor Research and Technology in Australia and he supplies the MD Shear Units to Amcor in New Zealand. Mr Singleton's advice to Mr Slade was that extreme force would be required to shatter the glass because it is laminated for safety. Mr Singleton's opinion given to Mr Slade was that it would be nearly impossible to shatter with a finger.

   Further, Mr Singleton advised Mr Slade that he knew of only one other breakage. This had apparently been caused by a forklift hitting the testing equipment. Later Mr Singleton, on 6 December, sent some data about the screen. This data indicates that the glass screen is about 6.4 inches square and 2.4 millimetres thick with a toughened Mylar film on the outside surface.

3. As well as obtaining technical information from Mr Singleton, the employer spoke to the Technical Manager of Pilkington Glass, also on 6 December,

and discussed the possibility of the glass breaking from the force applied by touch or the tap of a finger. The advice received was that it was extremely unlikely that this could occur and that indeed a short sharp blow would be needed even if the glass had a scratch or a hairline fracture. The advice given to the employer was that a centre punch is used by Pilkingtons to shatter glass of this kind.

4. The MD testing equipment, as I have seen for myself, has operating instructions prominently displayed on it. Several times in the instructions the word "pressing" is used in relation to the method for delivering commands to the equipment via the glass touch screen. In his evidence Mr Eniata said he had been familiar with the way the equipment worked and he acknowledged that commands are given to the unit by "pressing" the screen. He said he had told the employer that all he had done was tap the screen with his fingernail. When asked whether he had used an object to break the glass, he told Mr Slade, *"…all I did was press the screen and it broke."*

The employer was not obliged to send glass of the same type to a laboratory for destruction testing to be carried out. It was not required to go so far as to find out exactly what force was required and how it might be applied, whether by a part of the body or an object, to cause a breakage. The employer acted reasonably in obtaining information from its own technical adviser. The employer, I consider, also acted reasonably in discounting theories that the glass broke because of a structural flaw in the screen, or because the equipment had been shifted from one location to another in the factory before the breakage occurred, or because the equipment had been fixed to the floor by only two bolts instead of four. Mr Slade and other management personnel who investigated the breakage, with their intimate knowledge of the equipment were in a position to discard as implausible suggestions that other influences, apart from force applied by the operator, significantly contributed to the breakage.

I find that it was a reasonable conclusion for the employer to reach that excessive force had been used to cause the glass to break. "Excessive" merely means any force that goes well beyond the range of force likely to be exerted by different people who are operating the machine consistently with the instructions to press the glass.

Excessive force can be applied through negligence or carelessness, but negligence on its own will not ordinarily justify a dismissal unless it is gross, or amounts to recklessness; see, *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2ERNZ 311 at 318 – 319 and *Jupiter General Insurance Co Ltd v Shroff* [1937] All ER 67 at 73 – 74.

I find however that it was reasonable for the company to conclude that Mr Eniata had not merely pressed or tapped the screen but had hit or struck it. I also find that it was reasonable for the company to conclude that the degree of force likely to have been used pointed beyond a case of simple negligence or carelessness, such as might have occurred if Mr Eniata had been distracted or angry. The company was entitled to conclude that Mr Eniata had acted either recklessly without regard to the consequences, or deliberately with intention to break the screen. Knowledge of the probable consequences may be presumed where there is recklessness.

This was a case where the employer had to consider the explanation of the employee that there had been nothing abnormal about the circumstances in which he operated the testing equipment. In his explanation Mr Eniata made no concession of responsibility to any degree for what happened - he said that he had not used excessive force but had just pushed the button as he had normally done in the past to operate the equipment. Against this however the employer had technical information pointing to a likelihood that to shatter the glass the force applied to it would have to be excessive. It is at least implicit that the employer rejected the no-blame explanation of Mr Eniata. It was reasonable for the employer to do so because of the strength of the technical information. It was in my view so strong that the employer could reasonably conclude that Mr Eniata had been negligent to a high degree, or had intended to damage the glass, or had been reckless as to whether he did so or not, through the force applied by him.

As to whether the employer met minimum requirements of procedural fairness as set out in the well known Labour Court decision of *NZ Foodprocessing Union v Unilever NZ Ltd* [1991] NZILR 35, I find as follows. Mr Eniata had clear and early notice of the specific allegation of misconduct to which he was required to answer and of the likely consequences if he was found to have been responsible. Early on in the series of interviews it was put to Mr Eniata and his representative that excessive force must have been used and he was advised that summary dismissal was a possible penalty if he was found to have wilfully damaged the equipment.

