

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2019] NZERA 471
3063716

BETWEEN

KUKYI TUPUANGA
Applicant

AND

AUCKLAND MEAT
PROCESSORS LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Sam Audeau for Applicant
Madeleine Lister for Respondent
Investigation Meeting: 9 and 10 August 2019
Oral Determination: 10 August 2019
Record of Oral Determination: 12 August 2019

DETERMINATION OF THE AUTHORITY

- A. Mr Tupuanga was not unjustifiably dismissed.**
- B. Auckland Meat Processors Limited did not breach its statutory duty of good faith.**
- C. Costs are reserved.**

Employment relationship problem

[1] Mr Tupuanga worked for Auckland Meat Processors Limited for over 31 years in a variety of positions, most latterly as a Mutton Slaughterman/Butcher. The terms of Mr Tupuanga's employment are set out in a collective agreement between

Auckland Meat Processors and the NZ Meat Workers Union Inc (NZMWU) dated 24 September 2018 to 30 April 2020. Mr Tupuanga was a union delegate and given his tenure was considered to be a senior employee.

[2] Auckland Meat Processors is certified to provide meat from animals that have been slaughtered in accordance with Sharia law (Halal). As a certified plant Auckland Meat Processors is subject to regular audits by the Approved Halal Organisation. Included as part of this audit is a check that the Halal slaughtermen are able to perform their religious obligations which include prayers at specified times throughout each day.

[3] Mr Tupuanga worked in the mutton team at the “sticking pen” where he would rotate between various tasks. He worked alongside a number of Halal slaughtermen.

[4] Mr Tupuanga was dismissed following allegations that he had made derogatory comments and conducted himself in a way that belittled the Islamic faith. He challenges the dismissal which he says was unjustified and claims Auckland Meat Processors breached its statutory duty of good faith.

[5] Auckland Meat Processors denies the claims.

Issues

[6] In order to resolve Mr Tupuanga’s application I must determine the following issues:

- a) Whether Mr Tupuanga was unjustifiably dismissed and if so what if any remedies should be awarded?
- b) Did Auckland Meat Processors breach its statutory duty of good faith and if so what if any penalty should be imposed?

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. It has not recorded all evidence and submissions received.

Racial harassment

[8] Mr Tupuanga was dismissed after Auckland Meat Processors concluded he had acted in a way that amounted to racial harassment. Racial harassment occurs when language is used that directly or indirectly expresses hostility against, or brings into contempt or ridicule a person of the ground of race and the person finds this offensive or hurtful and has, either by its nature or through repetition, a detrimental effect on the employee's employment, job performance or job satisfaction.¹

Events leading to the dismissal

[9] Not long after 1.30 pm on 13 May Halal slaughterman Mohammed Sarik stopped the chain in the sticking pen and rang the bell for the team leaders. He had observed Mr Tupuanga abusing another of his team (Mr Sheik Imran) and pretending to kneel and pray in the Islamic way.

[10] Mr Sarik was offended by what he saw and left the slaughter floor to attend a supervisors' office and then the HR office. When he arrived at the HR office he advised Ms Jackie Dennis, Health and Safety and HR Advisor, about his observations. Ms Dennis told me that when he attended her office Mr Sarik was visibly shaking and was distressed.

[11] Team Leader, Ms Kalone Lufe proceeded to the sticking pen where Mr Tupuanga was stunning. She asked Mr Tupuanga about the incident. His only response at that time was to shrug his shoulders.

[12] To deescalate the situation Mr Tupuanga was taken off the line to his supervisors' office. Ms Dennis asked that Mr Tupuanga be taken to a meeting room so that he could be interviewed. Ms Dennis was advised that the Halal men were threatening to stop the chain and walk off site if the issue was not resolved. Ms Dennis suggested Mr Tupuanga apologise to the Halal men. He was also offered a move to the beef floor but he wanted to think about that option overnight. While this meeting was taking place another similar incident occurred involving another team member, Mr Hoori Rihari.

¹ See the definition set out in the Employment Relations Act 2000, s 109.

[13] Following the second incident, Ms Dennis and three other managers met with Mr Sarik who advised them Mr Tupuanga had been making racist remarks for a while including:

- The New Zealand Government is letting too many Muslim refugees in and [they're] taking all our jobs
- Why are all the Muslims in Christchurch sitting on their arse, they should come to Auckland and work;
- Telling the Halal team, they were “shitty” because they were not eating (during Ramadan).

[14] The following day (14 May) Mr Shane Baty, Health and Safety and HR Manager, met with Mr Imran to get his view of the incident. During that meeting Mr Imran informed Mr Baty that at the time of the incident Mr Tupuanga had said:

- That his daughter had more muscles than Imran and Imran was weak;
- He was a “fucking Muslim”;
- “you are taking our jobs”;
- “I will get rid of you”; and
- “you’re always fucking praying and taking too long”.

[15] Mr Imran then confirmed that Mr Tupuanga had bowed down on his knees twice, mocking how the Halal slaughtermen prayed.

[16] Mr Baty, Ms Dennis and Beef Slaughter Floor Manager, Mr John Lee, met again with Mr Tupuanga to hear his side of events. During that meeting Mr Tupuanga advised that on or about 6 May 2019 Mr Imran, who Mr Tupuanga referred to as the “new little man” had told him he would take him outside and give him a hiding and that his behaviour toward Mr Imran the previous day was in retaliation to that threat. He said that when he bent over he was making fun of Mr Imran’s size not his religion.

[17] After considering Mr Tupuanga’s response Mr Baty was of the view that a formal investigation into the 13 May incident and the wider allegations of racial harassment was warranted.

Investigation process

[18] On 14 May Mr Baty wrote to Mr Tupuanga inviting him to attend an investigation meeting regarding complaints of harassment and discrimination of the

Halal Slaughtermen. Mr Tupuanga was advised that the company may conclude his actions constituted serious misconduct and a possible outcome was dismissal.

[19] That same day Mr Baty reviewed the CCTV footage of the mutton floor at the time of the incident which showed Mr Tupuanga kneeling down twice, facing the office and lowering his head as if in prayer. Mr Baty also undertook interviews of Mr Tupuanga's team leaders and other colleagues.

[20] During the investigation meeting on 15 May Mr Tupuanga reiterated his previous response that when he had first started working the previous week Mr Imran had threatened to give him a hiding. He explained that he did not make fun of anyone's religion, that he got down on his knees to look at sheep on the race and that he had spoken to the "new little man" that morning to introduce himself and apologise.

[21] The meeting was then adjourned to allow Mr Baty to conduct further inquiries including Mr Tupuanga's explanation about kneeling down to look for sheep.

[22] Mr Tupuanga's explanation that he had been kneeling down to look at sheep while facing the office was tested and found to lack plausibility. No sheep were visible from the angle Mr Tupuanga had been facing.

[23] The investigation meeting was reconvened on 17 May. At that meeting Mr Tupuanga was advised that the version of events described by the Halal slaughtermen was preferred because:

- a) Mr Tupuanga altered his explanation to include that he was looking for sheep and not just bending down to mock Mr Imran's size and the enactment carried out demonstrated that no sheep were visible from the position taken by Mr Tupuanga;
- b) A number of employees had witnessed Mr Tupuanga mocking the prayer routine and the video footage confirmed he had knelt down twice;
- c) Mr Tupuanga and Mr Imran had both confirmed they had not met spoken (apart from the incident on 13 May) until the morning of 15 May which

contradicted Mr Tupuanga's explanation that Mr Imran had threatened him.

- d) Mr Tupuanga had contacted other members of the team in an effort to bolster his explanation and seek support. This was after being told to keep matters private and confidential and not to go into the sticking pen area.

[24] Mr Baty advised Mr Tupuanga that the allegations of racial harassment had been substantiated, that this appeared to amount to serious misconduct and a formal disciplinary meeting would be convened. Mr Tupuanga was again advised that the outcome of the process may result in termination or a lesser sanction such as a warning.

[25] Before leaving the meeting Mr Tupuanga was invited to provide the names of any other people he wished to have interviewed. He did not provide any further names and declined an invitation to view the CCTV footage. Mr Tupuanga requested copies of all notes from the investigation and was advised these would be provided. The notes were couriered to Mr Tupuanga that day.

Disciplinary process

[26] In a letter dated 17 May Auckland Meat Processors set out its investigation findings and invited Mr Tupuanga to attend a formal disciplinary meeting and copies of all witness interviews and investigation notes were couriered to his home address. Auckland Meat Processors set out its view that Mr Tupuanga had used hurtful and offensive language and conducted himself towards the Halal slaughtermen which had caused a detrimental effect on the team members job satisfaction and ability to perform their Halal duties.

[27] In particular and with reference to the comments provided to Auckland Meat Processors during the interviews with Mr Imran and Mr Sarik Auckland Meat Processors was concerned that Mr Tupuanga had:

- a) Proffered verbal abuse towards the Halal team members;
- b) Caused racial disharmony;

- c) Mocked Islam beliefs;
- d) Provoked the Halal team members with his continued slander towards Ramadan; and
- e) Belittled the Islamic faith by performing a prayer action on his knees.

[28] Mr Tupuanga was reminded that dismissal was a possibility.

[29] At the beginning of the disciplinary meeting on 20 May Mr Tupuanga advised that he wished to see the CCTV footage. This was arranged and the meeting adjourned to allow that to happen. Mr Tupuanga was invited to revert to Mr Baty if he had any questions or additional responses before a decision was made. Mr Baty advised Mr Tupuanga that he was prepared to investigate the incident further if requested.

[30] The meeting was reconvened on 23 May although by now a decision had been made. Mr Tupuanga was asked if he had anything further to add before the decision was delivered. He did not.

[31] After providing Mr Tupuanga the opportunity to make any comments on a proposal to terminate his employment the decision to dismiss was confirmed. That decision was later confirmed in writing.

Conclusions

[32] Under s 103A of the Act I must objectively determine whether Auckland Meat Processors actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[33] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, Auckland Meat Processors sufficiently investigated issues, raised its concerns with Mr Tupuanga, gave him a reasonable opportunity to respond and genuinely considered his explanation prior making the decision to dismiss him.

[34] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Tupuanga being treated unfairly.² A failure to meet any of the s 103A(3) tests is likely to result in an action being found to be unjustified.

[35] It is not for the Authority to substitute its decision for what a fair and reasonable employer could have done in the circumstances and how such an employer could have done it. In *Angus v Ports of Auckland Ltd*, it was emphasised there may be a range of responses open to a fair and reasonable employer, and that the Authority's task is to examine objectively the employer's decision-making process and determine whether what the employer did, and how it was done, were what a fair and reasonable employer could have done.³

[36] The Court of Appeal has also discussed s 103A of the Act, observing:⁴

It is apparent that the effect of the statute is that there may be a variety of ways of achieving a fair and reasonable result in a particular case. As the Court in *Angus* observed, the requirement is for an assessment of substantive fairness and reasonableness rather than "minute and pedantic scrutiny" to identify any failings.

[37] Mr Tupuanga says the claims that he had been threatened of physical assault by Mr Imran were brushed off and not investigated. I am satisfied the company did investigate this allegation. Mr Baty interviewed Mr Imran on 14 May and asked him specifically about the allegation. Mr Imran is small in stature. He denied making any threat against Mr Tupuanga and expressed surprise at the allegation telling Mr Baty that given his size he would be the one getting the hiding.

[38] At the Authority's investigation meeting Mr Tupuanga changed his version of events and told me he had heard rumours that Mr Imran had made this threat but that he had not made a threat directly to him [Mr Tupuanga]. This was the first time Auckland Meat Processors had heard this explanation.

² Employment Relations Act 2000 (the Act), s 103A(5).

³ *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466 at [36]-[44].

⁴ *A Ltd v H* [2016] NZCA 419, [2017] 1 NZLR 295.

[39] Mr Tupuanga says he was not provided with copies of any witness statements as a result of Auckland Meat Processor's investigation. He says there appears to be some brief notes taken from purported meetings with employees. I am satisfied Mr Tupuanga was provided with all of the notes of all interviews taken during the investigation undertaken by Mr Baty. These notes were couriered to Mr Tupuanga's home on 17 May 2019.

[40] Mr Tupuanga is critical of the extent of the notes made of the interviews during Auckland Meat Processors's investigation. The ideal investigation may include fully transcribed recorded interviews which are signed by each of the interviewees. While that did not happen in this case I am satisfied the notes taken by Mr Baty and Ms Dennis adequately recorded the interviews undertaken and cannot be regarded as a procedural flaw. Even if it were it would be a situation which would fall within the parameters of s 103A(5) of the Act. That is, that the apparent defect would be regarded as minor and did not result in any unfairness to Mr Tupuanga.

[41] Mr Tupuanga says a number of options other than dismissal were available to Auckland Meat Processors but were not considered. For example:

- a) Facilitated mediation;
- b) A lesser penalty;
- c) Moving him to another team; or
- d) Demotion or loss of opportunity.

[42] None of these options were put forward during the disciplinary process. Mr Baty's uncontested evidence is that he considered moving Mr Tupuanga to the Beef Slaughter Floor and thought about other positions on the Mutton Slaughter Floor where he might work but separated from the Halal men. In the end he concluded that serious misconduct had occurred and dismissal was the appropriate sanction.

[43] Following the dismissal Mr Baty met with the Branch President of the NZMWU and was asked to review the decision to terminate Mr Tupuanga's

employment and consider a lesser penalty in light of Mr Tupuanga's tenure. Mr Baty told me he considered carefully whether to reverse his decision but again, decided dismissal was the appropriate outcome in the circumstances.

[44] Those circumstances included 15 previous disciplinary investigations undertaken into Mr Tupuanga's conduct. At the Authority's investigation meeting Mr Tupuanga acknowledged that he had been subject to a number of disciplinary processes which included allegations of bullying and harassment. He also conceded that he had been given many second chances during those disciplinary processes.

[45] Mr Tupuanga also claims the decision to dismiss was pre-determined. Mr Baty's evidence was uncontested. He told me he stayed awake for hours each night struggling with the decision he had to make. He said it was not a decision he took lightly. Further, when Mr Baty was asked to give his decision on Friday 17 May he declined telling Mr Tupuanga that he was not in a position to give a decision at that time as one had not been made.

[46] Mr Tupuanga told Auckland Meat Processors during the disciplinary process that he detests all forms of racism and was highly supportive of his colleagues during the recent tragedy in Christchurch. Mr Tupuanga told me that rather than consider his response Auckland Meat Processors ignored his view and did not explore this with him. Mr Tupuanga has provided me with copies of text messages he sent to both Mr Sarik and Mr Razim Niyas supporting his evidence that he was on friendly terms with the two men.

[47] Mr Razim Niyas attended the Authority's investigation meeting and told me he and Mr Tupuanga were and continue to be friends. Despite his friendship Mr Razim Niyas confirmed that on 13 May Mr Tupuanga was mocking the prayer and made the comments to Mr Imran. He also told me that if you are friends with Mr Tupuanga then everything will be alright but if you go against him he will make your job harder.

[48] While a meat works is a robust environment I find Mr Tupuanga's comments and conduct was capable of being regarded as serious misconduct. His comments and

conduct were racially offensive and denigrating to the Halal slaughtermen at whom they were directed.

[49] There is no doubt that the comments and conduct by Mr Tupuanga were hurtful and had a detrimental effect on the job satisfaction for the Halal team. I find it is highly likely that the incident on 13 May was the proverbial “straw that broke the camel’s back” for the Halal men. Mr Sarik and others had been exposed to the repetition of Mr Tupuanga’s comments and conduct over a period of time.

[50] The decision to dismiss was a decision a fair and reasonable employer in all of the circumstances of this case, could make. Mr Tupuanga’s application is declined.

Breach of good faith

[51] Mr Tupuanga has failed to establish to my satisfaction any breaches of good faith on the part of Auckland Meat Processors. Accordingly his application for penalties is declined.

Costs

[52] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Auckland Meat Processors shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Mr Tupuanga shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[53] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority