

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 5
5303100

BETWEEN

IESE OSO
Applicant

A N D

MASTAGARD COLERIDGE
RECYCLING LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Jonny Sanders, Advocate for Applicant
Dean Russ, Counsel for Respondent

Investigation Meeting: 26 November 2010 at Christchurch

Date of Determination: 13 January 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Oso) had been employed in the business by the respondent (Mastergard) and its predecessors for a total of 11½ years, originally in the capacity of a Driver, but latterly in the capacity of Foreman. Mastergard took over the site operations in May 2007 and in January 2009, Mr Oso was promoted to the position of Foreman.

[2] Mr Oso was on scheduled annual leave from 7 January 2010 to 18 January 2010. On 8 January 2010 the motor of a Bobcat machine owned by Mastergard and operated by a Mastergard staff member reporting to Mr Oso, suffered a complete seizure. It is common ground that the seizure was caused by insufficient oil in the Bobcat's engine.

[3] Mastergard invited Mr Oso to a disciplinary meeting to discuss the issue with the Bobcat. This meeting took place on 20 January 2010 and although Mastergard's communications to Mr Oso made it clear that he could have a lawyer or support person present at the meeting, he chose to attend alone. Two days later, Mr Oso was summarily dismissed from his employment.

[4] Mr Oso contests that summary dismissal on the basis that there was no justification for a finding of serious misconduct against him, that he was not personally responsible for the engine of the Bobcat failing, that he was away on holiday at the time the incident occurred and that it was unfair and unreasonable to hold him accountable for the sins of others. Further, Mr Oso contends that the dismissal was procedurally unfair in that the decision-maker was not the individual at Mastergard who heard his explanation about the conduct complained of and that the allegation that Mastergard had lost trust and confidence in him was never put to him during the disciplinary process.

[5] A personal grievance was promptly raised and the parties attended mediation in an unsuccessful attempt to resolve their differences before the matter proceeded to the Authority for determination.

Issues

[6] The only issue for determination in the present case is the question whether Mr Oso was unjustifiably dismissed or not. However, it will be convenient to analyse that issue in two parts, first by considering the nature and extent of Mr Oso's obligations to Mastergard and second the appropriateness or otherwise of Mastergard's response.

What were Mr Oso's obligations?

[7] Mr Oso was, at the relevant time, a Site Foreman for Mastergard. As such he reported to Kevin Smith, the Operations Manager. The employment was governed by an individual employment agreement. In addition to that document, Mastergard provided a series of other documents including such things as a health and safety policy, a performance and review agreement, a confidentiality and information agreement and, importantly for our purposes, a position description agreement.

[8] Mr Oso read and accepted the terms of the engagement based on these documents.

[9] Taking in their totality, the contractual relationship between the parties required Mr Oso to:

- Comply with all lawful and reasonable instructions;
- Perform duties with reasonable skill and diligence;
- Oversee Mastergard's site operations;
- Comply with health and safety requirements;
- Ensure daily records and basic maintenance is attended to.

[10] Furthermore, serious misconduct is described in the contractual documentation as including serious or repeated failure to follow reasonable instructions.

[11] Mastergard say that Mr Oso knew of his obligations by executing and accepting the relevant employment documentation, that in relation to the particular machine whose engine seized, he would have been well aware of the primacy of maintaining appropriate oil levels in the machine from his long and satisfactory career as a driver of such machines prior to becoming a Foreman, and that the Operations Manager Mr Smith, had specifically raised with Mr Oso the need for the latter to ensure that proper maintenance obligations were maintained together with the supporting record keeping.

[12] Effectively, this submission falls into two parts. The first relies exclusively on the contractual documentation between the parties, and the second relies on the evidence of the exchanges between Mr Smith on the one hand and Mr Oso on the other.

