

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 128
5298820

BETWEEN

STUART CHAMBERS
Applicant

AND

ERS NEW ZEALAND
LIMITED t/a TRANSPACIFIC
INDUSTRIAL SOLUTIONS
LIMITED
Respondent

Member of Authority: P R Stapp

Representatives: Mark Ryan Counsel for the Applicant
Daniel Erikson Counsel for the Respondent

Investigation Meeting: 6 April 2011 at New Plymouth

Further
information/documents
by: 8 April 2011

Submissions: 6, 16 and 24 May 2011

Determination: 29 July 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stuart Chambers was employed by ERS New Zealand Limited t/a Transpacific Industrial Solutions Limited (TIS) as an industrial services officer (mainly emptying septic tanks for TIS customers). Transpacific Industrial Solutions Limited is involved in industrial cleaning and waste and facilities management services throughout New Zealand. Mr Chambers started his employment with TIS on 19 November 2007.

[2] During his employment, Mr Chambers had a number of concerns about different health and safety issues. On 5 November 2009 Mr Chambers decided to take some photos of hazards in the workplace the next day.

[3] On 6 November 2009 while he was taking his photos at the site, his supervisor, Mr Ross Maindonald, approached him about what he was doing with his camera. They got into a verbal and physical altercation resulting in Mr Chambers and Mr Maindonald falling to the ground grappling for the camera. Mr Maindonald received a cut and scratch on his cheek. Mr Chambers became upset that Mr Maindonald had taken the camera from him and he wanted it back. The branch manager, Mr Andrew Shewen, intervened and directed them to separate places to diffuse the situation. The Police were called and later that day Mr Chambers was bailed on condition that he was not allowed to return to the site. Mr Maindonald was dealt with separately and was subsequently given a warning in regard to his involvement.

[4] The parties met on 9 November 2009 when Mr Shewen started to inquire in to what had happened on 6 November 2009.

[5] Mr Shewen investigated by getting a statement from Mr Maindonald. Also, Mr Shewen wrote up what he witnessed and he understood had occurred. He talked to various other people present at the site who he thought might have seen something happen. A further meeting was took place on Monday 23 November 2009.

[6] On 27 November 2009 Mr Shewen put in writing his findings and had them delivered to Mr Chambers who was able to discuss them at a final meeting which occurred on 11 December 2009.

[7] Mr Chambers was dismissed by Mr Shewen, and the decision was put in writing with reasons on 15 December 2009.

[8] Mr Chambers emphatically denied he had done anything wrong. He claimed his dismissal was unjustified and filed a statement of problem in the Employment Relations Authority.

[9] There has been mediation, but the employment relationship problem remains unsettled. It falls to the Authority to make a decision.

The issues

[10] Mr Chambers has decided not to pursue a claim that the respondent failed to provide him with a safe and healthy place of work (Submission dated 6 May 2011).

[11] The issues in this matter can be summarised as follows:

- (a) Who initiated the altercation that occurred on 6 November 2009?
- (b) Has there been any disparity of treatment in the outcome for disciplinary action between Mr Chambers and Mr Maindonald?
- (c) Would a fair and reasonable employer have dismissed Mr Chambers for the incident on 6 November 2009?
- (d) Is there a right to claim for disadvantage in regard to previous matters, having regard to:
 - The 90 day rule;
 - Any overlapping dismissal claim?
- (e) What actions are being relied upon by Mr Chambers for his claim that TIS breached good faith in his employment?
- (f) Have the above alleged breaches been brought within 12 months of the cause of action?
- (g) Both parties are seeking costs.

The facts

[12] Mr Chambers and Mr Maindonald did have a verbal and physical altercation on 6 November 2009 at work when Mr Chambers was taking photos at the site.

[13] Mr Maindonald believed that Mr Chambers was taking photos of him and says his intervention to stop Mr Maindonald taking photos was in the best interests of the company. There was no explanation for this. Also, I accept that there was no relevant policy relied upon at the time. A policy subsequently provided by the respondent related to entirely different topics, although without a proper explanation from Mr

Chambers of what he wanted to do and why he was taking photos, this probably caused Mr Maindonald at least to be concerned about the interests of the company.