Mr Eniata I find was given a real opportunity to attempt to refute the allegation or explain or mitigate his conduct. The employer's enquiries were conducted between 23 November and 6 December and Mr Eniata was personally interviewed on several occasions, commencing on 28 November after he had returned following an absence for personal reasons. I do not consider that the employer predetermined the dismissal before it had concluded its enquiries or that its consideration of Mr Eniata's explanation was biased. Although Mr Slade had decided before 6 December that Mr Eniata should be dismissed, it is relevant that his superior, Mr Ian Sangster, the Group General Manager of Amcor, involved himself when requested by Mr Eniata's representative to review the decision. He made enquiries and was told that there had only been two instances when a screen had broken, and this was across a range of some 70 or more similar units Amcor had located throughout Australasia. In one of these the equipment had been hit by the forklift and the other had occurred in the Auckland factory. In the latter it was suspected that the glass had been deliberately broken but it could not be established by whom. Mr Sangster received the written specification for the glass from Australia and he contacted Pilkingtons and spoke to the Technical Manager who advised that a breakage caused by a finger was highly unlikely. Mr Sangster came to the conclusion that Mr Eniata had used excessive force and had wilfully damaged the screen of the testing equipment. He, however, left the final decision to Mr Slade who then confirmed his earlier decision that Mr Eniata would be dismissed.

Having reached the conclusion, reasonably in my view, that excessive force had been used and to such a degree that an element of wilfulness could be imported into the actions of Mr Eniata, in my view it was open to the employer to conclude that those actions amounted to serious misconduct. The reckless or deliberate destruction of an employer's property will generally be incompatible with the obligations of an employee to maintain the trust and

confidence required in the employment relationship and to generally act in good faith towards the employer.

In the circumstances of this case, I find that dismissal was an option open to a fair and reasonable employer. Amcor was of course aware that Mr Eniata had served the company for 12 years but in the end it was entitled to bring about the consequence of summary dismissal for gross misconduct. Then range of disciplinary responses was ultimately a matter for the employer and as a matter of legal principle it is not for the Authority to substitute its judgement as to what penalty should or should not actually have been imposed; see *Read v Air New Zealand* [1991] 3 ERNZ 139 at 146, as approved by the Court of Appeal in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483.

The employer was not required to be satisfied beyond reasonable doubt of the circumstances in which the glass was broken. Once the employer had conducted a reasonable enquiry and had reached conclusions reasonably open to it about the circumstances, upon finding that there had been serious misconduct on his part it became the employer's call as to what action it should take against Mr Eniata. It is not the role of the Authority to second-guess the employer in the way it conducted it's enquiry or in the conclusions it reached, provided the employer acted reasonably in doing these things, which in my view it did.

I therefore conclude that the dismissal of Mr Eniata was justified. On the basis of the quality of the enquiry that Amcor carried out and the quality of the conclusions reached by Amcor from its enquiry, the decision to dismiss was one that was open to a fair and reasonable employer. It may be that at a practical level, if the misconduct had not been sufficiently serious to justify summary dismissal but had been such that dismissal on notice could properly have been carried out, then the solution to the employment relationship problem would be the payment to Mr Eniata of wages for one week, the contractual period of notice, rather than a finding of unjustified dismissal leading in turn to consideration of the various remedies available at law. If the question of remedies had arisen so too would the question of contribution on the part of Mr Eniata. If his actions could be classed as blameworthy and if they were linked to the damage to the employer's property, then s.124 of the Employment Relations Act 2000 requires such action to be accounted for in fixing remedies. I consider it implausible that the screen broke under the force created by merely tapping a finger. Taking even the most charitable view, Mr Eniata was at least negligent and therefore blameworthy to some degree.

I have, however, found that the employer was able to reasonably conclude that the actions of Mr Eniata went well beyond simple negligence and constituted serious misconduct.

Accordingly, it is the determination of the Authority that the problem of Mr Eniata is not one to be resolved in his favour. No findings or orders are made against the employer, Amcor.

Costs are reserved. If the representatives, Ms Hendra and Mr Harrison, are unable to dispose of this issue, Amcor may apply for costs by memorandum and Mr Eniata shall have 14 days in which to reply. Any application for costs is to be made before the end of January 2001.

A Dumbleton
Member of Employment Relations Authority