[13] As to the first, it is axiomatic that in accepting contractual obligations explicitly set out in writing, Mr Oso was committing himself to the performance of those obligations. But the difficulty with that self evident conclusion is that it does not take us very far. Nowhere in the contractual documentation, is Mr Oso bound to physically and personally check the oil levels of the machines of all the people who report to him, nor is there any explicit contractual requirement that Mr Oso is

invariably to personally attend to documentation supporting the maintenance requirements for those same machines. The nearest that the contractual documentation gets is the provision that Mr Oso is to *oversee/and if required assist with completion of daily checks and cleaning plus basic maintenance.*

[14] On the face of it, it might be thought that a straightforward construction of that provision goes far enough to require Mr Oso to complete tasks which were overlooked by a subordinate. Certainly, that is the essence of Mastergard's submission on the point. However, submissions for Mr Oso emphasise that the dismissal was not simply for failing to observe the contractual requirements, but more particularly was for failure to follow a lawful and reasonable instruction and the extent of that lawful and reasonable instruction is, on the evidence, in dispute. There is no doubt there were discussions between Mr Smith and Mr Oso but the question for the Authority is whether those discussions can be properly construed as a specific instruction for Mr Oso to perform certain tasks.

[15] A particularly difficulty with reliance on the contractual position exclusively is the fundamental fact that the machine in question blew up while Mr Oso was on annual leave. It follows that there was no basis at all on which the actual damage to the machine could have been prevented by Mr Oso on or about the day it happened. Certainly it is true that had Mr Oso thought to personally check the records of the machine and/or personally check the levels of oil in the machine before he went on leave, the disastrous consequences might have been averted.

[16] I leave for the meantime the question whether Mr Smith the Operations Manager gave Mr Oso any specific instructions in relation to plant maintenance and consider now the nature of the discussions between Mr Smith and Mr Oso at the disciplinary meeting on 20 January 2010. It is common ground that only Mr Smith and Mr Oso were present and that Mr Oso maintained that his obligation finished when he reminded his staff of their obligations. When I talked to Mr Oso in the investigation meeting, he told me that he trusted the driver of the Bobcat (actually his cousin) to do as he told him and Mr Oso agreed with the proposition that I put to him that he never actually saw his cousin taking the required steps. However, Mr Oso added that if he was not busy he would physically check the machines for oil but these checks performed by Mr Oso were occasional rather than regular. What he

maintained he did do regularly was tell his staff that they must perform the check every day.

[17] Indeed, that instruction is reiterated by the so-called DS31 form. This is a Mastergard form entitled *Driver's summary*. It requires the driver to record his personal information together with information relating to the particular piece of plant to be driven and then to check by ticking an *OK* that a number of aspects of the piece of plant were in order. No surprisingly, the first question on this list is engine oil. Most important of all, the first major subheading on the form reads as follows:

These checks are to be done before you leave the yard in the morning.

[18] That instruction is in capitals.

[19] In the circumstances, it is no surprise at all that Mastergard dismissed the driver of the Bobcat for serious misconduct. Not only was the Bobcat out of oil, but DS31 forms had not been completed for approximately four weeks. The question is whether Mr Oso has failed in a material obligation by the way in which he has conducted himself in this matter.

[20] I conclude that there is no contractual obligation on Mr Oso to physically perform the checks himself. However, an employee in a supervisory role must be failing in their duty if they have not ascertained that checks that ought to be made by a subordinate, have in fact been made. There are a number of ways in which such a regime could be undertaken, including occasional spot checks of particular machines or particular employees, review on a regular basis of the completed DS31 forms and the like.

[21] Quite clearly, none of those processes were in place. Had they been, the fact that the machine operator in question had failed for fully four weeks to complete a DS31 form would have been picked up by Mr Oso. The fact that it was not suggests that he had no process at all for reviewing this critical aspect of his subordinate's performance.

[22] Mr Oso, not unnaturally, relies in his submissions on the physical reality that he was not even present in the workplace when the machine failed. It follows, so the submission goes, that he was in no position to make the check that would have ensured that the machine did not fail. But that begs the question of why he had failed

to notice that the DS31 forms, forms which are required to be filled in by each driver *before you leave the yard in the morning* had not been completed on this machine for fully a month.

[23] I turn now to the question of whether Mr Smith gave Mr Oso specific instructions in respect of the checks to be made by subordinate staff. I am satisfied on the evidence the Authority heard that no such instruction was ever given. What I think happened was that there were a significant number of discussions between the principal protagonists, but no explicit instruction from Mr Smith requiring Mr Oso to check the information that he was given by his staff.

[24] I agree with Mr Sanders (advocate for Mr Oso) when he submits that the suggestion there was such an explicit instruction from Mr Smith has only been advanced by Mastergard since the termination of Mr Oso's employment. The allegation on which Mr Oso was dismissed is based exclusively on Mr Oso's contractual obligations and not the obligations that he might have derived from a verbal instruction from Mr Smith. It follows that I do not find myself much assisted by the argument around whether there was a verbal instruction or not; the dismissal was couched firmly on the footing of the contractual obligations that Mr Oso had accepted and I consider that there was no verbal instruction from Mr Smith, although there were continuing attempts by Mr Smith to mentor Mr Oso during the course of the employment relationship.

Was Mastergard's response appropriate?

[25] Mr Sanders, for Mr Oso, argues that Mastergard's response to Mr Oso's behaviour was not commensurate with the nature of the offence, that in effect Mastergard over reacted. He also contends that there are procedural difficulties in Mastergard's management of the issue. Those procedural infelicities are said to be the failure of Mastergard to put to Mr Oso their loss of trust and confidence in him and the fact that Mastergard's General Manager, who was the decision-maker, never heard Mr Oso's explanation face-to-face.

[26] Both of those deficiencies seem to me to have some force. Expressed another way, the procedure undertaken by Mastergard was both quick and somewhat disjointed. There was a disciplinary meeting on 20 January 2010 involving just Mr Oso and Mr Smith, and then literally two days later Mastergard's General

Manager tells Mr Oso that he is dismissed. Mastergard's General Manager, Mr Stapleton, never heard Mr Oso's explanation from his own mouth. While I was impressed with Mr Smith as a witness, it is unfair of Mastergard to put him in the position of having to carry to his General Manager the burden of representing to the ultimate decision-maker an employee's explanation for the complained of behaviour. That is not a good process and as Mr Sanders rightly observes, Mr Oso is entitled to be heard by the decision-maker, in this case Mr Stapleton, the General Manager of Mastergard: *Timu v. Waitemata District Health Board* [2007] ERNZ 419 applied.

[27] Furthermore, if the decision to dismiss Mr Oso had been made by Mr Smith (assuming he had the authority so to do) or, in the alternative if Mr Stapleton had conducted the employer's inquiries and then made the decision to dismiss, in either case, it would have been easy for the parties to deal with the question of whether or not trust and confidence had completely failed, or not. As it was, there is no evidence to suggest that Mr Smith and Mr Oso discussed trust and confidence (or its absence) in the disciplinary meeting on 20 January 2010, but it is plain from the dismissal letter dated two days later and signed by Mr Stapleton that *We find this to be a trust and confidence issue.*

Determination

[28] I am satisfied that Mr Oso is entitled to succeed to the extent that he has satisfied me that he has a personal grievance because the process adopted by Mastergard in investigating his behaviour fatally deprived him of the opportunity to be heard by Mastergard's decision-maker, Mr Stapleton. It follows that the decision to dismiss Mr Oso is not a decision that a fair and reasonable employer would have made in all the circumstances of this case: s.103A Employment Relations Act 2000, applied.

[29] However, I am required by s.124 of the Act to consider the question of contribution. The statute requires the Authority to reflect on whether the circumstances giving rise to the personal grievance were contributed to in any meaningful respect by the behaviour of the applicant.

[30] In this case, it is impossible not to conclude that if Mr Oso had not absolutely failed in his duty to ensure that proper checks were being carried out by his subordinates, Mastergard would not have lost a significant amount of money as a

consequence of the seizure of the engine of the Bobcat machine, and equally importantly, Mr Oso would not have been subjected to the disciplinary process which resulted in him losing his employment.

[31] In all the circumstances of the present case, I conclude that Mr Oso's contribution to the circumstances giving rise to his personal grievance is 100% and accordingly no remedies are payable by Mastergard notwithstanding the fact that Mr Oso has persuaded me that he has a personal grievance for unjustified dismissal.

Costs

[32] Costs are reserved.

James Crichton
Member of the Employment Relations Authority