[14] Mr Maindonald was hurt and shaken by the experience of the physical and verbal altercation. He accepted he took Mr Chambers' camera and Mr Chambers physically confronted him to get it back. There has been an allegation by Mr Maindonald that he was punched by Mr Chambers. This remains unresolved, but it is common ground that they both fell on the ground, tussling and grappling for the camera. Mr Chambers' own written statement made it more than likely he accepted at the time he had touched Mr Maindonald.

[15] Mr Maindonald denied that he had said to Mr Chambers that Mr Chambers was fired. Mr Maindonald accepted in cross-examination from Mr Ryan that he had said to Mr Chambers that he was sacked, but Mr Maindonald says he said this in the heat of the moment. Mr Maindonald had forgotten that he had earlier informed the Police (Police statement) and during Court proceedings in regard to assault that he had said to Mr Chambers that Mr Chambers was sacked. It was clearly a heat of the moment comment and a comment that Mr Maindonald had forgotten making, I hold because:

- (a) Mr Maindonald had no authority to dismiss Mr Chambers;
- (b) Mr Maindonald had a statement taken of his version of the event;
- (c) Mr Shewen investigated the matter including Mr Maindonald's involvement and the comment was not an issue then;
- (d) Mr Shewen was responsible for the disciplinary meeting and the decision.

[16] In any event an investigation and disciplinary process occurred after this that meant that other people became involved in the decision making and which Mr Chambers accepted by agreeing to be involved.

[17] Mr Chambers was put on notice of the allegation. He was informed of the seriousness of the matter. He was informed of his right to have a support person attend any meeting to assist him. Mr Chambers tried to arrange for lawyers to assist

him and meetings were delayed by TIS to enable Mr Chambers to have his representatives attend the meetings.

[18] Mr Chambers put his version of the event that occurred on 6 November in writing, and his statement was considered by Mr Shewen. Mr Chambers' statement was primarily relied upon by Mr Shewen to make his findings and reach a decision. I am satisfied Mr Shewen put out of his mind a comment made by the worker who informed him of the 6 November altercation when Mr Shewen was attending a meeting, that *Stuart decked Willy*. I hold this was not a consideration in Mr Shewen's decision. Indeed I am supported in reaching this conclusion by there being no evidence of any scrutiny about what that worker meant and how the worker had reached that conclusion.

[19] Mr Chambers sent a letter to TIS complaining about other people in the workplace in regard to a range of issues. This was an entirely new and separate matter from Mr Chambers at the time. Mr Shewen replied that he would make enquiries. However, the investigation on the altercation intervened.

[20] Mr Shewen found that Mr Chambers admitted being involved in the altercation that involved verbal abuse and that Mr Chambers had physically touched Mr Maindonald when the two of them were grappling for the camera. Mr Shewen dismissed Mr Chambers relying on an action of serious misconduct. Mr Maindonald was also disciplined, but with a verbal warning.

Determination

[21] For completeness there are no personal grievances in regard to Mr Chambers' health and safety concerns and his concerns about other people. First, this is because no proper personal grievance was raised within 90 days as required by s.114 of the Employment Relations Act 2000 that requires an employer to be put on notice of any claim and the remedies to resolve the claim. If anything, there were concerns genuinely raised by Mr Chambers about what he considered were health and safety issues in the workplace. It was a pity that TIS did not formally respond to those matters and send letters in response to Mr Chambers to conclude the deliberations made on the matters.

[22] I accept that Mr Chambers had genuine concerns about health and safety in the workplace at the time.

[23] Secondly, a letter which Mr Chambers sent to TIS with concerns about other people and their behaviour was replied to by Mr Shewen. It was his intention to make inquiries about the matters, but Mr Chambers was dismissed in the meantime.

[24] Indeed the matters relating to the safety and health claims have been withdrawn by the applicant.

[25] Mr Shewen's decision to dismiss Mr Chambers was based primarily on Mr Chambers' own written statement of his version of events in which Mr Chambers referred to touching Mr Maindonald. Mr Shewen was entitled to rely on that, I hold, given the information in it confirmed the altercation, Mr Chambers' involvement in the incident with Mr Maindonald, the verbal abuse that occurred, and that Mr Chambers physically touched Mr Maindonald.

[26] It therefore follows that Mr Shewen's action of not providing Mr Chambers with a written statement from Mr Maindonald was not fatal, although it was not consistent with best practice, I hold. This is balanced with Mr Shewen relying on Mr Chambers' own written statement and orally providing him with the information about what Mr Maindonald had said.

[27] Also, it was not fatal that the sequence of events and Mr Maindonald's involvement, were not determined correctly by Mr Shewen, because he was able to refer and rely on the admissions in Mr Chambers' statement as to Mr Chambers own involvement in the matter. An issue has emerged during the Authority's investigation about who initiated the altercation. I hold that this was not a determinative factor in the dismissal because:

- a. The photo montage produced by Mr Chambers at the Authority's investigation did not prove who initiated the altercation in regard to what happened and the timing.
- b. The submission made that TIS did not interview an employee in regard to what that employee saw at the time has not been of much help because the notes produced support that that person did not witness the incident. A fair and reasonable employer would have concluded that that employee would not have assisted.

- c. Mr Chambers' explanation at the time did not refer to him acting in self defence in that all he wanted to do was reclaim his property.
- d. Mr Chambers referred to his involvement:
 - i. *"...placing my leg out and forcing him to the ground backwards..."*
 - ii. *"I used body size to subdue him and my other hand to push his face to the ground..."*
- e. Mr Shewen became aware of an incident and he had to intervene and direct both people away from the scene.
- f. Mr Chambers was upset and het up about the events.

[28] I find there has been no procedural failure in regard to TIS's approach to this matter. There was an investigation. There was a disciplinary meeting. The findings were provided to Mr Chambers to comment on. Mr Shewen made a decision open to him given the behaviour that he determined had occurred. This was a decision made on an honestly held belief, I hold. Also the timing of the process can not be criticised because Mr Chambers was represented and meetings were planned around Mr Chamber's representative's availability.

[29] As I concluded earlier any comment Mr Maindonald made to Mr Chambers about being sacked was in the heat of the moment. Also, I accept that Mr Maindonald had genuinely forgotten about it by the time he gave his evidence in the Authority. His comments had no immediate affect because Mr Shewen intervened, put in place an investigation and disciplinary process and was the decision maker. Also, I hold that even although the line of questioning in cross examination was to highlight that Mr Maindonald could not be relied upon, he had genuinely forgotten about making the comment. In accepting this I hold that the evidence is not sufficient to establish that Mr Maindonald has not told the truth about who started the altercation, and in any event the employer had enough information at the time to reach an honestly held believe about Mr Chambers' involvement.

[30] I conclude that, in all the circumstances, the decision reached by Mr Shewen was a decision a fair and reasonable employer would have reached. It was open to the

employer to dismiss Mr Chambers for serious misconduct since his actions involved verbal abuse and he physically touched Mr Maindonald in an inappropriate way to recover his camera.

[31] It was accepted that Mr Maindonald's written statement was not provided to Mr Chambers. However, Mr Chambers was aware of the details of the allegations. They were set out in letters from TIS dated 11 and 27 November. Mr Chambers did not have anything to add in response to Mr Maindonald's written statement during the Authority's investigation. The omission would not have had any impact on the end result, I hold.

[32] In regard to the claim that there has been disparity of treatment I hold that Mr Chambers' involvement in the altercation was more significant than Mr Maindonald's. Mr Maindonald had an explanation in attempting to prevent Mr Chambers from taking photos that he considered was justified in the best interests of the company at the time, and if anything I hold his action was an example of poor judgment, and that Mr Maindonald was treated within a the range of options open to the employer. Although Mr Maindonald has been accused by Mr Chambers of instigating the altercation it probably would not have happened if Mr Chambers had taken a different approach. Nevertheless Mr Maindonald's reaction to take the camera was not in keeping with best practice and his reaction has left TIS exposed to criticism about his management of the situation. There is an apparent disparity. However, it was a matter for the employer to decide what the degree of Mr Chambers' and Mr Maindonald's involvement was, and to determine appropriate remedies, which it did do. If this was to create any disparity of treatment and a personal grievance I would have held that Mr Chambers' involvement would be 100% blameworthy for reacting in the way he did, and his entitlement to remedies reduced by that amount. This is because Mr Chambers reacted by placing his leg out and forcing Mr Maindonald to the ground backward and Mr Chambers used body size to subdue Mr Maindonald and used his other hand to push Mr Maindonald's face to the ground.

[33] There has been no breach of good faith established by Mr Chambers in regard to his claim.

[34] Mr Chamber's claims are dismissed.

[35] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority