

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 154/09
5134303

BETWEEN BRENT HAROLD WEBSTER
 Applicant

AND PORT OTAGO LIMITED
 Respondent

Member of Authority: Paul Montgomery

Representatives: Anja Klinkert and Ina Stewart, Counsel for Applicant
 Peter Churchman, Counsel for Respondent

Investigation Meeting: 4 August 2009 at Dunedin

Submissions received: On the day

Determination: 11 September 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Webster was employed as a trainee cargo handler by the respondent. He was summarily dismissed following a verbal altercation and later, for assaulting his supervisor. The applicant claims his dismissal was unjustified and further his suspension was unfair and unreasonable in all the circumstances.

[2] Mr Webster initially sought reinstatement but in his statement of problem withdrew this aspect of his claim. He seeks loss of remuneration, compensation and costs.

[3] The respondent denies its actions in respect of Mr Webster were unjustified. It says the matter was extremely serious, was investigated thoroughly with the applicant having representation at all relevant stages and it reached its decision to dismiss only following its establishing the facts. Accordingly, it denies to meet the remedies the applicant seeks.

[4] The parties attempted but were unable to resolve their differences in mediation.

Essential facts

[5] At the time of the incident, Mr Webster had been employed by the respondent from 26 June 2004 until he was dismissed on 26 March 2009.

[6] On the morning of Thursday, 20 March, the applicant was rostered to work in a group under the supervision of Mr Waugh. The applicant was on the wharf when Mr Waugh instructed him to board the vessel and assist in container lashing operations. Mr Webster responded by telling his supervisor to *get fucked* and left the area for smoko. The evidence of witnesses indicates the applicant was angry and that the request from Mr Waugh was calm and reasonably put to the applicant. Witnesses told the inquiry the company instigated that the applicant was angry and out of control.

[7] On his way back from smoko, the applicant encountered Mr Waugh who was returning to the vessel after collecting planning sheets from the office. Mr Webster says Mr Waugh raised the earlier incident with him and a brief argument followed. He says Mr Waugh struck him first and the applicant retaliated, punching him in the face. Mr Waugh suffered bruising to his face and a broken nose. He sought first aid promptly and the terminal supervisor was notified of the incident once Mr Waugh had reported to the sick bay.

[8] Once notified, Mr Horner, general manager operations, went to the sick bay where Mr Waugh was receiving first aid. Also present at the sick bay at that time were Mr Graham Pont, terminal manager, Mr Peter Lumb, shift manager, and Mr Ian Quarrel, a member of the Maritime Union Executive (MUNZ). Mr Horner decided to have Mr Waugh taken to accident and emergency at Dunedin Hospital and arranged to meet with him upon his return later that day.

[9] Mr Horner then commenced an investigation process to establish what had occurred and at 11.54am on 20 March, he met with Mr Webster. That interview was also attended by Mr Quarrel as the applicant's support person, Mr Pont and Mr Lumb. At the time the investigation began, Mr Phil Adams, the Union secretary, was unavailable as he was returning from an overseas trip. Notes of this interview and of

the subsequent interviews were taken by Mr Pont and those notes have been made available to the Authority.

[10] The notes of this first interview with the applicant indicate that Mr Webster did not mention the first part of the incident where he had been asked to come aboard the vessel to assist in lashing and his refusal and abuse of Mr Waugh. Mr Horner says the applicant suggested that the genesis of the later altercation was over the fact that he had gone to smoko early.

[11] Mr Horner also notes that at no stage during his investigation did Mr Webster indicate that the incident had occurred because he was tired, because he had been working long shifts or because he was affected by fumes from paint being applied in the immediate area. At that first interview, Mr Webster told Mr Horner that other possible witnesses were a Russell Hennigan, Wayne Wilson, Michael Lysaght and Steve Smith. Mr Horner indicated to the applicant that he would be suspended on full pay until the investigation had closed and it is clear that neither the applicant nor his representative made any objection to the suggestion.

[12] In the course of the afternoon, Mr Horner interviewed the witnesses nominated by Mr Webster. However, it eventuated that neither Mr Hennigan nor Mr Lysaght had seen anything that was of assistance.

[13] Following Mr Waugh's return from Dunedin Hospital, the general manager began an interview with him at 2pm. Mr Quarrel, Mr Pont and Mr Lumb were also present. Mr Waugh gave his version of events regarding the request to have Mr Webster board the vessel and assist in container lashing and the response that he received to that instruction. Mr Waugh told Mr Horner that he and the three lashers who had been working forward on the vessel came ashore for a tea break and that on his return from picking up some planning sheets and moving towards the vessel, Mr Webster had come over to him, abused him again and pushed him. Mr Waugh told the inquiry that he pushed Mr Webster back and then the applicant hit him with a heavy punch to the face causing his nose to break and also severe bruising.

[14] Later that afternoon, Mr Horner interviewed John Pearse with the same representatives present. Mr Pearse said that Mr Waugh had asked the applicant and Richard Templeton to come up onto the vessel to help with the lashing at the forward end. This witness said the applicant lost control at this point and verbally abused

Graham Waugh. The witness said he was not present at the time of the subsequent incident where the applicant struck Mr Waugh.

