

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 3/08
WRC 23/07**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN DONNA MAREE TAUHORE
Plaintiff

AND FARMERS TRADING COMPANY
LIMITED
Defendant

Hearing: 14 and 15 November 2007
(Heard at Wellington)

Appearances: D D Vincent and M W F Esera, Counsel for the Plaintiff
P A Swarbrick, Counsel for the Defendant

Judgment: 25 February 2008

JUDGMENT OF JUDGE C M SHAW

[1] Donna Tauhore has challenged a determination of the Employment Relations Authority. It found that there were some minor procedural breaches by Farmers Trading Company Limited (Farmers) when investigating her behaviour towards a co-worker, Lisa Dye, which resulted in her dismissal but that Ms Tauhore's claim for unjustified dismissal was unsuccessful. The case was heard as a de novo challenge.

[2] In deciding whether Farmers was justified in dismissing her, it is necessary to consider whether, in terms of s103A of the Employment Relations Act 2000, its actions and how it acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[3] In this case, the focus is on whether the investigation undertaken by Farmers into Ms Dye's allegations was fair and reasonable.

[4] If it were, the next question is whether on the basis of that investigation Farmers was justified in concluding that Ms Tauhore had committed an act of serious misconduct and, finally, whether in all the circumstances, its decision to dismiss was one that a fair and reasonable employer would have reached.

The facts

[5] Donna Tauhore was a sales assistant at Farmers' Masterton store as was her friend Lisa Dye. From Farmers' perspective there was some history between them. In February 2005 when their manager Dorothy Coupe was going on leave she left a note for the temporary manager warning her to "*keep a close eye on those two as things are getting out of hand again ...*".

[6] The background to her concern was an allegation that Ms Tauhore was having an extra-marital affair and was pressuring Ms Dye to lie and cover up for her. Ms Tauhore strongly denies the allegation but a decision on that is beyond the scope of this case. True or not, Mrs Coupe believed it and conveyed to the temporary manager that there was going to be a big blow-up between Ms Tauhore and Ms Dye. She was correct.

[7] On 8 April 2005 at about 10.20am Ms Tauhore obtained permission from Mrs Coupe to leave work to go home to change her soiled clothes. Mrs Coupe saw her return to work about 20 minutes later wearing, in Mrs Coupe's view, the same clothes and in a grumpy mood.

[8] The same day, Ms Dye was on annual leave and was at her own address. She says that during the morning Ms Tauhore came to her home while she was sleeping in and assaulted her around the head because Ms Dye was involved with Ms Tauhore's boyfriend. Ms Tauhore denies she went to her home in the morning. She says she went out of work hours during her lunch break to apologise to Ms Dye for words exchanged the night before. She also denies she assaulted her.

Farmers' work rules

[9] These are contained in the employment agreement. They include a list of behaviours that amount to serious misconduct and which are most likely to result in summary dismissal. The list is expressly not exhaustive. Other matters not specified may also amount to serious misconduct.

[10] The rules also specify behaviours which amount to misconduct. Serious or repeated breaches of these behaviours are likely to lead to dismissal.

[11] Farmers alleged that Ms Tauhore breached two of the rules:

[Serious misconduct]

4. *Honesty & Integrity*

Deliberate falsification of Company records/documents (including timekeeping), or the giving of false information at an interview or wilfully making false declarations.

[Misconduct]

9. *Personal behaviour*

All team members are expected to conduct themselves in a socially acceptable manner.

Specifically threats, abuse, physical violence, threatening behaviour or threatening/bad language to team members, customers or suppliers. Provocation will not be accepted as an excuse.

[12] In its dismissal letter Farmers also cited rule 3:

[Serious misconduct]

3. *Reputation*

Conduct inside and outside the workplace, which in the company's reasonable opinion brings it into disrepute, or otherwise causes it damage.

The investigation

[13] Ms Dye's allegation first came to the attention of Mrs Coupe on the afternoon of 8 April when, in spite of her being on her first day of annual leave, Ms Dye arrived at work. Mrs Coupe observed her to be crying and sobbing and quite hysterical.

[14] Ms Dye told Mrs Coupe that Ms Tauhore had been to her home at about morning tea time and had belted her in the head. Mrs Coupe observed a big bump on

Ms Dye's head. Apart from the allegation of assault, Mrs Coupe was concerned that Ms Tauhore had given her an untruthful reason for wanting to leave work that morning and so reported the matter to Mr Marupi, the store manager.

