

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 160/10
5291564

BETWEEN

MAWIER DOHL
Applicant

AND

BEARE HAVEN
INVESTMENTS LIMITED t/a
PAK'N SAVE LOWER HUTT
Respondent

Member of Authority: G J Wood
Representatives: Mawier Dohl on his own behalf
Joe Richardson for the Respondent
Investigation Meeting: 31 August 2010
Submissions Received: 31 August 2010
Determination: 11 October 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Dohl claims that he was unfairly treated in the last six months or more of his employment, and then unjustifiably dismissed for serious misconduct. The respondent (Pak'N Save) rejects all of Mr Dohl's claims.

[2] The issues for determination are:

- Whether Mr Dohl was allowed to leave work as requested on the date of his accident;
- Whether Mr Dohl left work without authorisation more than once;
- Whether or not Pak'N Save failed to deal with incidents of bullying by other staff members;

- Whether or not Mr Dohl's manager and/or duty manager abused him using bad language;
- Whether Pak'N Save should have accepted Mr Dohl's resignation during the disciplinary process;
- Whether his dismissal was justified and,
- If his dismissal was unjustified, or he had otherwise been unjustifiably disadvantaged, what remedies should be awarded to him?

The Facts

[3] A number of the incidents concerning Mr Dohl occurred more than three months earlier than him raising a personal grievance. However, Pak'N Save did not object to the issues being raised and investigated and therefore there is no bar to the Authority doing so.

[4] Mr Dohl was employed at Pak'N Save Lower Hutt as a produce assistant. He worked there for 2 years and 7 months, until his dismissal toward the end of July 2009.

[5] Mr Dohl complained about a number of staff subjecting him (an immigrant) to racial harassment that was not properly dealt with by Pak'N Save management. On 30 March 2009, Mr Dohl claims that other staff had turned the lights off in the toilet area, leaving him in the dark, and that they had stolen his apron at the same time. Pak'N Save management investigated this incident and, having viewed video footage, found two bakers to be involved. It accepted their explanation, coupled with their apology, that they had turned the lights off as they did not realise anyone else was there, and that they had taken the apron to the laundry by mistake with their own gear.

[6] The store manager told Mr Dohl that it had been a mistake and that the staff were apologetic. While Mr Dohl appeared initially to accept this explanation, the next day he made it clear that he did not believe the bakers, and left work without notification because he was upset about the matter. A few days later, as a follow up, Mr Dohl was again told it was merely an accident.

[7] Apart from Mr Dohl's perception, there is no evidence that the bakers deliberately turned the light off on him and took his apron, and even if that were true, there was no evidence that this was done for reasons of racial harassment. I therefore dismiss Mr Dohl's claims here.

[8] Pak'N Save took Mr Dohl's walking out without notice further as what it claimed to be *abandonment* of his employment. He was issued with a first warning. During the process, Mr Dohl apologised for walking out, as he realised that it was wrong, but he did not consider the warning was fair because he had apologised. At the investigation meeting, Mr Dohl accepted that what he had done was wrong and the matter rests there.

[9] On 27 April, Mr Dohl made another complaint about racial harassment, alleging a staff member on checkout was racist because she did not serve him straightaway when he wanted to do a price inquiry, but instead made him wait while the checkout operator served a customer. I accept that this is standard Pak'N Save practice. It certainly makes good sense to serve customers before staff have price checks done for them. I therefore do not accept Mr Dohl's perception that this was unfair or unreasonable treatment, let alone racial harassment.

[10] On the morning of 3 May, Mr Dohl suffered an accident at work when a chopping board fell on his head when he was trying to get a crate of kiwifruit. The chopping board, for some reason, was balanced on the crate at the time. According to the injury incident form prepared by Mr Dohl at the time, he suffered bruising to his forehead. Although Mr Dohl later claimed that the chopping board had been left there by staff with racist motives who wanted him injured, he also accepts that the board was in plain view and that he could have moved it had he thought to do so before trying to get to the crate of kiwifruit. Given that Mr Dohl did not insist on leaving work to get medical attention, I do not accept that he was unjustifiably denied leave to seek medical attention. I therefore dismiss his complaint over that. I also dismiss his complaint that this was part of some racially motivated plan to injure him, for which no evidence was supplied, especially given that Mr Dohl saw the board and yet he failed to remove it, and as all staff were given instructions not to leave boards lying around in such circumstances any more. Indeed at one point in his evidence to the Authority, Mr Dohl accepted that the chopping board incident was just an accident.

[11] Later Mr Dohl again refused to accept Pak'N Save's explanation that it was an accident, and refused to carry on working because he considered the chopping board incident to be an attempt to kill him, even although as noted above he acknowledged that he had seen the board. Mr Dohl, however, returned to work after the store manager informed him that he was required to do so.

[12] On 5 June, Mr Dohl failed to turn up to work. He could not be contacted to find out why he had not attended. I accept from the time card records that Mr Dohl was, despite his denial, away on 5 June without authority, and that he could not be contacted. When spoken to about his absence, it became clear that Mr Dohl believes he suffered an eye injury at the same time as his head was bruised by the chopping board. He was referred to a doctor for medical treatment.

[13] On 12 June Mr Dohl wanted to go home because his eye was painful and that Panadol did not work. He did not want to use Neurofen as suggested, despite a doctor's nurse stating that it would be safe. Upon being told by his manager that he could leave work in order to see his doctor, he decided not to go home.

[14] On 15 June, Mr Dohl was still concerned about his injury and wanted to see a doctor, which he did. He was then referred to an optometrist. The optometrist gave him some drops, but could find nothing particularly wrong with his eye.

[15] Given that Mr Dohl was still complaining of feeling unwell the next day, Pak'N Save decided to send Mr Dohl to a specialist, at its own cost, which was organised for two days' time, 18 June.

[16] Mr Dohl tried to change that appointment because he claimed he had another appointment with his doctor. He was advised by a director of Pak'N Save to attend, which he did. He did not, however, return to work straight after the appointment, as expected, despite not having a medical certificate.

[17] Despite being spoken to by the store manager and the director, Mr Dohl also claimed he could not work the next day, 19 June. He continued to claim that he could not work because of soreness in his eye. However, when the specialist provided his opinion on 2 July, received by Pak'N Save on 7 July, the specialist indicated that the most likely diagnosis was *recurrent erosion syndrome following initial corneal abrasion*. Lubricants were recommended, and it was expected that his problems would settle down within a few weeks, but that Mr Dohl was still fit to work.

[18] In the meantime, there was an incident between Mr Dohl and a co-worker about who was responsible for shifting a pallet of lemons, in which the produce manager had to intervene. There was no evidence, apart from Mr Dohl's perception, that there was any racial motivation to this incident. Because of the seriousness of this accusation requiring convincing proof, I do not accept the claim of racial harassment on this occasion.

[19] I also note that at one point the store manager tried to explain to Mr Dohl how serious it was to accuse others of racism. I accept that the store manager made a comment to the effect that it would not be right, for instance, for Mr Dohl not to like the store manager because he was *white*. I conclude that Mr Dohl's perception that the store manager was telling him that Mr Dohl was working for the *white man*, was a misinterpretation of what the store manager was telling him.

[20] On 14 July there was a long meeting with Mr Dohl about him again claiming that everyone was deliberately trying to hurt him at work, particularly focused on his eye. It was made clear to Mr Dohl that he had to take his lubricants, which he considered did not work. However, he had not collected the prescription given for all the lubricants it was suggested he use and Pak'N Save had agreed to pay for. During the meeting Mr Dohl made it clear that he did not want an interpreter, and that doctors in New Zealand were not as good as those in his native country. At the end of this meeting, Mr Dohl again left work without authorisation.

[21] Mr Dohl was written to on 20 July requesting a meeting on 24 July to discuss his eye injury and his absence without permission on 14 July. Mr Dohl was told again that he needed to take his medication if his eye was going to get right, and also that Pak'N Save had offered to pay for it.

[22] Despite agreeing to take the medication and to go back to work after raising his concerns over the letter, Mr Dohl returned an hour later to dispute the points again. Mr Dohl then left work without authorisation for the next two days.

[23] On his return, on 27 July, Mr Dohl claimed that he was being picked on and bullied again by the produce manager, and in particular that the produce manager would not accept that his eye was still injured and was trying to force him to work when unfit to do so. Statements from staff written at the time are consistent with Pak'N Save's evidence that Mr Dohl was again raising the issues of his sore eye and

his earlier warning; that the produce manager had had enough; and that the produce manager told him that he simply had to get on with his work. At that point, Mr Dohl abused the produce manager using strong expletives, stating that he would not work there any more. He then said that all the staff were the same; and that they *were dogs coming to this country running from poverty*. I do not accept that there was any swearing by Pak'N Save staff at Mr Dohl, nor that this had occurred before.

[24] Mr Dohl was taken to see Pak'N Save's director. Before meeting the director, Mr Dohl said that he would resign, but the duty manager said that his resignation would not be accepted in the heat of the moment. He repeated this request when he met with the director, who said that he could not accept it because Mr Dohl was so upset. Mr Dohl was then told of a disciplinary meeting to be held the next day to cover recent events.

[25] Despite Mr Dohl stating in evidence that there was no meeting on 28 July and that he was simply handed a letter of dismissal, I accept the director's evidence that there was a meeting that day. At the meeting Mr Dohl declined a representative and was asked to explain what had happened the day before. Mr Dohl did accept that he had had a disagreement with the produce manager, and did not deny that he had called the staff *dogs running from poverty*.

[26] The director also reviewed Pak'N Save's ongoing concerns about Mr Dohl's failure to take treatment for his eye condition, and his several absences without permission. Mr Dohl did not address those issues despite being asked to, but repeated that he wanted to resign. The director stated that he could not accept his resignation in the course of a disciplinary meeting, even although Mr Dohl requested to do so several times.

[27] The director's reasons for not accepting the resignation were twofold. First, he did not feel Mr Dohl was in the right state of mind to resign, and second, in any event, the matter could come back to haunt Pak'N Save in the guise of a constructive dismissal claim.

[28] In assessing Mr Dohl's employment Pak'N Save's director was very concerned about his behaviour, and in particular the incompatibility between him and other staff in the produce department. He noted that Mr Dohl had refused to accept medical opinions that his injury was not serious enough to prevent him from attending

work; that he had left his employment without permission on three occasions after he had already been warned about that; and that he had created severe disruption by using bad language and insulting his fellow staff members.

[29] He therefore decided to dismiss him summarily. The dismissal was for three reasons:

- (a) *Refusing to seek medical treatment.*
- (b) *Leaving your place of employment without permission or notifying your supervisor of your intention to do so.*
- (c) *Causing an incompatible situation between your fellow employees within the produce department by using bad language and calling them dogs.*

[30] The matter has been to mediation, and was then directed back to mediation, which Mr Dohl did not attend, claiming that he had not received formal notice of the mediation meeting. As matters remain unresolved, despite the opportunity given to the parties in the course of the investigation meeting to resolve them, it falls to the Authority to make a determination.

Determination

[31] As can be seen from the facts as found above, I have concluded that there have been no disadvantages to Mr Dohl in his employment, except for the warning. The warning was, however, justified. Indeed, Mr Dohl accepted both at the time and at the investigation meeting that what he had done was wrong.

[32] Concerning the dismissal, Pak’N Save’s director made it clear that whatever the case with the other issues, Mr Dohl would have been dismissed for serious misconduct because of his abusive behaviour towards fellow workers on 27 July, being serious misconduct due to the incompatibility he created with other staff (reason (c) above).

[33] The director accepted in evidence that it was wrong to categorise Mr Dohl’s behaviour as a refusal to seek medical treatment (reason (a)). Pak’N Save remained concerned, however, about his attempts to delay attending the specialist’s appointment and his failure to take the medication prescribed. These are not proper grounds for dismissal, and had they been the sole ground for dismissal, Mr Dohl’s dismissal would have been unjustified.

[34] Mr Dohl's failure to attend work on several occasions or to refuse to carry out his duties without a good reason, such as on health and safety grounds (reason (b)), do constitute grounds for dismissal, I find. Refusing to follow a supervisor's instructions can constitute serious misconduct; and failing to attend work without good reason can constitute misconduct, for which Mr Dohl had already been warned. I accept that a fair and reasonable employer could justify dismissal of a staff member in these circumstances.

[35] I accept that the major reason for the dismissal, however, was the abuse of his manager and fellow staff members on 27 July. Mr Dohl has made much of what he believes were racially motivated actions towards him by other staff. Instead, Mr Dohl's comment that his fellow workers and not just his managers were like *dogs coming to this country running from poverty* was a very abusive statement, with racist overtones. It is an extremely derogatory comment to make about immigrants who come to New Zealand to better themselves, and it also appears to show that Mr Dohl held a very low opinion of his fellow staff members.

[36] As Mr Dohl himself made very clear to Pak'N Save on many occasions, it is part of an employer's duty to protect staff from abuse, particularly abuse with racist overtones. Pak'N Save could not, as a fair and reasonable employer, be expected to put up with this behaviour from Mr Dohl himself.

[37] I therefore determine that it was open to Pak'N Save to summarily dismiss Mr Dohl for this behaviour, whatever provocation he felt he was subjected to. I note that there was no evidence other than Mr Dohl's of this being a response to any abuse by any Pak'N Save staff towards Mr Dohl on this occasion.

[38] Where independent grounds for justifying summary dismissal exist, the failure to prove other grounds relied on for dismissal (such as reason (a)) does not necessarily render a dismissal unjustified: *Zendel Consumer Products Ltd v. Henderson* [1992] 2 ERNZ 377. In this case, I accept Pak'N Save's assessment that Mr Dohl's behaviour was simply so serious on 27 July that dismissal was justified, without any reliance on other matters.

[39] Mr Dohl rightly complains that he was told he could not resign. No employer has the right to stop an employee from resigning; otherwise workers could exist in

conditions akin to slavery. Pak'N Save now accepts that in law it could not have stopped Mr Dohl from resigning.

[40] However, Pak'N Save was right not to simply accept Mr Dohl's resignation in the heat of the moment, as Mr Dohl may well have changed his mind and then, as indicated in Pak'N Save's evidence, a claim for constructive dismissal may have resulted. There was, however, nothing to stop Mr Dohl from resigning simply because Pak'N Save purported to refuse to accept his resignation. If he really wanted to resign, he simply could have done so on the spot. It was his election not to do so and Pak'N Save can not be held responsible for that. Overall, I consider that while it was wrong of Pak'N Save to simply state that it would not accept Mr Dohl's resignation, it was also appropriate for it to indicate to Mr Dohl that it did not want to accept his resignation in the heat of the moment, or while he was not in the best frame of mind. Given that no actual prejudice arose to Mr Dohl as his dismissal was justifiable, and the matter really lay in Mr Dohl's own hands in that he could have resigned anyway, I conclude that there is no personal grievance around these actions of Mr Dohl and Pak'N Save.

[41] In all the circumstances, I conclude that what Pak'N Save did (the dismissal and the reasons therefore) and how it acted (the disciplinary process) were what a fair and reasonable employer would have done in all the circumstances at the time. I therefore dismiss all of Mr Dohl's claims against the respondent, Beare Haven Investments Limited, trading as Pak'N Save Lower Hutt.

Costs

[42] Costs are reserved.

G J Wood
Member of the Employment Relations Authority