IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 204
ARC 24/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TANGIANAU HERE Plaintiff
AND	MCALPINE HUSSMAN LIMITED Defendant

Hearing: 7 September and 15 November 2012
(Heard at Auckland)

Counsel: Mr G Bennett, advocate for plaintiff
Mr R Towner and Ms D Doak, counsel for defendant

Judgment: 6 December 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

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[1] The plaintiff was employed by the defendant company for approximately 23 years. He was dismissed for threatening his supervisor, Mr McAuley. His dismissal followed an earlier warning for swearing at Mr McAuley. The plaintiff pursued a personal grievance in the Employment Relations Authority (the Authority). The Authority dismissed his grievance.[1] He challenged the Authority's determination on a de novo basis.

Background facts

[2] Mr Here was employed as a process worker with McAlpine Hussman Ltd (the company). On 21 July 2010 he received a written warning for swearing at his

[1] [2012] NZERA Auckland 61.

supervisor, Mr McAuley. The warning arose out of an incident during which Mr McAuley approached Mr Here to find out whether he had completed some work that he had assigned to him. Mr Here responded to this enquiry by telling Mr McAuley to "fuck off". The written warning set out the improvement required in terms of Mr Here's behaviour, namely that there was to be "no further incidence of using abusive language with any member of staff or other person associated with the company – effective immediately." According to the company's disciplinary policy, a warning remains in place for 12 months.

[3] Mr Here did not challenge the validity of the warning at the time. He accepted in evidence that the company had been very clear about its expectations following the 21 July incident.

[4] A further incident occurred less than six months later, on 6 December 2010. Mr McAuley had issued Mr Here with a work instruction and went to check on progress some time later. He found Mr Here talking to another employee. Mr Here told Mr McAuley that they were discussing how the task should be completed. Mr McAuley told Mr Here that there was no need to discuss it. Mr Here replied that the workplace was not a prison and Mr McAuley retorted that it was not a holiday camp either, and that Mr Here was expected to work. I accept Mr McAuley's evidence that he walked away at this point and returned to his work bench.

[5] A few minutes later Mr Here approached Mr McAuley's work bench, stopped a few metres from him and told him in a raised voice that he (Mr McAuley) had better not make a complaint about him and "I know where you live". Mr McAuley said that Mr Here appeared very angry and that his face changed colour. There is no doubt that Mr McAuley took Mr Here's statement as a serious threat. He was extremely shaken and felt panicked by the incident. He was aware (because Mr Here had previously told him) of a domestic incident involving Mr Here ripping a telephone off a wall and Police intervention. He also knew that Mr Here knew where he lived, given that he had visited him previously. Mr McAuley was sufficiently concerned that he contacted the Police to report the threat, and also contacted his security company instructing them that, if the security alarm at his home was activated, they were to come straight round rather than telephoning him

first. Mr McAuley had trouble sleeping and was afraid that Mr Here might make good on his threat.

[6] Mr Here went and spoke to the factory manager, Mr Atkins. Mr McAuley was subsequently summonsed to Mr Atkins' office. Both Mr Here and Mr Henry (a senior supervisor) were present. Mr Atkins told Mr McAuley that Mr Here had made a complaint about him. Mr McAuley was asked what had happened and he told Mr Atkins that Mr Here had threatened him, saying "I know where you live." Mr Henry confirmed that he had heard the comment. Mr Atkins then asked Mr Here whether he had made such a comment to Mr McAuley and Mr Here admitted that he had. Mr Here says that at this point Mr Atkins threw up his hands and told him that he had just lost his case, that he could not be helped and that "this has to go further." I preferred Mr Henry's evidence as to what unfolded. He said that Mr Atkins indicated that he would need to commence a disciplinary investigation (which he subsequently did). Mr Atkins suggested that Mr Here go home and cool off and return in the morning.

[7] Mr Here's evidence was that during the course of the meeting, Mr McAuley indicated that he would like to forget the incident and return to work. Mr McAuley was adamant that he had said no such thing and his evidence was supported by Mr Henry's recollection of events.

[8] At the meeting Mr Here explained his perception that Mr McAuley had been following him around and that there had been ongoing issues between them.

