Determination Number: AA 301/06
File Number: 5029731

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY OFFICE

BETWEEN	Vicki Brown-Fitikefu
AND	Chief Executive, Department of Corrections
REPRESENTATIVES	Sione Fonua Karen Spackman
MEMBER OF AUTHORITY	Dzintra King
INVESTIGATION MEETING	12 June 2006
SUBMISSIONS	Applicant's on 23 June and 10 July 2006 Respondent's on 30 June 2006
DATE OF DETERMINATION	20 September 2006

DETERMINATION OF THE AUTHORITY

The applicant, Ms Vicky Brown-Fitikefu, claims that she has been unjustifiably dismissed by the respondent, the Chief Executive, Department of Corrections. The respondent admits she was dismissed but denies that the termination was unjustifiable.

Mrs. Brown-Fitikefu was employed as a Community Work Supervisor looking after offenders. She had been employed by the Department for over fifteen years.

Complaints

Mr. Alastair Riach, the Waitemata Area Manager of the Community Probation Service for the Department of Corrections, received a complaint about the applicant in January 2005. The complainant, an ex-offender, claimed that Mrs. Brown-Fitikefu had sworn at offenders while on worksites and that she had threatened to smash him in the side of the head. Later in January Mr. Riach received complaints from Ms Karen Dewson, the Health and Safety Adviser at the Waitakere Animal Welfare Centre where the applicant had been supervising a group of offenders. He also received a complaint from Ms Vicki Whittaker, the Manager of the Centre. The complaints were about Mrs. Brown-Fitikefu swearing on the worksite within the hearing of visitors, including children, and allowing offenders to use chainsaws without regard to the proper safety procedures.

Mr. Riach informed the applicant of the complaints and that Ms Michele Beard, a Service Manager from Kaitaia, would be conducting an investigation into the allegations that Mrs. Brown-Fitikefu had committed acts of serious misconduct. The allegation regarding the chainsaws was withdrawn.

However, during the course of Ms Beard's interviewing Ms Dewson and Ms Whittaker further allegations emerged. These were that she had permitted an offender to work up a ten foot fence without safety equipment and that she had sworn at the offender. Ms Whittaker said that Mrs. Brown-Fitikefu had told the offender that if he were to "fall off that fucking fence [she would] fucking bash [him]." Mrs. Brown-Fitikefu was suspended while an investigation was carried out.

Ms Beard interviewed the offender who had been pulling tree branches over the ten foot fence. Relevant parts of the interview are set out below:

> Mrs. Brown came over to the fence I was on and said in a joking manner to not fall off or she'll punch me, she was only joking, I took it as a joke, I had finished pulling all the branches down by then so I climbed down.
>
> Did the CWS tell anyone to stop doing what they were doing?
>
> No – just for me not to fall off, but she didn't ask me to climb the fence, I just saw the branches stuck so I just climbed up to get them down. When she said not to fall I had finished and climbed down anyway
>
> Have you ever heard any of the CWS's swearing and or threats?
>
> No, not that I know of.
>
> Can you give any specific examples of when you have heard swearing and of threats? The earlier comment when she said not to fall off or she'll punch you, how did you take this?
>
> No- I took her comments when she said not to fall off or she'll punch me as joking – she said it in a joking manner and that is how I took it.
>
> …when Mrs. Brown came over to say not to fall off I had finished and climbed down.

The offender was not expressly asked whether Mrs. Brown had sworn at him when he was up on the fence nor was he expressly asked whether she told him to get down.

No weight seems to have been given to his assertion that he had finished and was climbing down anyway.

He was asked twice about his reaction to her comments and both times he said it had been said in a joking manner. This assertion was not put to the other person (there is no evidence that Ms Dewson heard anything said), Ms Whittaker. At no stage was she asked about the tone in which the comment she said she had heard had been made.

The notes of the meeting at which Ms Beard interviewed Ms Whittaker say she said

> I was there at the time and she [Vicki Brown] said to him [Offender on the fence] 'if you fall off that fucking fence I'll fucking bash you".
>
> How did the offender respond?
>
> 'It's all right Mrs. Brown I'm not going to fall out of the tree'.

Ms Whittaker said there was another incident when Mrs. Brown said "you fucking get your fucking arses over there". Mrs. Whittaker also said that the PD workers were treated "like pieces of trash".

Mrs. Brown said she could not recall saying "fucking fall off there and I will fucking bash you".

Ms Beard prepared a report which tentatively concluded that with the exception of the first complaint (the complainant could not be located) the allegations were upheld. There were a number of meetings with Mrs. Brown-Fitikefu and her PSA representative. After Ms Beard sent her report to Head Office she had no further involvement in the process.

After having heard from Mrs. Brown-Fitikefu and her representative Mr. Riach concluded that she had committed serious misconduct. The acts of serious misconduct were that

- She had sworn at offenders. This was based on the information provided by Ms Whittaker and Mr. Phil Mackie, another Community Work Supervisor, who had confirmed that he had heard Mrs. Brown-Fitikefu swearing in the past.
- She had threatened an offender. Mr. Riach said that although the offender had denied he felt threatened he accepted Ms Whittaker's and Ms Dewson's evidence. (Ms Dewson did not say she had heard this).
- She had not told him to get down from the fence.

The applicant was dismissed on 26 May 2005 as a consequence of three acts of serious misconduct. The respondent says that the three acts had a cumulative effect but that each act on its own would be sufficient to justify dismissal, particularly the threats against the offender and her permitting the offender to work at the top of a ten foot fence.

Test for Justification

In Air NZ v Hudson 30/5/06, Shaw J, AC 30/06, the Court explored the s.103A test for justification. At para 105 she commented that the early common law test required the Court to make an objective assessment of the justification for the dismissal but that the test evolved to give the employer more discretion to dismiss, provided the dismissal was within the range of options that was available to a fair and reasonable employer.

In interpreting s103A Shaw J said that the justification for dismissal had now to be viewed on an objective basis from the point of view of a neutral observer and that the Court must judge all the circumstances objectively. At para 119 she said that s103A:

> … requires the Authority or the Court to consider [the employer's] actions against what a fair and reasonable employer would have done.

The Court or Authority is required to ascertain whether the actions of the employer were those of a fair and reasonable employer and to evaluate the employer's actions on an objective standard. She also said that the concept of good faith must now be part of an inquiry into the justifiability of an employer's actions. At para 129:

> The objects of the Act already referred to may be taken as a guide to the standards which apply to a fair and reasonable employer. In the light of these, s103A can be read as giving the Authority and the Court the opportunity objectively to evaluate the subjective decision of an employer against the standard of a hypothetical fair and reasonable employer in order to ensure that the objectives of good faith behaviour and the need to address any inherent inequalities is achieved in all the circumstances of that case.

The employer could have made the decision to dismiss but whether a fair and reasonable employer would have dismissed was a matter for evaluation against all the relevant circumstances which

> …include not just the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances of both the employee and employer. [para 142]

Was the respondent entitled to conclude that Mrs. Brown-Fitikefu had sworn at the offender?

Mr. Riach was entitled to conclude that Mrs. Brown-Fitikefu had spoken to the offender using the words reported by Ms Whittaker. Ms Whittaker was an independent witness who had nothing to gain from misreporting what she had Mrs. Brown-Fitikefu say. The offender was asked a very general question about whether he had heard any of the CWSs swearing.

Although there were assertions that Ms Dewson had also heard what had been said it is clear that she had not. Ms Dewson had said she could not see Mrs. Brown at the time she became

aware of falling branches and that she did not hear any swearing because she was in the office.

Was the respondent entitled to conclude that Mrs. Brown-Fitikefu had threatened the offender?

No. The offender stated twice that he had taken it as a joke. The tone in which the remark was made is very important and the only evidence about that is the evidence of the offender who was quite adamant that it was said in a jocular manner. The concept of joking relationships has been explored in an anthropological context and also in a work environment. Seemingly offensive jokes or comments can in fact serve to resolve conflict and cement relationships. The offender's response was perfectly polite and not indicative of his having felt frightened or threatened.

Health and Safety

The allegation was that Mrs. Brown had allowed him to work up a ten foot fence without safety equipment. Given that the offender stated that he had climbed up on the fence on his own initiative the allegation can only relate to the allegation that Mrs. Brown did not tell him to get down once she found him on the fence and her failure to get proper equipment to assist him to get down.

Ms Whittaker said in her interview that the offender stayed in the tree and carried on doing what he was doing whereas the offender clearly said he had finished when spoken to by Mrs. Brown and got down. Ms Beard concluded that the offender had said that Mrs. Brown had not told him to get down but that question was never put to him and the record of the interview does not indicate that any such statement was made. I do not think that Ms Beard could have safely concluded that the offender had said that Mrs. Brown had not told him to get down.

The respondent could not have concluded that she allowed him to work up on the fence. To allow is to permit. She did not give permission nor issue an instruction to the offender and expressed her displeasure and concern when she found him on the fence. It would have been sensible to tell him to stay there until she obtained the requisite safety equipment to ensure a safe descent and I note that Mrs. Brown acknowledged this in her interviews with the respondent.

I was told that there had been other health and safety incidents but that those had not resulted in dismissal. The weight given to Mrs. Brown's transgression appears to have been influenced by an allegation that Mr. Karl Bethell had previously spoken to her an incident where an offender had put a nail into his hand when undertaking demolition work at a school. Mrs. Brown said that she had never been involved in demolition work at a sol and that the only school related work she had supervised had been scrub cutting at Waitakere College. The respondent made no further enquiries about this.

The other incidents involved a person with offenders in a van driving through a barrier arm and the barrier arm ending up inside the vehicle; and a person sitting on a fork hoist. It is difficult to see the difference in seriousness between those events (which could also have resulted in serious injury) and the fence incident.

Justifiability

The justifiability of this dismissal is finely balanced. The union organiser obviously recognized this as she indicated that in her view it did not warrant a dismissal but that a final warning would be acceptable.

By the time the issue of the offender on the fence was first brought up it was 9 February 2006. The incident appears to have taken place around 10 December 2005. The allegation was put to Mrs. Brown on 11 February. It is unfortunate that there was a delay between the time of the incident and the respondent's becoming aware of it. Recollection is clearer closer to the time and the delay may explain in part the contradictory accounts given by people.

The employer was entitled to conclude that Mrs. Brown had sworn at the offender in the sense that she had used the word "f" when speaking to him. The employer was also entitled to conclude (and Mrs. Brown did not deny it) that she had said she would inflict some damage upon him if he fell. However, the important issue of the tone and manner in which Mrs. Brown communicated with the offender and the way in which he took her comment were not dealt with adequately.

Had the employer established that Mrs. Brown's words were offensive to the fence climber and that he had felt threatened and frightened by what she had said then her comment would have constituted serious misconduct and rendered her dismissal justifiable as it clear that the use of offensive language can be grounds for dismissal.

However, things must be considered in their context. The evidence was that bad or offensive language was prevalent in the workplace. Sensitivity to what are generally regarded as swear words will vary from person to person and also contextually. The Employment Court discussed the importance of the nature of the workplace and context in Howe v Internet Group Ltd (IHUG) [1999] 1 ERNZ 879.

It is possible to say, for example, "oh, piss off, you silly bastard" in a manner and context where no offence would be intended or taken. It could be said in a jocular tone to a close friend who had made a deliberately outrageous remark, for instance. Said in an angry fashion to a stranger, the intention and the manner of reception would very likely be quite different.

This is not to say that it is a good thing or an acceptable thing for community service workers to use such language when speaking to offenders. There is much merit in the respondent's Code of Conduct and its endeavour to break accustomed patterns of behaviour by ensuring that its employees act as positive role models. The respondent says that the applicant's behaviour has to be viewed in the context of the Code of Conduct. I agree. However, that does not mean that the dismissal was justified in the circumstances of this case. A lesser penalty would have been fairer, especially considering the applicant's long employment history.

Remedies

The applicant seeks $7,560 in lost wages and $15,000 as compensation. At the time of the hearing no details of the applicant's earnings were made available to me. There was evidence that she was paid a month's notice. Mrs. Brown-Fitikefu is entitled to be paid the balance of three wages' wages, with deductions for the month's notice and for any earnings within that period. The parties should endeavour to resolve this. If they are unable to do an application may be made to the Authority for determination of what monies are owed.

Mrs. Brown-Fitikefu gave evidence of the effect of the dismissal. The respondent is to pay $5,000 as compensation.

Contribution

Section 124 Employment Relations Act 2000 requires that when remedies are being considered the extent to which the actions of the employee contributed to the situation must be taken into account and in appropriate circumstances the Authority can reduce the remedies.

There is little doubt that Mrs. Brown-Fitikefu contributed towards the circumstances giving rise to the personal grievance. Had she not used the language she did and had she taken proper steps to ensure that the offender stayed on the fence until his safe descent could be assured the grievance would not have arisen. Using the words she did was foolish and ill considered. I set her contribution to the personal grievance at 50% and the remedies are to be reduced accordingly.

Costs

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

Dzintra King
Member of Employment Relations Authority