[15] Later that same day, Mr Richard Templeton and Mr Wayne Wilson were also interviewed. Mr Templeton said Mr Webster's abuse of Graham Waugh was uncalled for while Mr Wilson confirmed he heard Mr Waugh ask the applicant in a reasonable manner, to come aboard the vessel to assist. He also stated to the inquiry that Mr Webster responded to the request by telling Mr Waugh to *get fucked*. Mr Wilson indicated he was not present at the subsequent incident involving the punch to Mr Waugh.

[16] The respondent then ran the CCTV history for the two cameras covering the area where the alleged assault had occurred. However, the view from both cameras was blocked by three containers which were stacked between where the cameras were located and where the incident took place.

[17] By this time, it was after 5 o'clock on the Thursday before Easter and most staff had already left for their break and the matter was not able to be resolved until after Easter. Mr Horner said he wanted to meet the applicant and discuss with him the evidence that the inquiry had received, and to see whether he had anything to add to the explanation he had already provided. At the request of MUNZ, the meeting with Mr Webster was postponed until Mr Phil Adams, the Union president, was available to represent the applicant and Mr Webster continued to be under suspension on full pay.

[18] On the morning of 26 March 2008, Mr Horner and Mr Matt Ballard, the general manager human resources, met with Mr Webster, Mr Adams and the then Union president, Davey Dick. Mr Horner took Mr Webster through the evidence received and outlined the summary of his initial conclusions based on that evidence. Mr Horner asked the applicant if he had any additional information to add or any comments to make.

[19] Mr Horner says that at that point Mr Webster presented his view that the matter was some type of conspiracy to get rid of him and that Mr Waugh had deliberately exaggerated his injuries. He said the applicant continued to blame Mr Waugh for the incident, saying that Mr Waugh had provoked him.

[20] Having listened to what Mr Webster and his representatives had to say on his behalf, the meeting was adjourned and Mr Horner and Mr Ballard left the room and went into another office to discuss the matters in question. They concluded that this matter amounted to serious misconduct justifying dismissal.

[21] Having come to the conclusion that termination of the applicant's employment was the appropriate penalty, Mr Horner said he prepared a letter terminating the applicant's employment. In that letter, Mr Horner said he had concluded that Mr Webster had first refused to carry out a proper work instruction and had used aggressive and inappropriate language in doing so. Further, he said that the scuffle which followed was initiated by the applicant and ended with Mr Webster landing a heavy punch to Mr Waugh's face. The letter concluded by rejecting the applicant's defence of provocation and confirming that his employment was terminated.

[22] The two men returned to the meeting room and Mr Horner gave the letter to Mr Webster.

[23] After reading the letter, the applicant continued to press his view that his dismissal was a conspiracy and that Mr Waugh's nose was not in fact broken. Mr Ballard says he advised the applicant to take advice from his Union as to what formal processes might now be available to him in the event that he wished to challenge the dismissal.

The Union's inquiry

[24] After the respondent had concluded its investigation and had dismissed Mr Webster, the Union undertook an independent investigation, arrived at a conclusion of mutual culpability and recommended a different outcome to that selected by the company.

[25] The difficulty is that its investigation came too late to influence the company's decision. Also, it was clear from the evidence that the company did not concur with the Union's conclusions.

The issues

[26] To resolve this matter, the Authority needs to make findings on the following issues:

- Did the respondent undertake a full and fair inquiry in respect of the incidents between the applicant and Mr Waugh; and
- Was the respondent entitled, on the evidence before it, to conclude the applicant's actions were capable of constituting serious misconduct and justifying summary dismissal; and
- What weight was the respondent obliged to have placed on the Union's investigation and conclusions as to penalties on both men involved; and
- In the event the applicant was unjustifiably disadvantaged by the suspension and unjustifiably dismissed, what remedies are due to him; and
- If remedies are due, to what extent did the applicant contribute to the circumstances giving rise to the disadvantage and dismissal?

The test

[27] The test for justification in terms of disadvantage and dismissal is set out in s.103A of the Employment Relations Act 2000 and its amendments. The section requires the Court or the Authority to consider objectively what the employer did and how the employer acted at the time and, in all the circumstances, was it action that a fair and reasonable employer would take.

The investigation meeting

[28] At the investigation meeting, the Authority made it clear to the parties that its role was not to conduct an inquiry into the incidents giving rise to the grievances, but to investigate how the company behaved in its inquiry and in reaching its conclusions.

[29] The Authority heard evidence from the applicant and from Mr Phil Adams and Mr Quarrel. For the respondent, evidence was received from Mr Ballard, Mr Horner and Mr Pont. Counsel presented their submissions at the close of the respondent's evidence.

[30] A significant aspect of the meeting was that Mr Adams' recollection on several important issues differed significantly from Mr Webster's evidence. Mr Quarrel told the Authority he was *happy with the way Brent was treated* in the

course of his first interview following the incident. Further, this witness confirmed that, in his view, Mr Waugh was seriously injured when Mr Quarrel saw him in the sick bay immediately after the incident.

[31] The Authority expresses its thanks to all witnesses for their openness at the meeting and in their responses to questions from the Authority and from both counsel. I also wish to record my appreciation to counsel for their on point questioning which enabled the meeting to be completed within the day allocated.

Analysis and discussion

[32] As noted above, the Authority's role was not to re-conduct the employer's inquiry but to make findings on the issues set out above.

(a) The company's inquiry

[33] It is clear the company, as soon as was practicable, spoke to both men involved in the incident. It is also clear the company sought out and interviewed those present at the first verbal altercation between the two men.

[34] Further, Mr Webster, in respect of the physical exchange, maintained Mr Waugh struck him first and that the facial injury sustained by Mr Waugh was in a retaliatory, not an aggressive, setting.

[35] The evidence before the Authority was that Mr Webster bore no signs of even superficial injury when questioned by the company on the day of the incident, while those suffered by Mr Waugh were obvious and later medically diagnosed.

[36] Both men involved were Union members and both had Union representation throughout the employer's inquiry process, as is appropriate.

(b) Suspension

[37] The Authority, on the basis of the evidence before it, accepts suspension in all the circumstances at the time was warranted. A serious assault was involved and the respondent and Union sought a fair investigation. At the initial meeting in the inquiry, neither Mr Webster nor Mr Quarrel opposed the suspension in spite of having the opportunity to do so. The suspension provided a cooling off opportunity and also accommodated a short delay until Mr Adams' return from overseas.

[38] Both company and the Union strenuously oppose and openly discourage the use of physical violence in the workplace. The assault was not witnessed, the closed circuit footage was unable to determine any useful information due to the distance factors and the presence of three stacked containers in the area. The respondent was thus unable to provide the applicant's representatives with any useful objective evidence of the assault, nor did it have it itself. The respondent therefore drew what the Authority believes are credible inferences based on Mr Waugh's leaving the office after picking up the documents he required and his reporting to the sick bay in a distressed and injured condition.

[39] The respondent took the time to establish the facts surrounding the first exchange between the two men. It was entitled to come to the view, based on eyewitness accounts, that Mr Webster's reaction to a lawful instruction, delivered to him reasonably, was a blatant rejection of that instruction and of authority.

[40] It was also justified, on the balance of probabilities, to accept the damage received by Mr Waugh at the hand of Mr Webster, who has never suggested that that damage came about other than because of his punch, was sufficiently serious to consider the applicant's action as serious misconduct.

(c) **The Union's investigation**

[41] It is clear to the Authority the Union is thoroughly opposed to physical confrontations on the waterfront, however they may occur. That is accepted. The Union undertook its own investigation and interviewed both members. This was post-dismissal and it recommended suspension without pay for both men.

[42] It is commendable the Union sought to resolve the issue between two of its members. However, the issue before the Authority relates to the employment relationship between Mr Webster and the respondent. Had the Union's inquiry and recommendation as to *in house* penalties come before the respondent's decision to dismiss, the Authority is not convinced it would have altered the company's decision.

[43] In short, the respondent, in such circumstances, is required to conduct a full and fair inquiry into the incident. It did so. When requested to supply CCTV coverage, it asked its contracted security company to make this available. The contractor was unable to provide it in sufficient detail to support either party. The

respondent was thus entitled to draw reasonable inferences regarding what took place between Mr Waugh and Mr Webster.

[44] On the basis of probability, given the significant differences in the degree of the injuries sustained by each man, and the improbability of Mr Waugh, an older and smaller man, would have instigated a physical interaction with a larger, military-trained younger man, the Authority finds the company was justified, in all the circumstances, in dismissing Mr Webster. A fair and reasonable employer would have done so, given the seriousness of the assault involved which was compounded by the earlier refusal to follow a lawful and reasonable instruction from his supervisor. But for the assault, the disciplinary process would undoubtedly have fallen short of dismissal.

The determination

[45] Returning to the issues set out above in this determination, I find:

- The inquiry undertaken by the company was full and fair with the applicant represented at all meetings; and
- The respondent was entitled, on the evidence before it, to conclude the assault constituted serious misconduct under the collective agreement; and
- The obligation in disciplinary processes lies with the employer, not the Union, although the goodwill of the Union is acknowledged; and
- The applicant was not disadvantaged by his suspension, there being no objection to it on the part of either the applicant or his representative and the suspension was on full pay; and
- The applicant was not unjustifiably dismissed from his employment.

[46] Mr Webster does not have a personal grievance and the Authority is unable to assist him further.

Costs

[47] Costs are reserved. Counsel are to confer and attempt to resolve the issue of costs between them. Failing that outcome, Mr Churchman is to lodge a memorandum with the Authority. Ms Klinkert is to provide her memorandum in response 14 days following the service of Mr Churchman's document.

Paul Montgomery
Member of the Employment Relations Authority