[15] On 9 April 2005, Ms Dye showed Mrs Coupe six text messages sent to her by Ms Tauhore that day. In those she referred to Ms Dye as a "*fukn hoar*". She used phrases such as "*U sat thia & lyd ur hoar ass of agn? & i blevd u coz i thot u wer my frnd?*" She also said "*... u hd da cheek 2 sit thia & let me apologise and feel bad?*" In another, she said "*Ur luky i dnt cum bak rnd thia & smsh u gd & propr ...*". Because of the abusive and threatening nature of these texts, Mrs Coupe and Mr Marupi decided to relocate Ms Dye to work in another department of the Farmers store.

[16] On 12 April 2005, Mrs Coupe received a written complaint from Ms Dye alleging that on 8 April Ms Tauhore had entered her home and assaulted her during working hours. She said she was concerned for her wellbeing at work where she would be intimidated by Ms Tauhore and would have to resign. Mrs Coupe referred this letter to Mr Marupi.

[17] Farmers' loss prevention and risk control manager, Iain Robertson, was called in to investigate the matter. In Mr Marupi's presence, he took formal statements from Mrs Coupe and Ms Dye on 13 April 2005. Mrs Coupe's first statement was made at 10.55am. She described Ms Tauhore's request to go home on 8 April and then her observation of Ms Dye later in the day when she saw bumps on the left side of her head. She also said in that statement that Ms Dye had shown her the text messages from Donna's number. She reported that one of them in particular said "*I'll come back and finish you off.*" Mrs Coupe now accepts that these words were not exactly as used in the text messages but were paraphrased. She did not have the text messages in front of her when she was speaking to Mr Robertson.

[18] Ms Dye was interviewed at 2pm on 13 April. She told Mr Robertson that on 8 April she was on annual leave, had got up at 7.30am to let the dog out, and left the door ajar before going back to sleep. She was woken by the blankets being pulled off her and Ms Tauhore yelling at her and hitting her on the head several times with

both closed fists and an open hand. Ms Tauhore also pulled her hair and accused her of sleeping with her boyfriend. After 10 minutes of Ms Dye denying these allegations, Ms Tauhore calmed down, said she was sorry, and then left. Ms Dye said she went back to bed and cried and then contacted her sister who came to her home and talked to her about it. She suffered a headache, had trouble with her vision, and had a big “egg” on the side of her head. Ms Dye said she decided to lay a complaint after she got the texts on 9 April as she was frightened for her safety. She hadn’t been to the police because she was worried it would make Ms Tauhore worse.

[19] Mr Marupi wrote to Ms Tauhore requiring her to attend a meeting on 14 April 2005 to discuss serious concerns about breaches of two of Farmers’ work rules, namely honesty and integrity, and personal behaviour. The specific allegations were that on Friday 8 April 2005 she left work to go to a home address of a fellow team member where she physically assaulted that team member and that she had asked for time off to change her clothes when she was engaged in these activities. She was told this was a serious matter which might result in disciplinary action up to and including dismissal and that she was entitled to a representative at the meeting.

[20] At 3.30pm on 13 April, Mrs Coupe personally delivered Mr Marupi’s letter. Ms Tauhore took its receipt very badly. Mrs Coupe immediately reported her reaction to Mr Robertson who made notes of Mrs Coupe’s account. Those notes are timed at 3.35pm and read:

Today at about 3.30pm I gave Donna Miller [Tauhore] a letter inviting her to an investigative interview.

When she opened it she pointed at Iain Robertson’s name and said “what the fuck’s he got to do with it?”

I said “he’s the Area Risk Control Manager”.

She said “no, he’s not, he’s Loss Prevention”.

I said “no, he’s the Risk Controller and there is risk to staff here”.

She said “whatever!”

The she said “she’s lucky I didn’t finish her off then, fucking slut!” “She shouldn’t have slept with my friend, she wouldn’t like it if I slept with a friend of hers, fucking slut!”

I said “it will all be discussed at the meeting tomorrow”.

She said “what did she tell you?”

I said again about discussing it at the meeting tomorrow.

Donna then said “she shouldn’t have narked!”.

She said “now I’ll have to give her another hiding”.

She said “I’ll go round there tonight after work hours and belt her up again and this time I’ll finish her off!”

I said “don’t be stupid Donna, you’re in enough trouble as it is!”

She said “Nah, she’s nothing but a slut, if she’d kept her mick in her pants it wouldn’t have come to this!”

I said “are you coming to the meeting tomorrow?”

She said “what about the two hours before?”

I said “it’s in the letter, you will be on full pay.”

I then asked her again if she will be there and she said “yes and I hope she is too. She started it, she can fucking finish it.”

Donna then grabbed her gear and left.

[21] Mr Robertson, Mr Marupi, and Mrs Coupe discussed this reaction as they believed Ms Tauhore’s threats were genuine. It was suggested to Ms Dye it was best if she did not go home that night.

[22] At about 4.30pm on 13 April 2005 while Mrs Coupe was driving her home to collect her clothes, Ms Dye received another text message. It was not from Ms Tauhore’s cellphone but bore a striking similarity to the text messages she had received on 9 and 10 April 2005. Ms Dye showed it to Mrs Coupe. It read:

U fukn hoar hd 2 fuk wif me agn aye btch u cldnt leav it alne aye u mut u dnt knw wot a fukn big mstke u jst made

[23] Ms Dye then decided to lay a complaint of assault with the police.

Disciplinary meeting

[24] The investigation meeting was held by Mr Robertson at 11am on 14 April 2005. Mr Marupi was present as decision-maker. Mrs Coupe was there to support Mr Marupi as he had held the position of store manager for only a short time and was not familiar with the processes.

[25] Ms Tauhore attended without a representative. She said in Court that she believed that as Mrs Coupe would be there she would be her support person although it is clear that this was not Mrs Coupe’s understanding. I accept that Ms Tauhore felt comfortable knowing that Mrs Coupe would be there as they obviously had got on

well up until that time. However, she was not her representative. I find that Ms Tauhore was given an opportunity to bring her own representative. It had been referred to in writing in the letter of 13 April and Mr Robertson told her again at the beginning of the meeting. She expressly said she did not want a representative.

[26] Mr Robertson read from the 13 April letter which contained the allegations, told Ms Tauhore that some investigations had been carried out in response to a complaint, and then asked her a series of pre-prepared questions. He wrote her answers next to the relevant questions but his notes are not a verbatim record.

[27] Ms Tauhore agreed the reason she gave Mrs Coupe for going home on 8 April was to change her clothes but when asked whether she went to Ms Dye's home, she said:

No, I went home and got changed. It's none of your business, what I do in my break is my business. No, I didn't go there then in my morning tea break

[28] In answers to continuing questions, she qualified her account to say that she had been to Ms Dye's home that day but it was when she was awake and not at the morning tea break. She denied assaulting her by physically striking her on the head and verbally abusing her. She insisted that her reason for going to her home was nothing to do with work and what she did outside work hours was none of Farmers' business.

[29] Ms Tauhore accepted she had sent Ms Dye text messages on 9 April but "*not the one yesterday*" in reference to the message on 13 April. She said the other texts were just telling Ms Dye she did not want to be friends with her. She then said she went to Ms Dye's house on Friday (8 April) lunchtime to apologise for what had happened at the pub the previous night and no blows were exchanged.

[30] When she denied sending the 13 April text, she said she really wanted to see it since everyone else had. There was a dispute about whether Ms Tauhore had a proper opportunity to see this text message. Mr Robertson's notes only record that she wanted to see it.

[31] In evidence, Mr Robertson said that he read all the text messages out at the meeting. They had all been transcribed. Ms Tauhore could not remember Mr Robertson reading out the texts but could not deny that he did. I find that, although Ms Tauhore wanted to see the phone with the last message on it, he refused as he was not going to give her Ms Dye's phone but the message on it was read in full.

[32] Ms Tauhore agreed that her behaviour when reacting to the letter given to her by Mrs Coupe on 13 April was inappropriate and she had flown off the handle "*As anyone would that got an allegation like that put in their face.*" She explained that when she said "*I should have finished what I started*" she meant she should have given Ms Dye a hiding but she did not.

[33] At the end of the meeting she was asked by Mr Robertson if she had anything to add and she said "*No, but as far as working together there is no problem. I can work with her, I just don't want anything else to do with her outside of work.*" She said Ms Dye might have got her injuries by banging her head against a wall.

[34] Mr Robertson asked Ms Tauhore if she wanted to read the notes of the interview. He told the Court her response was that she would not look at it, sat with her arms crossed, and was belligerent. He noted on the disciplinary interview checklist that she refused to sign stating "*Why should I?*" Ms Tauhore's evidence was that, when he asked if she wanted to look at the notes of the book, she had a quick look through them but because she had already known he had not written down what she had been saying she just said "*No I don't even want to bother with them.*" She told the Court she did not want to waste her time reading over the notes when she had been watching him write and he had not written what she had wanted him to.

[35] Ms Tauhore took issue with the way Mr Robertson wrote his notes. She described him as fluffing through pages and writing the answers randomly wherever. She believes that he just wrote down what he wanted to hear. Mr Robertson explained that he had gone into the meeting with questions already written down and that he noted her responses under the questions as he went. I find it is likely that

what Ms Tauhore thought was “fluffing around” was Mr Robertson fitting her answers to the prepared questions, some of which were out of order.

[36] I accept Mr Robertson’s evidence that at the end of that meeting Ms Tauhore was given a proper opportunity to read through the notes and to make any comments or corrections if she wished. On her own account Ms Tauhore passed only a cursory glance over the notes and did not register any complaint at that stage about matters which she now says were inaccurately recorded. I find she had a proper and genuine opportunity to check the notes. In the absence of her taking up that opportunity, the company was entitled to rely on her account as it was recorded at that time. She also had adequate opportunity to give any further details of her version of events.

[37] Following the meeting Mr Robertson and Mr Marupi had a discussion and phoned Farmers’ support office for advice. Mr Robertson rang Ms Dye’s mother to ask her when she had been at her daughter’s home on 8 April. He took from that conversation that Ms Dye had been in a distressed state during her visit. Mr Robertson was challenged about the content of this phone call. Evidence which he gave to the investigation meeting led the Employment Relations Authority to conclude that Mrs Dye had told him that Lisa had told her about the assault by Ms Tauhore. I am satisfied that the purpose of Mr Robertson’s call to Mrs Dye was not to ask about the allegations of assault but to find out what time she was at the house. The only other information Mrs Dye gave him which he relied on was that Lisa Dye was distressed at the time. As she did not know about Ms Tauhore’s visit or the allegation of assault she did not speak to him about that.

[38] It is apparent that a passage of incorrect evidence was included in the briefs of both Mr Robertson and Mr Marupi produced to the Authority. Because they were not read out, the error was not detected at that stage nor was it challenged but it was relied on by the Authority in its determination. Both Mr Marupi and Mr Robertson frankly accepted that those briefs were in error and expressly resiled from their evidence to the Authority that Lisa had told her mother about the events that she had said had happened that morning.

[39] Mr Robertson also rang the phone number from where the last text had been sent. A person called Scott answered. Mr Robertson established his name, thanked him and then hung up. Mr Robertson did not tell Ms Tauhore about either of those calls. He was not able to contact Ms Dye's sister who he had been told was also at Ms Dye's home with her mother on 8 April.

[40] Mr Marupi and Mr Robertson then discussed the matter. Mr Marupi thought Ms Tauhore's attitude to the investigation was unhelpful. Putting together what he had heard in the interview and the other information obtained by Mr Robertson, he concluded that Ms Dye's account about whether Ms Tauhore had come to her home and what happened there was more credible.

[41] He didn't accept Ms Tauhore's explanation that she went to Ms Dye's house to offer an apology. He found her response about Ms Dye's injuries to have been flippant and consistent with her behaviour after the event such as the sending of the text messages. He also believed Ms Dye when she said the incident had occurred during work hours.

[42] Mr Marupi concluded that Ms Tauhore's behaviour was a serious breach of work rules and amounted to serious misconduct because of the physical violence against another team member coupled with continued threats of violence even after a disciplinary investigation had commenced. He said that she showed no remorse, did not take any responsibility for her actions, and misled the manager about her reasons for being away from work. This meant that her employment with Farmers could not continue.

[43] The disciplinary meeting was reconvened at 11.40am on 15 April. Mr Robertson first asked Ms Tauhore if she wanted to add to what she had said the day before. She did not. In the absence of any new information, Mr Marupi, reading from notes prepared by Mr Robertson, outlined his conclusions and informed her of his decision to summarily dismiss her. A dismissal letter was later prepared and sent to Ms Tauhore confirming this decision and the reasons for it. As well as detailing the breaches of work rules 4 and 9, this letter included reference to work rule 3 concerning conduct inside and outside the workplace which brings the company into

disrepute or causes it damage. Mr Robertson now accepts that he did not put to Ms Tauhore at the meeting the allegation that she might have brought the company into disrepute and that there was no basis for a dismissal based on a breach of work rule 3.

Later explanations and events

[44] During the Employment Relations Authority investigation of Ms Tauhore's personal grievance, she gave further responses to the allegations which I find had not been raised at the disciplinary meeting on 14 April. First, she said that her sister Tania had been at her house on 8 April and could verify that she had gone home and changed her clothes before returning to work. Second she said that a friend called Scott Wallace told her that Ms Dye had been the one who sent the 13 April text from his phone to her own phone.

[45] Ms Tauhore told the Court she had mentioned her sister's presence at home at the investigation meeting when she was asked if she wanted to add anything. That was not apparent to the Farmers' representatives who, if it had been mentioned, I find are most likely to have followed it up as they had with Mrs Dye. It is more probable than not that she did not tell the meeting.

[46] Tania Tauhore and Scott Wallace both gave evidence in Court. Tania Tauhore said that she was at her sister's house on 8 April when Ms Tauhore came home to change her clothes. She could not remember the exact time but it was sometime between 10 and 11am. Tania Tauhore said that her sister had called on her to remember the events of that day some time after and had told her that Farmers might be ringing her because she was supposed to have assaulted Lisa. Tania Tauhore's evidence was not entirely convincing and she did not deny that it was given with the benefit of hindsight.

[47] Mr Wallace's evidence was particularly implausible. He said he had met Ms Dye in the street about lunchtime on 13 April. She came to his place an hour later and asked him to text a message (which she dictated to him) from his phone to a number she gave him. The evidence established that Ms Dye was at work that day and at 2pm she was being interviewed by Mr Robertson. The text was sent at

4.20pm. Mrs Coupe heard it arrive while she and Ms Dye were in her car. Mr Wallace's evidence is not credible.

[48] However even if these later accounts were truthful, Farmers had no knowledge of them at the time of the dismissal and Ms Tauhore did not raise the fact that such evidence might have been available at the time of the investigation.

[49] In November 2005, Ms Tauhore was prosecuted in the District Court for assaulting Ms Dye on 8 April. She was found not guilty. That result can have no bearing on the decision by Farmers to dismiss her. In the first place, the dismissal occurred before the hearing of the criminal charge and, secondly, the standard of proof in the criminal case is completely different from that which an employer must meet when disciplining an employee. The actions of Farmers are to be judged on the circumstances at the time of the dismissal.

Did Farmers act as a fair and reasonable employer would have in all the circumstances?

[50] Counsel for Ms Tauhore correctly submitted that the allegations that she entered Ms Dye's home and assaulted her while she was asleep were serious. They required and justified a thorough investigation because, as has often been recognised, the evidence to support allegations must be as compelling as the charge is serious.¹ Mr Vincent submitted that there were a number of potential witnesses of relevance who were not interviewed and, given the seriousness of the allegations, it was not enough for an employer to say that it simply believed one version over another.

[51] I find that the Farmers' investigator and decision-maker did not simply believe one version. Apart from Ms Dye, they had other corroborative evidence which included what Mrs Coupe told them and the undisputed text messages sent on the morning of 9 April.

[52] Mrs Coupe simply reported what Ms Tauhore told her and was not challenged on that. She explained to the Court that she regretted the course that things had taken. She got on well with her staff. I am satisfied she had no animosity

¹ *Pallet Supplies Co Ltd v Yates* [1998] 1 ERNZ 532

towards Ms Tauhore and took a balanced and responsible approach to dealing with Ms Dye and Ms Tauhore and their fractious relationship. Farmers acted reasonably in relying on Mrs Coupe's observations.

[53] The tone of the text messages of 9 April was ugly and threatening. They are consistent with Ms Tauhore's explanation that in them she was expressing anger that Ms Dye had apparently lied to her the day before. They are also consistent with Ms Dye's account that Ms Tauhore came in, hit her, and accused her of sleeping with Ms Tauhore's boyfriend before calming down and apologising before leaving. The threat to "*cum bak rnd thia & smsh u gd & propr*" could reasonably have been interpreted as indicating she had already been violent to Ms Dye.

[54] These texts, combined with Ms Tauhore's statements on 13 April to Mrs Coupe such as "*now I'll have to give her another hiding*" and "*belt her up again*" were, I find, sufficient evidence for Farmers to form an early view about what had happened and, in the absence of any convincing explanation from Ms Tauhore during the investigation, to conclude that Ms Dye's account was to be preferred. Ms Tauhore was less than forthcoming during the investigation meeting. I accept Mr Marupi's evidence that she was uncooperative and belligerent. She had a fair opportunity to give a full account of her version of events, refer to her sister as a person who could back up her story, and to correct any of the deficiencies which she now alleges are in the notes recording the meeting. She did none of this.

[55] In *Tamarua v Toll NZ Consolidated Ltd*², the employee's explanation to the Court for his alleged theft of objects was accepted as credible but, because that evidence had not been known to the employer at the time of the dismissal, it was not possible for the Court to substitute its judgment for that of the employer. In this case, even if Tania Tauhore and Mr Wallace's evidence could be accepted as vindicating Ms Tauhore, these matters were not raised at the time during the investigation, and cannot be relied on subsequently to discredit her employer's decision to dismiss her. Ms Tauhore's own evidence established that she had been to Ms Dye's address on 8 April. Her denial of any violence to her is inconsistent with

² [2007] ERNZ 52

the physical injury to Ms Dye's head and Ms Tauhore's statements in the text messages and to Mrs Coupe on 13 April.

[56] Mr Vincent also submitted that the meeting was manifestly inappropriate for a number of reasons. I will consider each point in turn.

1. It is alleged Farmers had already formed the view that Ms Tauhore had assaulted Ms Dye based on Ms Dye's reaction rather than any material facts and the meeting was to hear an explanation for what had happened rather than to hear what had happened.

- I find that the employer had reasonably formed a view before the investigation meeting based on not only Ms Dye's account but Mrs Coupe's observations and the text messages. The opening statements made by Mr Robertson at the interview with Ms Tauhore on 14 April refer to serious concerns Farmers had in relation to breaches of the rules. He told her they required an explanation from her regarding the matter which would be taken into account before any final decision was made. This meeting was therefore an opportunity for Ms Tauhore to disabuse Farmers of their initial belief that the incident had occurred.

2. It is submitted that Ms Tauhore had no proper opportunity to be heard because, although she knew that dismissal was an option because of the allegations of physical assault, she had not been shown the statements by Ms Dye and Mrs Coupe that had been taken by Mr Robertson.

- I find that, although Ms Tauhore was not shown the statements before the meeting, substantive parts of the two statements were read out to her at the meeting. It would have been preferable if she had been shown the actual statements before the meeting but there is no question that she was fully advised of both the general allegations and specifically what Ms Dye and Mrs Coupe had said. There was an overnight gap between the first and the second meetings which gave Ms Tauhore an opportunity to consider the allegations and come up with an explanation if one had been available.

3. Next, Mr Vincent submitted that Ms Tauhore did not know the significance Farmers had placed on her reaction to being given the suspension letter.
 - The notes of the 14 April meeting record that Mr Robertson stated “*Yesterday you were heard to make threatening comments about Lisa. Do you recall that?*” She denied that they were threatening but later agreed that her behaviour was inappropriate and could be seen as threatening. She had flown off the handle. I find that Ms Tauhore was given a proper chance to give an explanation for her reaction.
4. Mr Vincent alleged it was not put to Ms Tauhore that she had lied about the reason for going home.
 - Although it had been foreshadowed in the 12 April letter to her and she was asked some questions about her request to go home, the allegation that she had lied to Mrs Coupe was not put to her at the meeting.
5. It was submitted that Ms Tauhore was not forewarned that the 9 April texts were the subject of the inquiry.
 - There was no mention of the texts in the 12 April letter, however she was asked a specific question about this in her interview. She explained that the apparently threatening text messages were just telling Ms Dye that she didn’t want to be friends with her. While she had no notice that she would be asked about them, the way in which they were dealt with in the meeting was not prejudicial to her. She did not deny sending them.
6. Finally, Mr Vincent submitted that Ms Tauhore was cross-examined and not given a proper opportunity to give her version of events.
 - I am satisfied that the questions as recorded were appropriate. Ms Tauhore gave her version but did not help herself by the attitude she adopted. She was certainly not trapped by any of the questions asked.

[57] As the Authority noted, Farmers could have improved its investigation by revealing to Ms Tauhore that Mr Robertson had both spoken to Karen Dye and ascertained that the last text message had come from Mr Wallace's phone. However, the preponderance of the evidence relied on by Mr Marupi came from the sources already discussed namely Ms Dye, Mrs Coupe, the text messages, and the reactions of Ms Tauhore to the allegations both in front of Mrs Coupe and at the investigation meeting. It is highly unlikely that it would have made any substantive difference to the outcome had Ms Tauhore been advised of the conversation with Mrs Dye or the fact that the text message came from Mr Wallace's phone. The only information Mrs Dye gave was about when she was at Lisa Dye's house and that she appeared distressed.

[58] Procedural fairness in an employment investigation means that an employee must be given a fair opportunity to be heard and to state his or her case³. To do this an employee must be aware of the reasons for the investigation and be given a fair hearing.

[59] In assessing whether an employer has acted as a fair and reasonable employer, the Court is not to subject the employer's conduct of the disciplinary process to pedantic scrutiny.⁴ Any deviation from ideal procedures must be treated proportionately to the gravity of the allegation against the employee. As Chief Judge Goddard said in *Unilever*:

What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not over-indulgent person.

[60] In this case the employer was faced with a serious allegation of assault but with equally compelling evidence that it had occurred. It did not conduct the investigation according to the highest standards of procedural fairness but, in assessing the matter objectively, I conclude that none of the deficiencies prejudiced the right of Ms Tauhore to know exactly what the most serious allegation against her was nor was she deprived of a fair opportunity to answer the allegation of assault and to provide an explanation which may have altered the mind of her employer. The

³ *Pitolua v Auckland City Council Abattoir* [1992] 1 ERNZ 693 (CA)

⁴ *NZ Food Processing IUOW v Unilever New Zealand Ltd* [1990] 1 NZILR 35, (1990) ERNZ Sel Cas 582

fact is that she had no answer other than a denial in the face of compelling evidence against her.

[61] I conclude that the investigation was not unfair to Ms Tauhore and that Farmers acted as a fair and reasonable employer in the circumstances.

The decision to dismiss

[62] I am satisfied from Mr Marupi's evidence that, in spite of receiving a lot of help from Mr Robertson, the decision to dismiss was his. The assistance was necessary as he had only been at Farmers in Masterton for a few weeks. His evidence in Court about his reasons for dismissal were, however, assured and consistent.

[63] This was not a case of inappropriate delegation of the decision-making process but an example of a new manager taking proper advice. He was involved at all times in the investigation up to and including the decision which, I find, he made and was responsible for.

[64] Mr Vincent submitted that, having decided that she had committed serious misconduct, Farmers then proceeded to dismiss Ms Tauhore based on a misunderstanding of its own rules and policies. He relied on the definitions of misconduct and serious misconduct in the Farmers' code.

[65] Of the two rules initially relied on, it was accepted by Farmers that the allegation of lying to Mrs Coupe was not properly put to Ms Tauhore and could not be relied on to dismiss her. It was her personal behaviour, as covered by rule 9 relating to the allegation of assault, that Farmers relied on to dismiss her. It was Mr Vincent's submission that, as personal behaviour is listed under misconduct, there was no proper evidence to substantiate a finding of serious misconduct to warrant dismissal.

[66] The list of matters under serious misconduct in the Farmers' rules of conduct is not exhaustive. The matters of personal behaviour listed under misconduct require all team members to conduct themselves in a socially acceptable manner. Physical

violence against a staff member is not socially acceptable. It was in all the circumstances a serious incident.

[67] I therefore find that Mr Marupi's conclusion that Ms Tauhore's actions justified a finding of serious misconduct was a decision which could properly be made by a fair and reasonable employer in all the circumstances, particularly in the light of the information he had at the time of the decision which included Mrs Coupe's observations of Ms Dye's demeanour when she reported the incident and the lump on her head.

[68] Given that Mr Marupi had good grounds to believe there had been violence, that it was against a co-worker, and that it was accompanied by threatening and abusive text messages, I find that it would have been irresponsible of a fair and reasonable employer in the circumstances in which Farmers found itself not to have characterised this as serious misconduct warranting dismissal. I therefore conclude that, in all the circumstances, it was justified in dismissing Ms Tauhore from her employment.

[69] Ms Tauhore's challenge to the Employment Relations Authority determination is dismissed.

Costs

[70] The defendant is to file a memorandum as to costs 28 days from the date of this decision. The plaintiff will have 14 days to respond to that.

**C M Shaw
JUDGE**

Judgment signed at 11am on 25 February 2008