

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 18
5622733

BETWEEN CLIVE SMITH
 Applicant

AND DIRECTOR GENERAL FOR
 MINISTRY OF PRIMARY
 INDUSTRIES
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Andrew McKenzie, Counsel for Applicant
 Maria Berryman, Counsel for Respondent

Investigation Meeting: 7 December 2016 at Palmerston North

Submissions Received: 15 and 23 December 2016 from Applicant
 22 December 2016 from Respondent

Determination: 29 March 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Clive Smith was employed by the Chief Executive of the Ministry of Primary Industries (MPI) as a Compliance Officer based in MPI's New Plymouth office. He claims his dismissal on 15 April 2016 for serious misconduct was unjustifiable. Mr Smith seeks reinstatement, lost wages, compensation and costs.

[2] MPI says Mr Smith was justifiably dismissed following a comprehensive investigation and subsequent disciplinary process. The investigation had concluded Mr Smith had initiated an altercation with another MPI employee in which he engaged in physical violence. MPI says Mr Smith had confirmed he accepted the

findings of the investigation. It also says it considered matters Mr Smith had raised as mitigating factors but found they did not excuse or explain his actions.

Background

[3] Mr Smith attended a farewell function at MPI in Petone on 10 September 2015. After that function ended a small number of MPI staff visited a Wellington bar to continue socialising. In the course of the night an incident occurred between Mr Smith and one of his colleagues, in which the colleague was hit several times and sustained face and head injuries.

[4] I shall refer to that colleague, who did not attend the Authority's investigation, as Mr X. Another MPI employee who had intervened in an attempt to stop the altercation was also punched, although it appears he was an accidental victim.

[5] This altercation was followed shortly thereafter by a second incident, in which Mr X knocked Mr Smith to the floor by a single punch to the head.

[6] MPI became aware of the incident the following day and undertook a preliminary inquiry into the events. MPI's Regional Compliance Manager (RCM) undertook that process in the course of which he interviewed Mr Smith, Mr X, and other MPI witnesses to the incident. During the interview with Mr Smith and his support person, the RCM, who did not give evidence at the Authority's investigation meeting, recorded in his notes that Mr Smith raised a number of personal health and family issues and stated more than once that he had "fucked up". The RCM documented Mr Smith's distressed demeanour in his notes of the meeting.

[7] He recorded that he told Mr Smith there were two matters for him to consider: one related to possible disciplinary issues arising from the altercation. The RCM noted he advised Mr Smith he was putting those issues to one side as he had not at that stage interviewed Mr X. The other matter was Mr Smith's health and wellbeing. The RCM's notes record that he told Mr Smith there were two ways for him to consider this: Mr Smith could go on sick leave, or he could be suspended from all work with MPI in order for him to focus on addressing his health issues. He noted that, after a short break, Mr Smith advised he wished to take sick leave. He did not return to work for the remainder of his employment with MPI.

[8] As a result of the preliminary inquiry MPI, through its Director Compliance (DC), decided to conduct a formal investigation into the events of the night of 10 September and early hours of 11 September. In a letter dated 14 October 2015 the DC informed Mr Smith that MPI's North Region Investigation Manager (NRIM) had been tasked with conducting the investigation, the terms of reference for which were enclosed with the letter.

[9] The terms of reference required the NRIM to undertake "a thorough, unbiased, and procedurally fair investigation into the facts, including identifying:

- a. What took place in the altercation as described by the individuals present, taking into account the information provided and the nature of the injuries sustained.
- b. Whether what has occurred constitutes serious misconduct in breach of the employees' obligations under their employment agreements and MPI's code of conduct.
- c. Any other directly relevant factors, including making findings as to whether any other misconduct or serious misconduct has occurred as supported by the evidence, and whether any mitigating factors apply."

[10] The NRIM was then to provide a "thorough written investigation report to (the DC), outlining:

- a. the investigation process;
- b. the findings from the investigation (including whether (Mr Smith), or (Mr X) have engaged in misconduct or serious misconduct); and
- c. any recommendations for resolving the situation (excluding recommendations of disciplinary action or outcomes)."

[11] The NRIM commenced the investigation in October 2016 and completed his investigation report on 2 March 2016. He concluded Mr Smith had engaged in physical violence and that the use of force was excessive causing the injuries Mr X sustained. He considered it more likely than not that Mr Smith hit Mr X without provocation and the assault was serious and deliberate.

[12] He also concluded Mr X's action of subsequently punching Mr Smith was not excusable, but he did not instigate the initial altercation and it was not outside the bounds of possibility that Mr X felt he needed to defend himself, considering what had just occurred. The NRIM found both Mr Smith and Mr X's actions amounted to physical violence against each other and constituted actions that were detrimental to

the safety and physical health of MPI staff. He concluded both had breached MPI's Code of Conduct.

[13] He had considered potential mitigating factors but they did not alter his conclusion, although he noted they might be taken into account by the decision maker. The NRM considered the actions of both Mr Smith and Mr X amounted to serious misconduct, but the protagonist was Mr Smith.

[14] The NRM gave his report in draft form to Mr Smith and Mr X and finalised it after considering the comments that each made. The final report went to the decision maker, Stephanie Rowe, MPI's Director Compliance. She informed Mr Smith, by letter dated 14 March 2016, that after careful consideration of the investigation report she was satisfied its findings were appropriate. She notified Mr Smith of her preliminary decision to dismiss him and requested a meeting to hear his views in relation to that.

[15] Ms Rowe and Mr Smith met on 6 April 2016 for more than six hours. During the course of the meeting Mr Smith had the opportunity, together with his union representatives¹ and lawyer, to make comprehensive submissions on Ms Rowe's preliminary decision and to raise factors he thought she may not have sufficiently taken into account. Ms Rowe confirmed her preliminary decision in writing on 15 April 2016.

The Authority's investigation

[16] Mr Smith and two NUPE officials, Les Bryce, Senior Organiser, and Janice Gemmill, Union Secretary, gave evidence for Mr Smith. For MPI, Ms Rowe gave evidence as did the District Compliance Manager for the Wellington/Taranaki district, the Chief Compliance Officer, and the Director Human Resources. I have not referred in this determination to all the evidence and submissions received. I have, however, set out the material facts and made findings on issues relevant to the determination of Mr Smith's claims in accordance with s.174E of the Employment Relations Act 2000 (the Act).

[17] This determination has been issued six days outside the statutory period of three months after receiving the last communication from one of the parties. When I

¹ Mr Smith was a member of the National Union of Public Employees (NUPE) which assisted him throughout the investigation and disciplinary process

advised the Chief of the Authority this would occur he decided, as he is permitted by s174D(3) of the Act to do, that exceptional circumstances existed for providing the written determination of the Authority's findings later than the latest date specified in s174D(2) of the Act.

Issues

[18] The major issue for determination is whether MPI's dismissal of Mr Smith for serious misconduct was justifiable.

[19] If it was not justifiable, further issues will arise over the appropriate remedies to be awarded and whether it is practicable and reasonable to reinstate Mr Smith to his former position.

The legal test

[20] The test for assessing whether a dismissal is justifiable is set out at s 103A of the Act. It requires an objective assessment of whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[21] The Act requires that a dismissal must not be determined to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[22] Where a dismissal is found to be unjustifiable and reinstatement is sought, inquiry must be made into whether it is practicable and reasonable for reinstatement to occur.²

Submissions and discussion

[23] Mr Smith acknowledged there was much in the disciplinary investigation that was fair and properly undertaken by MPI. He also said, through counsel, he did not seriously challenge the investigation report. However, he submitted his dismissal was unjustifiable by reason of disparity, both of process and outcome. He compared the treatment he received with that of Mr X whose conduct was also found to constitute serious misconduct. He also highlighted two conclusions drawn by the decision maker and referred to in the letter of dismissal which, in his submission, were

² Section 125 of the Act

unsound. He believed Ms Rowe was not entitled to rely on those conclusions to dismiss him.

[24] Mr Smith said he was effectively suspended on full pay throughout the period of the investigation and disciplinary process. In contrast, Mr X returned to work following a period of sick leave to recuperate from his injuries and he remained at work throughout the investigation. He said it appeared no consideration had been given to suspending Mr X. Counsel for Mr Smith submitted MPI must have made a decision before it embarked on a full investigation that Mr Smith's conduct was more serious than that of Mr X. One result was that Mr Smith was denied the opportunity Mr X enjoyed of redeeming or proving himself during the investigation.

[25] In counsel for MPI's submission, that difference in treatment between Mr Smith and Mr X was justified by their different circumstances. Counsel noted the Terms of Reference for the investigation, and early emails, made it clear the parties knew the actions of the two men had differed. She submitted it was reasonable and appropriate that their treatment was different. Counsel also noted that at the preliminary inquiry stage Mr Smith had the opportunity to provide his views on MPI's suggestion of special paid leave and did so.

[26] I agree with MPI that the different circumstances of Mr Smith and Mr X during the preliminary inquiry and in the early stages of the investigation were salient to the decision to keep the former on paid leave while permitting the latter to return to work after a short period of sick leave. In Mr Smith's interview of 17 September 2015 with the RCM he made certain disclosures about his health issues, including his state of mind and recent diagnosis of depression. This led the RCM to put potential disciplinary matters aside temporarily in order that Mr Smith could address those matters. In my view that was a reasonable decision in the circumstances and it was both prudent and compassionate to offer Mr Smith paid sick leave, which he accepted.

[27] Whether the same situation applied five weeks later when Mr Smith had received what he referred to as "impending medical clearance" to return to work is more problematic. Counsel for MPI submitted the employer was justified in deciding it was appropriate for Mr Smith to remain on special paid leave for the duration of the investigation. She said he had been involved in the initial decision and had had the opportunity to be engaged with the later decision, but had not responded. She noted the RCM had written to Mr Smith's representative seeking his view on special paid

leave but had not received a response. Counsel also noted the medical certificate Mr Smith submitted to his employer made no mention of his depression and how it might manifest itself in relation to ongoing work and the responsibilities of his role.

[28] It is correct that there was no written response to the RCM's email of 22 October 2015 regarding the continuation of paid leave. There was, however, a telephone conversation between Mr Bryce, who was representing Mr Smith, and the RCM following the RCM's second email on 2 November. Mr Bryce's evidence, which I accept, is that he had advised the RCM of Mr Smith's preference "for garden leave over suspension".

[29] The RCM's 22 October email to Mr Bryce had made it clear MPI did not consider it appropriate for Mr Smith to return to work prior to the conclusion of the investigation. The only matter on which Mr Smith's view was sought was whether he would accept a special paid leave arrangement for the duration of the investigation. It was made clear the alternative was suspension on pay.

[30] I do not accept MPI's submission that Mr Smith had the opportunity to be engaged in its decision that he remain away from work throughout the investigation. The only decision Mr Smith had the opportunity to be engaged in in October/November 2015 was how his continued paid leave was to be labelled. He had no opportunity for input into the decision MPI had made that he would not be permitted to return to work until its investigation was complete. I find that was unfair to Mr Smith.

[31] MPI may have had a valid concern over the paucity of information contained in the medical certificate declaring Mr Smith's fitness to return to work. However, it did not advise Mr Smith it required more detailed information on how a return to work would impact on his depression or ask him to provide that information. Nor did anything in the RCM's email of 22 October to Mr Smith's representative suggest the lack of such information was of concern to it or could affect the decision it had made.

[32] I have considered, but do not accept, counsel for Mr Smith's submission that MPI's failure to give Mr Smith the opportunity for input into the decision that he should not return to the workplace while the investigation continued indicated predetermination by MPI of the outcome of its investigation. I prefer MPI's submission that it had been clear from an early stage that the actions of Mr Smith and

Mr X were different. Mr Smith's conduct the day after the incident suggests he recognised he had been the protagonist in the altercation. His apology to Mr X and his expression of remorse to him, which Mr Smith did not deny making, indicate an awareness that he had been in the wrong.

[33] Other factors indicating this are Mr Smith's acknowledgement to the CCO on 11 September that he had been an idiot, questioning himself as to what he had done, and why he was behaving in the way he was, as well as his concern whether he would lose his job over his actions. Those matters were documented in notes, referred to as Job Sheets, made close to the time the comments were made.

[34] I am not persuaded by Mr Smith's evidence that his apology to Mr X had not been "an admission that it was all my fault" but was taking responsibility for his role in the incident. That interpretation of his own actions some time after the event suggests a belated attempt by Mr Smith to minimise his part in the altercation and suggest that fault should be equally apportioned between himself and Mr X. That was further underlined by the belief he expressed in oral evidence that he had been involved in a fight, not an assault.

[35] Both Mr Smith and Mr X were the subject of investigation by their employer for actions that potentially constituted serious misconduct. However, I find there were differences in their respective circumstances, apparent from an early stage, that justified the difference in treatment each received in relation to their remaining in, or being kept from, the workplace in the initial stages of the employer's investigation.

[36] Those differences may also have been sufficient to justify MPI's decision to keep Mr Smith away from the workplace for the duration of the investigation but Mr Smith was entitled to have his views on that matter considered before the decision was made. I find MPI disadvantaged Mr Smith by not giving him the opportunity to be heard once he had obtained medical clearance from his doctor. However, it does not follow that this failure indicated predetermination by MPI of the outcome of its investigation and, as I have noted above, I find it did not.

[37] In counsel for Mr Smith's submission MPI failed, in assessing Mr Smith's conduct as serious, to give sufficient or any weight to the factors such as the incident having taken place away from work, after a work function but unconnected to it, and in circumstances where there was no reflection on, or connection with, the employer.

MPI had also, in counsel's view, not given sufficient consideration to the fact that Mr Smith had contacted Mr X the day following the incident and apologised to him, or to the negligible impact there appeared to be on ongoing employment relationships.

[38] That submission does not reconcile with Mr Smith's stated acceptance of the findings of the investigation report. In that report the NRIIM carefully considered Mr Smith's actions in relation to his employment obligations, the MPI Code of Conduct, and MPI's "Organisational Guidelines: Discipline – Dealing with Misconduct". The latter document supports the Code of Conduct and comprises a set of guidelines and processes that deal with matters such as misconduct that could impact on the future employment relationship between the employer and an employee.

[39] The NRIIM's finding that Mr Smith had been the initiator in an altercation with Mr X against whom he had engaged in physical violence and excessive force led to his assessment that such actions were serious misconduct. That was in accordance with Appendix Two of the Organisational Guidelines which lists various examples of "offences deemed to be serious misconduct...", including "Physical violence.....to another MPI employee at any time."

[40] I find the investigator's conclusion of serious misconduct was reasoned and reasonable. He acknowledged matters that were mitigating factors in Mr Smith's circumstances, which he said might explain Mr Smith's motivation leading up to the physical violence, but which he did not consider excused his actions. His task, as specified in the terms of reference for the investigation, was to determine whether serious misconduct had occurred. It was not part of his task to make recommendations as to disciplinary action or outcomes and he did not do so.

[41] Those matters were for the decision maker to determine. Ms Rowe was entitled to rely on the findings of the investigation report and I am satisfied from the evidence that she considered the surrounding circumstances of the incident, and mitigating factors before reaching her preliminary decision that dismissal was the appropriate outcome.

[42] It was clear Ms Rowe did not make the preliminary decision, or the decision to confirm it, lightly. Her meeting with Mr Smith and his representatives to discuss her preliminary decision and to hear his views and representations on that, was lengthy and comprehensive as is borne out by the notes she took contemporaneously.

[43] Mr Smith had raised a number of issues in the meeting including his concerns about his workload and the stresses of his work, his depression, the effect of alcohol and its interaction with his prescribed medication, the MPI "culture", and the treatment of other cases involving assault within the organisation, all of which I accept from the evidence before me that Ms Rowe considered carefully. She took advice from MPI's Director HR before confirming her decision, several days after meeting with Mr Smith, that dismissal was the appropriate remedy.

[44] Counsel for Mr Smith submitted Ms Rowe acted unfairly in concluding Mr X was acting in self-defence and Mr Smith was not. He said this was not in accordance with the findings of the investigation that both incidents were "serious matters in their own right" and conflicted with the statement Ms Rowe made in her 14 March 2015 letter that she was satisfied the report's findings were appropriate.

[45] I do not find merit in that submission. The NRIM had considered Mr Smith's claim that he had punched Mr X in self-defence and had not upheld that claim in his investigation report. He found Mr Smith to have been the protagonist and considered it more likely than not that Mr Smith hit Mr X without provocation.

[46] The investigator had also carefully considered Mr X's claim that he had subsequently punched Mr Smith once in self-defence when under the impression Mr Smith was about to attack him again. He considered Mr X's conduct was not excusable but, noting that Mr X did not instigate the initial altercation, he could not discount the possibility that Mr X felt he needed to defend himself in the circumstances.

[47] Ms Rowe made it clear to Mr Smith she accepted the investigator's report. She noted in her written evidence she was "not able to discount the plausible explanation that (Mr X) genuinely considered he was going to be attacked again and acted out of self-defence". I do not find any inconsistency with the findings of the investigation report or with Ms Rowe's statement that she was satisfied the report's findings were appropriate.

[48] Counsel for Mr Smith referred in submissions to a disparity in the outcomes for Mr Smith and Mr X, with Mr Smith being summarily dismissed at the conclusion of the disciplinary investigation while Mr X was issued with a written warning which would expire after six months.

[49] While the outcomes were different I do not find MPI to have acted unreasonably in determining a different, and lesser, penalty to be appropriate for Mr X than that applied to Mr Smith. While both men were found to have been guilty of serious misconduct, the different outcome for each reflected the different circumstances of their actions on the night of the incident. It should not be a matter of surprise that the perpetrator of a serious assault on a colleague received a harsher disciplinary penalty than the victim of that assault who was found to have hit the perpetrator once in circumstances in which it was possible he feared receiving a further beating and acted in self-defence to forestall it.

[50] I am satisfied MPI reached a decision that was open to it to in all the circumstances. Mr Smith had the opportunity for support persons and representatives to assist him throughout the investigation process and, apart from the one matter I have earlier identified, he had ample opportunity to have his views taken into account throughout the investigation and disciplinary process. This included having the opportunity to comment on the draft investigation report before it was finalised and to engage with the decision maker extensively before she confirmed her preliminary decision that dismissal was the appropriate outcome.

[51] As I have noted earlier I find Mr Smith was treated unfairly by not having the opportunity to provide his views on his employer's decision, conveyed to him on 22 October 2015, that it was not appropriate for him to attend the workplace before the conclusion of its investigation. The choice he was given was between remaining on special paid leave or being suspended. Whichever he chose had the same effect of denying him access to the workplace. It was a Hobson's choice situation as he had no alternative other than to remain away from work.

[52] The Employment Court has confirmed that "*(i)t is well-established that a suspension of an employee from employment is a disadvantageous action as far as the employee is concerned*"³. While MPI labelled Mr Smith's absence as special paid leave, I find in the circumstances it was effectively a suspension.

[53] Mr Smith did not raise a personal grievance relating to this matter and his counsel referred to it as evidence to support his wider claim of disparity. Nonetheless,

³ *Sefo v Sealord Shellfish Ltd* [2008] 178 at 188 (paragraph 40)

it is open to me to find a personal grievance to be of a different type from that alleged⁴ and I do so in this instance.

Remedies and contribution

[54] Having found Mr Smith has a personal grievance I am obliged to consider what remedies, if any, are appropriate and whether Mr Smith contributed to the situation that gave rise to the grievance.⁵

[55] I accept it would have been distressing to Mr Smith not to have the opportunity to put forward his views on returning to work once he had medical clearance to do so. I assess appropriate compensation for that distress at \$2,000.

[56] The decision not to allow Mr Smith to have input into its decision that he was not to return to work until the investigation was concluded was made by MPI. Mr Smith did not play any part in that decision and therefore did not contribute towards the situation that gave rise to his personal grievance.

Determination

[57] For the reasons given above I find Mr Smith does not have a personal grievance for unjustifiable dismissal.

[58] I find MPI's action in effectively suspending Mr Smith without giving him the opportunity to comment on its decision to do so was unjustifiable and disadvantaged him in his employment. Mr Smith has a personal grievance in relation to that.

[59] I consider an award of \$2,000 under s 123(1)(c)(i) of the Act to be appropriate and I order MPI to pay that sum to Mr Smith.

Costs

[60] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁴ Section 122 of the Act

⁵ Section 124 of the Act