

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Daryl Askew (Applicant)
AND Tegel Foods Limited t/a Coq au Vin Poultry (Respondent)
REPRESENTATIVES R Foitzik for Applicant
R Gibson for Respondent
MEMBER OF AUTHORITY G J Wood
**INVESTIGATION
MEETING** Wellington, 19 April 2005
**DATE OF
DETERMINATION** 27 April 2005

DETERMINATION OF THE AUTHORITY

The Issues

1. The two issues which require determination in this case are whether the final warning and subsequent dismissal of Mr Askew by the respondent (Tegel) were justified in procedure and substance.

Background Facts

2. Daryl Askew started working at Coq au Vin Poultry (a business much later purchased by Tegel) fifteen years ago, joining it as a school leaver. At that time, the business was owned and run by Mr Karl Campbell. When Tegel purchased the business in 2000 he retained the title of business manager and was in essence the local manager.
3. Coq au Vin Poultry had been run along family lines at least until the purchase by Tegel. Management, including human resources management at Tegel, determined to implement more rigorous processes subsequent to the purchase of Coq au Vin. In particular, in the second half of 2002, staff were given a revised copy of the Tegel

employee handbook (which they signed) and aspects of it were discussed with them. A new emphasis was also given to health and safety issues. Mr Askew received the handbook and signed it as having read and understood it.

4. Mr Askew suffered a brain injury as the result of a childhood accident. This meant that he had difficulty digesting a lot of material at any one point in time. This was known to staff at Tegel and it did not impair him in his duties. His work record was good if not spotless and he was a valued long standing staff member.
5. Mr Askew was a driver, who also did some other tasks, such as packing and working in the smallgoods department. He was required to start work at 6am, when he was to commence deliveries for the day. In this aspect of his work I find that he was responsible to both Ms Joanna Niko and Ms Wendy Jackson. Mr Askew described Ms Jackson as a sales representative who had no authority over him except to tell him which orders to deliver. This is at odds with the evidence of all the other witnesses and Mr Askew's admissions at disciplinary interviews that Ms Jackson had responsibility to give him work directions.
6. In the course of 2004 at least, Mr Askew had a number of issues raised with him by management about his timekeeping and his attitude towards other staff and Ms Jackson in particular. These matters were dealt with by discussions between him and various management staff.

The Warning

7. On 26 July 2004, Ms Jackson made a complaint to Mr Campbell about Mr Askew's behaviour that morning. Ms Jackson claimed that Mr Askew had not started work by 6.15am and was told to do so by her, but when she returned 30 minutes later she had to tell him again to start work. Ms Jackson complained that Mr Askew refused to start work and swore at her saying he didn't have to do what she said. Ms Jackson also alleged that she later heard Mr Askew telling another worker that he would "*smash the fat bitch*".
8. After taking advice from the human resources department, Mr Campbell went to organise a disciplinary investigation meeting with Mr Askew that Mr Alf Robson, a

human resources advisor, was to conduct. Mr Campbell accordingly told Mr Askew that a meeting would be held the next day to discuss allegations of serious misconduct. Mr Askew was aware that this related to his behaviour toward Ms Jackson earlier that day. He was also told that he could bring a representative to the meeting. On the basis of my general credibility findings outlined elsewhere, I accept that Mr Campbell did provide this notification to Mr Askew even though the latter cannot recall it now. As an example of Mr Askew's poor recall, he claimed in his written evidence that there was no meeting on 24 August although he subsequently referred to it in his oral evidence.

9. The interview the next day was conducted by telephone conference. Mr Robson asked Mr Askew if he wished to have a representative present, but Mr Askew indicated that he did not. Mr Askew also acknowledged that he was aware of the purpose of the discussion, of the relevant company rules and that the matter was serious. He also accepted that he had had previous discussions with management about lateness and other performance matters. He was again told that the matter was serious and could result in his dismissal.
10. Mr Askew was then given an opportunity to respond to Ms Jackson's allegations, which were outlined to him. Mr Askew accepted that Ms Jackson could give him instructions but that she was "*in his face all the time*". He said that he did not start work because his sheets had not arrived at that time. He accepted that he had lost his temper and flown off the handle and had sworn at Ms Jackson. In relation to the later conversation overheard by Ms Jackson, he accepted that there had been a conversation but claimed that he did not say that he was going to smash Ms Jackson but rather that he felt like smashing her. Mr Askew also admitted clocking into work late, but only by five minutes.
11. I do not accept that Mr Askew told Tegel representatives that he did not believe that Ms Jackson had the authority to tell him to get on with his work or that he denied making any comments to another worker about Ms Jackson. This is inconsistent with the evidence of Mr Campbell and Mr Robson (whose memories are more reliable than Mr Askew for reasons outlined above) and because the contemporaneous notes of Mr

Robson clearly indicate that Mr Askew stated that he had told another worker that he felt like smashing Ms Jackson.

