



a regular newsletter for clients of
mcpheil gibson & swart ltd

ISSUE
295

October 2019

Client Services:

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Process and Substance . . . the 'sauce' for Success

With media reports it could be easy to reach a generalised view that even where an employee behaves badly, they can still succeed in taking a personal grievance claim. However, a recent decision of the Employment Relations Authority shows that a sound, but not perfect, process and good reasons will ultimately win through (*Tupuanga v Auckland Meat Processors Limited* [2019] NZERA 471).

It could also be said that in the current environment, the outcome was also a no brainer.

The grievant had worked for Auckland Meat Processors Limited ("**AMPL**") for over 31 years. He was a union delegate and a senior employee. AMPL is also an Approved Halal Organisation, part of which includes the requirement that Halal workers are able to perform prayers consistent with the Islamic faith.

In May 2019 one of the Halal slaughtermen reported to his Team Leader that the grievant had abused another worker and had also pretended to kneel and pray. In the meantime, the complainant had left the floor and was reporting the conduct of the grievant to the HR and Safety Advisor.

While the complainant was reporting the incident, the Team Leader approached the grievant and questioned him about the incident. The grievant was non-responsive. To de-escalate matters, the grievant was removed from the work area.

During this time, it was also reported by another worker that the grievant had been making racist and negative comments for some time. These included:

- “• *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).”*

As the investigation progressed, further details were provided by the complainant and it was alleged the grievant had stated:

- “• *That his daughter had more muscles than [the complainant] and [the complainant] 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] *[The complainant] then confirmed that [the applicant] had bowed down on his knees twice, mocking how the Halal slaughtermen prayed.”*

AMPL then met again with the grievant and sought his response. The grievant claimed that the complainant had threatened him several days before the incident and his conduct was in retaliation.

CCTV footage was also reviewed which confirmed the grievant had knelt down as claimed.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Raewyn Gibson, Peter Zwart** or **Dean Kilpatrick**.

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At this stage, AMPL was still in an information gathering phase. It had yet to proceed to a formal investigation. However, based on the allegations and responses, AMPL concluded a formal investigation was necessary. Consequently, AMPL wrote to the grievant on 14 May 2019 and, as recorded in the Authority, “[invited]” him to attend an investigation meeting regarding complaints of harassment and discrimination of the Halal Slaughtermen. [The applicant] was advised that the company may conclude his actions constituted serious misconduct and a possible outcome was dismissal.”

A meeting was held with the grievant on 15 May 2019. The Authority summarised the responses of the grievant:

“[20]...[the applicant] reiterated his previous response that when he had first started working the previous week [the complainant] 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.”

AMPL then investigated the incident further based on the responses of the grievant. After doing so, AMPL confirmed that the complaints of the complainant and others was preferred due the inconsistencies in the grievant’s responses, the consistency of the complainant and the other slaughter men and the CCTV footage. While offered the opportunity to do so, the grievant declined to review the CCTV footage.

Having completed its formal investigation, AMPL concluded:

“[24]...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. [The applicant] was again advised that the outcome of the process may result in termination or a lesser sanction such as a warning.”

Further meetings were held on 20 and 23 May 2019. With little further input from the grievant, and after providing the opportunity for him to comment on the potential sanction, the decision was made to terminate his employment.

The grievant alleged that AMPL had failed to follow a fair process and breached good faith. It is fair to say the objections raised were technical. However, two are worth noting.

The first is that the witness statements taken were inadequate and AMPL should have provided “fully transcribed recorded interviews which are signed by each of the interviewees”. The Authority disposed of this quickly noting that:

“While that did not happen in this case I am satisfied the notes taken by [AMPL] 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 s103A(5) of the Act. That is, that the apparent defect would be regarded as minor and did not result in any unfairness to [the applicant].”

The second is that the grievant claimed that AMPL did not consider alternatives to dismissal, for example, moving the grievant to another team, demotion and/or facilitated mediation. The Authority noted that none of these options were proposed during the disciplinary process. However, evidence from AMPL confirmed that moving the grievant to another team had been considered but discarded. Again, the Authority concluded there was no breach on AMPL’s part.

In conclusion, the Authority confirmed that:

“[48] While a meat works is a robust environment I find [the applicant’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.

...

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

As noted at the outset, the outcome is perhaps no surprise. However, what is noteworthy in this case is that AMPL undertook a sound process before reaching the decision to dismiss which put it in a strong position to defend the claims. This included gathering information about the incident, then undertaking a formal investigation and concluding with a disciplinary outcome. Each step of the way, the grievant was involved, informed of the potential outcomes and his explanations and feedback considered. A fair process is the cornerstone when any issues of misconduct or serious misconduct arise. We can assist in advising on an appropriate process and provide guidance on any issues that arise in the workplace.