[9] Mr Here went and spoke to Mr Kennedy, case supply manager at the company, shortly after the incident and told him that he had done a "really stupid thing" and that he was in trouble. Mr Kennedy suggested that Mr Here write a letter of apology.

[10] Once Mr Here had departed for the rest of the day, Mr Atkins went onto the factory floor taking Mr McAuley with him. He gathered the workers around and asked them whether there was anything wrong with the way Mr McAuley was

supervising or directing them. A few general suggestions were made (including that Mr McAuley could say "please" and "thank you").

[11] Mr Atkins asked Mr Henry to follow up with staff for witness statements if they had witnessed the incident. I accept that Mr Henry did so but none was forthcoming.

[12] Once Mr Here got home, he told his wife what had happened and she helped him write a letter of apology. The letter was dated 7 December 2010 and said:

> To Whom It May Concern
>
> I would like to take this opportunity to apologize for my outburst yesterday. I am sorry if what I said, in the heat of the moment, was taken seriously. I meant no harm or malice.
>
> Yours sincerely
>
> Taniganau Here

[13] Mr Here gave the letter to Mr Atkins the following day.

[14] Mr Here was asked to attend a disciplinary meeting by way of letter dated 7 December 2010. He was invited to bring a representative with him, advised of the seriousness of the allegation (involving a verbal threat to a team leader), and that he was to be suspended on full pay until the meeting occurred. The company advised that dismissal was a possibility.

[15] There was a dispute in the evidence as to whether Mr Here had received this letter. He said that he had not and that the first time he had seen it was when he was referred to it in Court. He said that Mr Atkins had told him on Tuesday morning (7 December) that there would be a meeting on Friday 10 December but that he thought that it would involve nothing more than a 'slap on the hand' and another warning. He said (somewhat inconsistently) that he did not know what the meeting on 10 December was to be about. However, notes that Mr Here prepared and which were put to him in evidence, refer to being given a letter by Mr Atkins on 7 December 2010. As things transpired, Mr Here attended work on 10 December, as requested in the letter and in time for the scheduled meeting. It is also clear that Mr Here had

taken steps to arrange to have a representative present at the meeting. I am satisfied that Mr Here received notice of the meeting, which contained details as to the nature of the company's concerns, the seriousness of the allegation, the possible consequences of an adverse finding, and of the right to representation.

[16] Mr Here attended the meeting with his representative (Mr Campbell, who was the union delegate at the factory). Ms Van Es, the Human Resources Manager, was also present. Ms Van Es took notes, and assisted Mr Atkins in her capacity as human resources adviser.

[17] Mr Here did not deny that he had uttered the words complained of, and nor did he (or his representative) suggest that anyone else should be spoken to. Mr Here offered his apologies and stated that the behaviour would not be repeated. He also referred to ongoing difficulties he had experienced with Mr McAuley, and said that he had raised concerns about the relationship which had not been addressed by management. Mr Campbell advised that the threat should be put in context and that he did not believe that others took it seriously. Mr Here said that he had only been joking and had not said it in a threatening way.

[18] The meeting was adjourned to enable consideration to be given to the matters that had been raised by and on Mr Here's behalf. The meeting was reconvened between 15-25 minutes later. Mr Here says that he was then told he was being dismissed, and that he was not asked whether there was any reason why he should not be. I do not accept that the second part of the meeting proceeded in this way. Ms Van Es was clear that she and Mr Atkins returned to the meeting and raised the proposal that Mr Here be dismissed and sought any comments in relation to that proposal. Her version of events is consistent with her contemporaneous notes of the meeting and Mr Campbell's recollection of what occurred. Mr Atkins advised Mr Here of the factors that had been considered, including Mr Here's time with the company, but said that given the nature of the incident and the safety concerns that it raised, he was considering dismissing Mr Here. He asked for any comments in relation to that proposed course of action. Mr Here did not say much, but did refer to his written apology.

[19] Mr Atkins then advised Mr Here of his decision to dismiss, and Ms Van Es prepared a letter of dismissal.