12. Mr Campbell discussed the results of the meeting with Mr Robson and the human resources manager. It was considered that serious misconduct had been established and that dismissal could be justified. However, in recognition in particular of Mr Askew's long service with Coq au Vin Poultry, Mr Campbell decided to issue him with a final warning. This finding was communicated to Mr Askew the next day, again by telephone conference, where the issues later set out in a letter were all covered.
13. The final warning is very clear in its terms. It indicates what the allegations against Mr Askew were, the company's conclusion on the facts established and that a final warning would be issued. It concludes by stating:

"Your actions were both disruptive and irresponsible, and this has damaged the employment relationship. Your ongoing employment with the company is subject to your willingness to comply with all company rules, policies and requirements.

Specifically you are reminded of the following:

1. *You must follow all lawful and reasonable instructions issued by the line managers on the site.*
2. *You must refrain from acting in an aggressive or argumentative manner at all times.*
3. *You must avoid using abusive or offensive language toward or directed at another employee who make take offence at such behaviour.*
4. *You must arrive to work at your designated start time and be ready and available to work as at your designated start time. At present your start time is 6am.*

We are now at a critical stage in terms of your employment with the company. You will find that from this point forward that any future misconduct or breaches of company rules will not be tolerated. Your behaviour in the workplace must improve. Failure to comply with the recommendations made above will result in your termination from the company."

14. I note in particular that the warning letter impliedly states that Ms Jackson is a line manager of Mr Askew. Mr Askew did move to challenge this warning, but only after his part in the disciplinary investigation which led to his dismissal had concluded.

The Dismissal Process

15. Unfortunately, matters were in some way to repeat themselves less than a month later. On 23 August, Ms Jackson again complained to Mr Campbell that Mr Askew had not

started work on time and when asked to start work abused her on two occasions. While Mr Campbell was discussing this matter and others with Ms Jackson, Mr Askew came into the office. Mr Campbell asked Mr Askew whether he was late that morning and Mr Askew became very upset. He said words to the effect of “*that bitch ... I’ll smack her head in*” to Ms Jackson and Mr Campbell, at the same time as turning and leaving to go to the smoko room. Mr Campbell was concerned about Mr Askew’s mood and Ms Jackson’s safety and followed him to the smoko room, trying to calm him down. After having done so, he told Mr Askew that this was a matter that would have to be taken further.

16. Later in the day, Mr Campbell advised Mr Askew that these matters would be the subject of a disciplinary meeting and that there would be meeting later in the day for that purpose. Mr Askew was also advised of his right to have a representative.
17. For reasons that are not clear, Mr Askew attended the meeting with his supervisor, Jo Niko, when it is clear he would have preferred his partner to have been present with him. However, Mr Askew did not state this at the time, and he confirmed to Mr Campbell that Ms Niko was there to represent him.
18. Mr Askew was told that this was a meeting about serious allegations, which could result in his dismissal. He acknowledged this and that he was aware of the house rules. The house rules stated that the use of abusive or offensive language which offends another person and the refusal to obey lawful and reasonable instructions were examples of behaviour considered as serious misconduct which would result in instant dismissal.
19. Mr Askew also acknowledged that he had recently been issued with a final warning concerning his behaviour towards Ms Jackson and told that any repeat of such behaviour would result in his dismissal.
20. Mr Askew was given the opportunity to respond to the complaints, which were that he had not started work by 6.11 and when instructed to go to work by Ms Jackson she was sworn at and told that she was just a sales rep and not his boss. Upon repeating the requirement to start work, Ms Jackson claimed that she was again told that she could not tell him what to do. It was then alleged that Mr Askew remained in the

smoko room for another thirty minutes before starting work. That Mr Askew had made threatening statements about 'smashing' Ms Jackson in both her and Mr Campbell's presence was also raised.

21. In response, Mr Askew stated that he clocked into work at 6.01 and that he did not swear at Ms Jackson, although he did say she was a sales rep and not his boss. He commented that while he did not have a problem with Ms Jackson telling him what to do, he did not like the way she approached the matter.
22. Mr Askew also accepted that he had made threatening statements to Ms Jackson and apologised for it. I do not accept that Mr Askew denied making threatening statements on the grounds that this was contrary to the evidence of Mr Campbell and Ms Niko, whose evidence I generally prefer for reasons given elsewhere in this determination. I also do not accept that Mr Askew stated that he did not accept Ms Jackson's authority as this is not consistent with the warning he was given and is inconsistent with the rest of the evidence, including the written notes taken by Mr Campbell at the time.
23. Mr Campbell and Ms Niko then interviewed another witness to the incident between Ms Jackson and Mr Askew. That worker accepted that Ms Jackson's statement was accurate and that her approach to Mr Askew that morning was not an unreasonable one.
24. The next day, Mr Campbell met with Mr Askew and his partner and presented him with his conclusions as set out above. Mr Askew was given an opportunity to comment on Tegel's conclusions, but he had no comment to make. Mr Campbell then told Mr Askew that the matter would be subject to further consideration before a final decision was made.
25. Before the final decision was made, Mr Askew's representative sent a fax disputing the final warning. Tegel determined not to act on this until after it had finally concluded its disciplinary investigation into the latest incident.
26. Mr Campbell, after discussions with human resources, came to the conclusion that he should dismiss Mr Askew. He did so because he believed that Mr Askew had refused to follow a lawful and reasonable instruction to start work and that he had behaved in

an aggressive and argumentative fashion towards Ms Jackson and made a threatening statement to her. Despite Mr Askew's long and loyal service, he felt that he had no option but to dismiss him because he had already been the subject of a final warning less than a month previously over similar matters.

27. On Monday, 30 August Mr Campbell again met Mr Askew and his partner and informed him that Tegel had determined to dismiss him and gave him a letter to that effect. Mr Askew was summarily dismissed on that date.

Disparity of Treatment

28. Evidence was given of two types of behaviour which Mr Askew compared to what he was alleged to have done and that he considered constituted disparity of treatment. First of all, there was a case of an assault on Mr Askew that did not result in the dismissal of Mr Askew's assailant. That matter took place at least three and perhaps as much as five years before Mr Askew's dismissal.
29. Second, a co-worker of Mr Askew had used bad and abusive language and was violent in the sense that he kicked boxes and was aggressive. Ms Jackson and Mr Campbell explained that while this worker was warned for aggressive behaviour, his abuse was not directed at any particular person and Ms Jackson considered his behaviour accordingly far less serious than that of Mr Askew towards her.
30. Another personal grievance, relating to the dismissal, was subsequently filed on Mr Askew's behalf. The matter has been to mediation and despite efforts there and during the investigation process, it has not been able to be resolved.

The Law

31. The law on summary dismissal for serious misconduct and the role of Authority is clearly set out in many decisions of the Employment Court and Court of Appeal. In particular I refer to *Ministry of Maori Development v. Travers-Jones* [2003] 1 ERNZ 174 where the Court held at p.184 that:

“A personal grievance is not an appeal to the Employment Relations Authority from the employer's findings of fact but is an inquiry into the question of whether the employer actually believed, and did so on reasonable grounds following a fair inquiry, that the

employee had been guilty of misconduct so serious that it warranted dismissal. In reaching conclusions, the employer is entitled to draw reasonable inferences from surrounding or circumstantial facts and it is not a valid objection that such inferences may not have been the subject of direct proof. The employer is also entitled, where there was conflicting accounts, to choose between them, either preferring one to another or rejecting one and accepting the other.”

32. Furthermore, as was made clear in *W & H Newspapers Ltd v. Oram* [2000] 2 ERNZ 448, the Authority has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. In this regard it is not for the Authority to substitute its view for that of the employer, even if the dismissal might have seemed harsh.
33. The Court of Appeal set out the law in relation to disparity in *Samu v. Air New Zealand Ltd* [1995] 1 ERNZ 636 and held at 639 that:

“... if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is forever after bound by the mistaken or over-generous treatment of a particular employee on a particular occasion.”

Warning – Procedure

34. I accept that the inquiry into the first incident by Tegel was fair. In particular, I have already concluded that Mr Askew was given the opportunity to have a representative before the disciplinary meeting was held. I do not accept that the fact that Mr Askew had difficulty in dealing with stressful situations and matters requiring immediate thought and response meant that further procedural requirements in relation to representation than those that occurred were required. Mr Askew was in fact asked twice if he wished to have a representative and I have no doubt that were an adjournment required in order for him to obtain representation of his choice, this would have been allowed. It was not, however, and Tegel is not responsible for Mr Askew’s decision at that time, although I accept that he may have benefited from representation at the meeting over the first incident.

Warning – Substance

35. I accept that the issuing of a final warning was a conclusion that a fair and reasonable employer could reach in the particular circumstances that occurred here.

Because the matter involved serious misconduct there was no requirement for previous warnings. Rather, having determined that serious misconduct had occurred, it was in fact open to Tegel to dismiss. That it did not do so was clearly on the basis of it acknowledging Mr Askew's fifteen years' loyal service. In this regard it is clear that if an employee has indirectly threatened another more senior staff member and also refused a lawful and reasonable instruction to commence work, having been caught not working after his start time, then this constitutes actions which could be considered serious misconduct.

Dismissal – Procedure

36. I accept that the process adopted by Tegel was substantially a fair one, although not perfect. It is my finding on the facts that Mr Askew freely chose Ms Niko to be his representative, although this was a strange choice given that she was his supervisor.

37. I do not accept that a roundtable meeting was required to try and reconcile the views of Ms Jackson and Mr Askew. Tegel was quite within its rights to interview the two separately, as well as the other worker, and draw its own conclusions on the matter, which it did. Ideally, however, it might have put the results of the interview with the other worker more clearly to Mr Askew, but this did not affect matters greatly, if at all.

Dismissal – Substance

38. The threat to 'smash' Ms Jackson was one that took place in front of her and Mr Campbell and Mr Campbell and Ms Jackson clearly heard it. Mr Campbell also was concerned enough to try and placate Mr Askew, and had he not been able to do so he was considering calling the Police. From Tegel's perspective, there was clearly sufficient evidence for it to conclude that Mr Askew had committed serious misconduct.

39. While Mr Askew apologised for his threats against Ms Jackson, it was open to Tegel to conclude that the threats might continue and/or that the situation might even worsen, given that Mr Askew had been given a final warning in the clearest terms about what would happen were he to repeat this sort of behaviour towards Ms Jackson.

40. An employer has duties to all its employees to ensure their health and safety and it was therefore open to Tegel to conclude that Mr Askew constituted an ongoing threat to it being able to meet those duties. Dismissal was thus an option available to Tegel, particularly as this behaviour almost mirrored the behaviour of less than a month earlier when Mr Askew had been given his final warning.

41. The two claimed examples of disparate treatment do not meet the required threshold, I find. The assault took place too long ago to be relevant to this case, while the other case of abuse was not as serious, particularly as the abuse was not aimed directly at a person in authority.

42. I therefore conclude that Mr Askew's warning and subsequent dismissal were justified.

Contributory behaviour

43. Even if Mr Askew had succeeded in his claim for personal grievances, I would have concluded that he was not entitled to any remedies whatsoever because of his contributory behaviour. His actions in threatening Ms Jackson, particularly in front of Mr Campbell, showed that at that time he was unable to control his behaviour. He therefore posed a real risk to the safe operation of Tegel's operation at Coq au Vin poultry.

44. While I accept that Mr Askew did not actually intend to carry out his threats, the fact that such behaviour occurs at all can have a severe impact on other employees. Furthermore, this behaviour was not of an isolated nature. For whatever reasons Mr Askew had clearly become resentful of Ms Jackson's role at Tegel and was unable to control his anger at times. This is clearly threatening, blameworthy behaviour which would mean in equity and good conscience he would not be entitled to any remedies. This is particularly so in the context of Mr Askew refusing to work when given an instruction to do so by someone in authority (*Dodd v. D E & L M Spence Ltd* [2002] 2 ERNZ 572 applied).

Costs

45. Costs are reserved.

G J Wood
Member of Employment Relations Authority