[20] I am satisfied that Mr Here was given a full opportunity to comment during the course of the meeting and that the company's concerns were squarely put to him for comment. After the meeting was adjourned, Mr Atkins and Ms Van Es discussed the issues that had been raised. Specific consideration was given to the matters that Mr Here had identified, and his length of service with the company. Consideration was also given to the effect on Mr McAuley of the threat and the circumstances surrounding it, together with the previous warning that had been given for abusive language.

[21] Mr Here's advocate wrote to the company raising a grievance on 10 December 2010. The grievance was said to relate to:

> "**Unjustifiable dismissal** – in that the process that Mr Here was subjected to was not in accordance with natural justice."

[22] Prior to the Authority's investigation, Mrs Here drafted a statement for a number of Mr Here's former work colleagues to sign, dated 14 March 2011, which was in the following terms:

> To Whom It May Concern,
>
> We the undersigned do hereby say that we were witness to the argument and so called threat to Dave McAuley on 6th December 2011 at our place of work "McAlpine Hussman Ltd"
>
> Joe Henry was not a witness to this.
>
> He was at his work desk app 20 meters away.
>
> We never took this seriously and everyone laughed about it.
>
> [signed by Junior John, Norm Campbell, Tauti Timoti, and Aria Aria]

[23] This letter was of limited relevance given that none of the people who signed the letter had taken up Mr Henry's invitation to provide a statement about what had occurred on the day in question, to enable it to be considered as part of the disciplinary process.

[24] In the course of evidence Mr Here emphasised that swearing was common in the workplace, and this was supported by evidence from Mrs Here relating to her observations at various social functions. Mr McAuley accepted that there was a degree of swearing that occurred within the company and between staff but drew a distinction between swearing during the course of general conversation (which took place on a routine basis) and swearing aggressively and directly at someone (which was neither accepted nor common). Mr Campbell, who has been with the company for 9½ years, said that while there was some swearing that took place during the course of a conversation it was "just swearing in general conversation, joking around, having a laugh." I accept that this was so.

[25] In any event it was the first incident, not the second incident, which involved swearing. Mr Here had not challenged the written warning he had received for swearing at Mr McAuley. The matter at issue in the second incident was a verbal threat that did not involve swearing. Both incidents did however involve inappropriate comments of an abusive nature to a supervisor. I do not accept that the sort of comment directed at Mr McAuley on 6 December 2010 constituted the type of behaviour that was generally accepted or commonplace in the workplace.

The claim

[26] Section 103A of the Employment Relations Act 2000 (the Act) provided, at the relevant time, that the question of whether or not a dismissal was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred. In *Air New Zealand Ltd v V* a full Court of the Employment Court observed that:[2]

> The meaning of the text of s 103A is clear on its face and in the light of its common law antecedents. It sets out a test for justification where a personal grievance has been alleged. In cases of dismissal, [former s 103A] requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss. The same test applies to justification in disadvantage grievances. Those actions are to be assessed

[2] [2009] ERNZ 185 at [37].

> against the test of what a fair and reasonable employer would have done in all the circumstances.

[27] It is not for the Court to substitute its judgment for that of the employer as if it were in the employer's shoes, but to conclude what a fair and reasonable employer would have decided in the circumstances of the actual employer.[3]

[28] Mr Here's behaviour constituted serious misconduct. Mr Bennett, for the plaintiff, conceded that this was so. The plaintiff's case was squarely focussed on the procedure that was adopted by the company. Earlier allegations relating to the lawfulness of the suspension were not pursued on the plaintiff's behalf, and nor were submissions advanced that the plaintiff had suffered any unjustified disadvantage. Rather, Mr Bennett submitted that the plaintiff's dismissal was unjustified because of procedural flaws.

[29] As I understood the case for the plaintiff, the incident on 6 December 2010 needed to be viewed in the context of the relationship issues that existed between Mr Here and Mr McAuley. It was submitted that the company had failed to adequately respond to these complaints. It was also submitted on the plaintiff's behalf that the company failed to follow the disciplinary processes set out in its policy document. In this regard Mr Bennett contended that the process was not fair and considered, rather it was ad hoc. He raised concerns about a failure to obtain witness statements; a failure to take notes during the investigation meeting; a failure to suggest that Mr Here obtain legal representation; and a failure to advise Mr Here as to the identity of the decision-maker. It was contended that these factors constituted procedural flaws rendering the dismissal unjustified. He also submitted that the decision to dismiss was contaminated by bias and predetermination.

[30] I deal with each concern in turn.

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[3] *V* at [33], [36].

Failure to address concerns raised

[31] While Mr Here complained about management not doing anything in relation to issues he had raised about Mr McAuley's management style, I do not accept that his complaints were made out. Ms Van Es gave evidence that Mr Here had come to see her with such concerns and that she had spoken to Mr Eagle (supply chain and logistics manager) about the issues he had raised. Mr Eagle's evidence (which I accept) was that he had numerous conversations with Mr Here about his concerns. He recalled Ms Van Es speaking to him about a complaint she had received about Mr McAuley following Mr Here around and that he spoke directly to both Mr Here and Mr McAuley. He told Mr Here that he considered that he required close supervision, and the reasons why that was so. Mr Here accepted this in cross-examination.

[32] Mr Here made reference to issues relating to Mr McAuley and their working relationship at the disciplinary meeting. It is evident that this was considered by Mr Atkins. It was also an issue that had been raised during the course of the meeting on 6 December 2010, and followed up by Mr Atkins following the meeting.

[33] I do not consider that it was necessary for the company to undertake further inquiries into the relationship between Mr Here and Mr McAuley at this stage. It is clear that Mr Atkins was alive to the issue but ultimately formed the view that the plaintiff's actions were not excused by anything that Mr McAuley had said or done. This was reasonable in the circumstances. Mr McAuley had asked Mr Here to attend to his work and Mr Here had approached him at his work station some minutes after their initial interchange and angrily told him in a raised voice that he had better not make a complaint against him, and that he knew where he lived. It was not a statement that had been provoked and nor was it made in the heat of the moment.

[34] Mr Here's position was that the company over-reacted to a statement made in jest. I do not accept this. It is apparent that Mr McAuley did not take the statement as a joke, and could not reasonably have been expected to have done so in the circumstances. Mr McAuley interpreted Mr Here's statement as a threat – he was observed by Ms Van Es and Mr Henry as being upset and visibly shaking. He took the precaution of ringing the Police and notifying his security company. Mr Here

was shouting and appeared to be angry. Mr Here went to see Mr Kennedy shortly after the incident and told him that he had done a "really stupid thing" and that he was in trouble. The letter of apology that Mr Here subsequently wrote referred to an "outburst". That reference is not consistent with a joke.

Failure to obtain witness statements

[35] Mr Here accepted that he had made the statement complained about at the meeting on 6 December 2010, but sought to minimise it. This meant that there was no dispute about the key factual issue, although there were issues about whether he had intended what he said to be taken seriously and the impact of it. Mr McAuley made it plain that he had taken Mr Here's statement seriously, and was very concerned about it. The only point that other witnesses could have cast any light on was the circumstances surrounding the incident, including the manner in which Mr Here had uttered the words complained about and how Mr McAuley appeared to have reacted at the time. It is clear that Mr Atkins immediately took verbal statements from the plaintiff, Mr McAuley and Mr Henry.

[36] Mr Henry was tasked with seeking witness statements from other workers who had been present at the time. He spoke to staff members individually and then followed this up in a meeting at which all were present, seeking anyone who had witnessed events on 6 December to come forward. No one did. Mr Henry said he took the additional step of speaking to them as a group to ensure that no-one felt intimidated. Mr Bennett suggested that the steps Mr Henry took were inadequate. I do not accept this. The company took reasonable steps to obtain statements from other potential witnesses, including by speaking to them individually.

Failure to take notes during the investigation meeting

[37] I do not consider that a failure to take notes during the initial meeting on 6 December constitutes a procedural flaw, and no authority was cited in support of this proposition. While contemporaneous notes may assist in resolving a dispute as to what occurred and, in this sense may be regarded as best practice, there was no obligation to take a written record of the meeting.

The company should have suggested that Mr Here obtain legal representation

[38] The company wrote to Mr Here advising him of its concerns, the potential consequences for him, and advised him of his right to representation at the disciplinary meeting. There was no obligation on the company to caution Mr Here that his chosen representative may not be a wise choice, or to otherwise seek to influence Mr Here's decision as to who (if anyone) he wanted to have present.

[39] I do not accept that there is an additional obligation on an employer to advise an employee that s/he would be wise to bring a legal representative to a disciplinary meeting. At the end of the day it is the employee's right to decide on the extent and nature of any representation, not the employer's.[4] If that choice turns out to be a poor one then I do not consider that to be a result that can be visited on the employing party.

[40] Accordingly, I do not accept that the company's failure to advise Mr Here that he should obtain legal representation constituted a procedural flaw.

Advice as to decision-maker

[41] Mr Here was not expressly told who the decision-maker was.

[42] Ms Van Es assisted Mr Atkins with the disciplinary process, and advised him throughout from a human resources perspective. She took notes during the meeting, and it is apparent that Mr Atkins took a lead role at the meeting. The ultimate decision-maker, as Ms Van Es said, was Mr Atkins. That would have been readily apparent to Mr Here, and was underscored by the fact that it was Mr Atkins who had written to him requesting his attendance at the disciplinary meeting with him.

[43] I do not consider that a failure to expressly advise Mr Here about who the decision-maker was to be amounted to a procedural failing in the circumstances.

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[4] Subject to valid issues being raised as to, for example, a potential conflict of interest.

Bias and predetermination

[44] Mr Bennett submitted that the decision to dismiss was contaminated by bias and predetermination on the part of both Ms Van Es and Mr Atkins. This had not been pleaded and accordingly the defendant had not been put on notice that such an allegation was to be levelled against the company's representatives. Nor, in any event, was an evidential foundation made out for such a submission.

[45] I am satisfied that, before reaching a decision to dismiss the plaintiff, the defendant considered (with an open mind) all relevant factors, including the explanations offered by and on behalf of the plaintiff, his written apology, his length of service, the previous written warning issued some five months earlier for abusive conduct against Mr McAuley, the effect of the threat on Mr McAuley and the potential safety issues this raised, and whether there were any alternatives to dismissal. I am unable to discern any basis for an allegation of apparent or actual bias against Ms Van Es or Mr Atkins.

Conclusion

[46] While the plaintiff wrote a letter of apology, it was diluted in force by the fact that it was not directed at Mr McAuley personally and was couched in qualified terms. Nor did the plaintiff fully accept responsibility for his conduct. Rather, he initially complained to Mr Atkins about Mr McAuley, failed to mention the threatening statement he had made to his supervisor, and subsequently sought to minimise it on the basis that it had been a joke. Nor could Mr Here's conduct be excused on the basis of any provocation on Mr McAuley's part, particularly given that Mr McAuley had walked away and returned to his own work station at the time Mr Here approached him and issued the threat.

[47] The plaintiff was represented at the disciplinary meeting, and he was given a full opportunity to be heard. He was squarely on notice of the concerns the company had and the possible consequences for him. Mr Atkins and Ms Van Es took time, during the adjournment, to discuss the issues that had been raised by and on Mr Here's behalf and what might be the appropriate disciplinary outcome. The plaintiff

was provided with an opportunity to comment on the proposed disciplinary action, and consideration was given to whether an outcome other than dismissal would be appropriate. The factory is a small working environment and there was no possibility of redeploying Mr Here in a location where he would not be in direct contact with Mr McAuley. It was reasonable for Mr Atkins to have regard to potential safety issues in the circumstances.[5]

[48] I am satisfied on the balance of probabilities that the company's decision to dismiss the plaintiff and the procedure that was followed were what a fair and reasonable employer would have done in all of the circumstances.

[49] The challenge is accordingly dismissed.

[50] If costs cannot otherwise be agreed they may be the subject of an exchange of memoranda, with the defendant to file and serve any memorandum and supporting material within 20 working days of the date of this judgment, and the plaintiff to file his memorandum and supporting material within a further 20 working days.

Christina Inglis
Judge

Judgment signed at 2pm on 6 December 2012

[5] See, for example, *Coffey v The Christchurch Press, A Division of Fairfax New Zealand Ltd* [2008] ERNZ 385 at [60].