

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2019] NZERA 656  
3057052

BETWEEN                      JEREMY AUGUST  
   Applicant  
  
A N D                              PAUL SMITH EARTHMOVING  
   2002 LIMITED  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Paul Mathews, advocate for the Applicant  
   Thomas Nation, counsel for the Respondent  
  
Investigation Meeting:        13 August 2019  
  
Submissions Received:        13 August 2019 from the Applicant  
   13 August 2019 from the Respondent  
  
Date of Determination:        14 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]        Jeremy August worked at Paul Smith Earthmoving 2002 Limited from May 2015 until 27 September 2018. Mr August was a senior operator, responsible for operating heavy machinery including excavation machinery on construction sites.

[2]        In 2018, Mr August worked on a construction project at a site in Dunsandle. Various issues arose on that site relating to strikes or damage occurring to underground services in the course of excavation and construction work. In response to this a new process was developed and put in place to ensure all staff working on excavation were aware of underground services and any excavation work was checked and signed off by the operator and a newly appointed excavations manager before excavation was undertaken.

[3] On 13 September 2018, in the course of carrying out excavation work on the site, Mr August struck an underground electrical cable and pulled it up.

[4] After investigating this incident, Paul Smith Earthmoving concluded that Mr August had failed to follow the new procedure, had shown a lack of judgement and had operated the machinery with a lack of safe practice. Paul Smith Earthmoving concluded that this was serious misconduct and it dismissed Mr August with immediate effect on 27 September 2018.

[5] Mr August raised a personal grievance for unjustified dismissal and a personal grievance for unjustified action causing disadvantage for the suspension that Paul Smith Earthmoving imposed on him prior to dismissal.

## **Issues**

### *Unjustified disadvantage*

[6] In order to resolve the unjustified disadvantage grievance I need to consider the following:

- (a) By suspending Mr August did Paul Smith Earthmoving cause disadvantage to Mr August's employment or a condition of his employment; and
- (b) If so, was Paul Smith Earthmoving's action justified?

### *Unjustified dismissal*

[7] In order to resolve the unjustified dismissal grievance I must decide whether Paul Smith Earthmoving's actions and how it acted were what a fair and reasonable employer could have done in all of the circumstances<sup>1</sup>. I will consider this in two areas:

- (a) Did Paul Smith Earthmoving follow a fair process in coming to the conclusion to dismiss i.e. did it act as a fair and reasonable employer could in the course of the process it carried out?
- (b) Was the decision to dismiss substantively justified i.e. did Paul Smith Earthmoving reach conclusions on what occurred and then the appropriate

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<sup>1</sup> Section 103A of the Employment Relations Act 2000.

sanction, which a fair and reasonable employer could have reached in all of the circumstances?

### *Remedies*

[8] If Mr August is successful with his unjustified disadvantage claim and/or his unjustified dismissal claim then I will need to consider remedies including reimbursement and compensation. I will also need to consider contribution if I award any monetary remedies to Mr August.

### **Unjustified disadvantage**

[9] Peter Burt, the Health and Safety Manager at Paul Smith Earthmoving, and Ray Singer, a Manager at Paul Smith Earthmoving, both became aware of the incident on 13 September 2018, in which Mr August struck an underground electrical cable.

[10] Mr Burt and Mr Singer were involved in investigating the incident and in the course of their investigation, they decided that Mr August needed to be removed from the site he was at. Mr August was transferred to another construction site, where there was limited excavation work.

[11] Then Mr Burt and Mr Singer considered the events further and decided Mr August should be suspended because they could not trust him to work safely in the interim period. So, on 20 September 2018, after a workplace health and safety meeting, Mr August was summonsed to Mr Singer's office. He was told that the investigation into his strike on the electrical cable had now moved to a HR matter and pending the outcome Paul Smith Earthmoving intended to place him on suspension. Mr August was then given a letter, which was inadvertently dated 30 August 2018 but should have been dated 20 September 2018, confirming that he was suspended on full pay.

*Did the suspension cause disadvantage to Mr August's employment or a condition of his employment?*

[12] The suspension caused a disadvantage to Mr August's employment.

*Were Paul Smith Earthmoving's actions justified?*

[13] The question of whether a suspension is justified turns on the way in which the suspension was effected and the reasons for the suspension i.e. the alleged behaviour giving rise to the suspension. These are issues of fair process and justification.

[14] In terms of process, an employer is not always required to tell an employee about a pending suspension with a view to the employee commenting on the proposal before a decision is made whether to effect a suspension or not<sup>2</sup>. If there is some valid reason why the employee's view on a proposed suspension should not be sought before a decision is made then an employer cannot be said to have acted unfairly.

[15] In this case, there was limited consultation with Mr August, in fact, it was not consultation at all but rather an explanation was given for placing him on suspension and then confirmation that he was suspended followed.

[16] I do accept that faced with concerns about Mr August's ongoing work and whether he could be trusted to work safely, Paul Smith Earthmoving did have a basis to consider that suspension was required. But these concerns did not obviate the requirement in this case to discuss suspension as a proposal, seeking Mr August's feedback on that before a final decision to suspend (or not) was made.

[17] So suspension may well have been substantively justified but the failure to consult over it properly and what was, in essence, the unilateral imposition of suspension renders the suspension an unjustified action which caused disadvantage.

### **Unjustified dismissal**

*Did Paul Smith Earthmoving follow a fair process?*

[18] The onus is on Paul Smith Earthmoving to satisfy me that Mr August's dismissal was justified. The first issue on the justification is, in coming to the decision to dismiss, based on a finding of serious misconduct, did Paul Smith Earthmoving follow a fair process.

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<sup>2</sup> *Graham v Airways Corporation of New Zealand Ltd* [2005] ERNZ 587

[19] Sections 4(1A) and 103A of the Employment Relations Act 2000 (the Act) are relevant to the issue of whether Paul Smith Earthmoving conducted a fair process. The matters for me to consider are:

- (a) Did Paul Smith Earthmoving investigate the events giving rise to the allegation of serious misconduct sufficiently?
- (b) Did Paul Smith Earthmoving outline the allegations giving rise to a potential finding of serious misconduct, explain the possible implications of a finding of serious misconduct and give all of the information it had that was relevant to the alleged serious misconduct, to Mr August for him to consider and respond to?
- (c) Did Paul Smith Earthmoving give Mr August a reasonable opportunity to respond to the allegations and the possible finding of serious misconduct, before it made its decision to dismiss?
- (d) Did Paul Smith Earthmoving consider properly any answers and explanations given by Mr August before it decided what had occurred and that this amounted to serious misconduct;
- (e) Did Paul Smith Earthmoving give Mr August an opportunity to respond to its conclusion that his conduct amounted to serious misconduct and dismissal was the appropriate sanction for that, before it imposed that sanction?
- (f) Did Paul Smith Earthmoving consider any responses given by Mr August to Paul Smith Earthmoving's decision, before it finally decided dismissal was the appropriate sanction?
- (g) If there was a failing by Paul Smith Earthmoving in any of the steps above, does that render the disciplinary process unfair?

*Did Paul Smith Earthmoving investigate the events giving rise to the allegation of serious misconduct sufficiently?*

[20] Mr Burt undertook most of the investigation into the strike incident. He spoke to a colleague of Mr August, who was working with him at the time of the strike and another

employee who was familiar with the work being undertaken. Mr Burt also spoke to the electrician who attended the site to deal with the cable.

[21] Mr Burt then started compiling an incident report. This report was not used in the disciplinary process and was not finalised until after the disciplinary process had been completed. Mr August was not given a copy of the report at any stage.

[22] Whilst the investigation appears satisfactory, my conclusion is that it was not complete and not finalised when Mr Burt and Mr Singer decided to take disciplinary action against Mr August. I accept that the incident report was not used in the disciplinary process but it seems to me that completing that formal and required aspect of the response to the incident was fundamental to deciding what steps might then be taken with Mr August.

[23] There are aspects of the incident report that highlight the flaws in the investigation:

- (a) The report concludes that Mr August admitted that he missed the direct steps required of him in relation to the proposed excavations work, those steps being required under the new process that had been implemented. However, there is no evidence that Mr August did in fact admit this. There was no interview with him prior to the disciplinary process, the only time he provided any information about the incident, to Mr Burt, was in the disciplinary meeting (which I will discuss further below). So, this conclusion was drawn after the disciplinary process and I am not satisfied that there was in fact any admission made by Mr August, in the disciplinary process, as recorded.
- (b) More specifically, the report records that Mr August failed to discuss the phase of work in question with the site excavations manager, but the report fails to record that the site excavations manager was not on site that day and therefore could not have been contacted by Mr August to discuss. There is no analysis or discussion of what Mr August should have done in lieu of discussing the phase of work with the site excavation manager, nor is there any analysis of whether the absence informed Mr August's decision to proceed with the excavation without the necessary discussion.
- (c) The report also records that Mr August was "fully conversant in the procedures and had undertaken to comply with them prior to this event." There is

however no evidence of this nor is there any evidence to show that this was discussed with Mr August such that he confirmed this. In fact, in my investigation meeting Mr August's explanation of his understanding of the procedure and sign off requirements was different from the process as explained by Mr Burt and Mr Singer. So, there existed a very real possibility that Mr August did not understand what was required of him, yet this was not investigated prior to the disciplinary process nor was it canvassed during the disciplinary meeting.

- (d) The report also refers to a "detailed interview" with Mr August which traversed all of the points in relation to the process and Mr August's alleged failings. As outlined above, this detailed interview did not occur prior to the disciplinary process and was in fact a reference to the disciplinary meeting. Notes from that meeting show that Mr August was actually only asked one question; what he had to say about the fact he had departed from the procedure.

[24] Standing back and taking an overall view of the investigation completed before the disciplinary process was commenced I find that Mr Burt and Mr Singer had preconceived ideas about Mr August's failings (based primarily on previous incidences of underground strikes by Mr August) and they simply looked to support those ideas in their investigation.

[25] The problem that then flowed from this was that once they believed their view of what had occurred had been supported, Mr Burt and Mr Singer predetermined that Mr August was guilty of serious misconduct and should be dismissed. Their investigation informed their view that Mr August was guilty of serious misconduct and should be dismissed unless there was an explanation from him that was completely different from what they understood to have occurred.

[26] As a consequence, when Mr August attended the disciplinary meeting a letter of termination had already been prepared.

*Did Paul Smith Earthmoving properly raise its concerns with Mr August and give him access to the information relevant to the allegations?*

[27] Having completed their investigation, Mr Burt and Mr Singer decided to progress with disciplinary action against Mr August. On 25 September 2018 Mr August was invited to attend a meeting with Mr Burt and Mr Singer. That invite was simply a text message asking him to attend a meeting at Mr Singer's office on 27 September 2018 at 11:00 am.

[28] Mr August was not given any information prior to the meeting on 27 September 2018. So he was not informed:

- (a) The nature of the meeting and that he was subject to a disciplinary process.
- (b) What the allegation was - that he had struck a cable and pulled it out of the ground.
- (c) That his conduct which had led to the cable strike was contrary to the new procedure, including what the new procedure was and what he was alleged to have done or not done in respect of that. Mr August had no indication of what he was alleged to have failed to have done in terms of the procedure and that this failing led to the cable strike.
- (d) That his conduct as alleged showed poor decision making or lack of judgement and that he did not carry out work, leading to the cable strike, in a safe manner.
- (e) That this conduct, leading to the cable strike, might amount to serious misconduct because of the nature of the failings, the severity of conduct and the possible implications (possible electrocution of workers on site, potential removal from site for Paul Smith Earthmoving and potential loss of the construction contract for Paul Smith Earthmoving).
- (f) That a finding of serious misconduct might result in the termination of his employment and why.
- (g) What information or evidence Paul Smith Earthmoving had to support the allegations such as statements from employees, photos, plans, site safety sheets that should have been completed, or other material (if such material existed).

[29] This was a complete failing by Paul Smith Earthmoving and it renders the process unfair as this failing informs many of the other steps.

*The opportunity to comment on the information and Paul Smith Earthmoving's consideration of any responses*

[30] It follows that if Mr August did not have the information to respond to, he did not have an adequate opportunity to respond. Further, if Mr August did not respond properly or fully then Paul Smith Earthmoving was unable to properly consider any explanation before it made decisions about the outcome. And then having made a decision about what the outcome would be Paul Smith Earthmoving did not give Mr August a chance to comment on that.

[31] Even if Mr August had been given a full and proper opportunity to comment I am not satisfied that the decision to dismiss him would have changed. Mr August was presented with a letter confirming his employment had been terminated with immediate effect at the end of the meeting on 27 September 2018, that letter had been prepared before the meeting commenced.

[32] It follows that the rest of the disciplinary process was also unfair.

*Conclusion on process*

[33] Given all of the above, I am satisfied that Paul Smith Earthmoving failed to carry out a fair disciplinary process.

*Was Paul Smith Earthmoving's decision substantively justified?*

[34] The disciplinary process was so flawed that a fair and reasonable employer could not rely on the conclusion that Mr August's actions in striking the underground cable and pulling it up amounted to serious misconduct. It follows that dismissing Mr August was not a conclusion a fair and reasonable employer could come to in all of the circumstances and the dismissal was not substantively justified.

## **Remedies**

[35] As Mr August has been successful with both of his personal grievance claims, I can award him any of the remedies provided for under s 123 of the Act; Mr August seeks compensation and reimbursement.

### *Reimbursement*

[36] Mr August seeks reimbursement for the earnings he has lost as a result of his unjustified dismissal pursuant to ss 123(1)(b) and 128 of the Act.

[37] I am satisfied that Mr August has a personal grievance and that he lost remuneration because of that grievance, so pursuant to s 128 of the Act I must award him the lesser of the lost remuneration or three months ordinary time remuneration.

[38] Mr August says his actual loss from his dismissal is \$8,638.00 (gross). This represents a gross amount and is less than three months ordinary time, so I will award this amount to Mr August (subject to contribution).

### *Compensation*

[39] I can award compensation for humiliation, loss of dignity and injury to feelings pursuant to s 123(1)(c) of the Act; this is compensation for the humiliation, loss of dignity and injury to feelings Mr August suffered because of the unjustified dismissal and unjustified disadvantage. I will deal with compensation for both grievances together.

[40] What I must consider is the effects of the suspension and the dismissal and the behaviour that gave rise to it on Mr August – i.e. identify the harm caused to him and the loss he suffered as a result. Then I must quantify that harm and loss by establishing where it sits on the spectrum of loss and harm seen in cases.<sup>3</sup>

[41] Mr August's evidence shows that as a result of the way he was treated:

- (a) He was in disbelief about the way he was treated, breaking down shortly after he was dismissed.
- (b) He became worried about his uncertain future, lack of income and finances generally especially given that he cared for his two teenage children.
- (c) He became depressed, this was not a medical diagnosis but Mr August's own reference to how he felt, he was demoralized and felt like his life was out of control.

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<sup>3</sup> *Richora Group Ltd v Cheng* [2018] NZEmpC 113.

(d) His self-esteem has suffered; he believes his mana amongst his peers has been taken away.

(e) He has become less social due to embarrassment and loss of confidence.

[42] So, Mr August is entitled to compensation for the loss and harm caused by the loss of dignity, humiliation and injury to feelings described above. When assessing the value of that compensable loss and harm I have considered the recent decisions of the Employment Court, which provide guidance on the assessments.<sup>4</sup>

[43] I assess the level of harm and loss to be slightly below the middle of the spectrum, and consider that the compensation sits at \$22,000.00.

### *Contribution*

[44] As I have awarded remedies to Mr August, I must now consider whether he contributed to the situation that gave rise to his grievance.<sup>5</sup>

[45] When assessing if Mr August's actions contributed to the situation that gave rise to his grievance I am looking for a causal link between his actions and the situation that gave rise to his dismissal.<sup>6</sup>

[46] I am satisfied that Mr August made a mistake in excavating as he did, by failing to properly consider the location of the underground cabling – he made assumptions about what he could do that were not safe.

[47] I accept that Mr August's actions contributed to his dismissal by Paul Smith Earthmoving. Therefore, I must reduce the remedies for this contributory behaviour and believe 30% is the appropriate reduction.

### **Conclusion**

[48] Paul Smith Earthmoving unjustifiably dismissed Mr August and treated him in an unjustified way causing disadvantage to his employment.

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<sup>4</sup> *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 71, *Waikato District Health Board v Kathleen Ann Archibald* [2017] NZEmpC 132, *Richora Group Ltd v Cheng* [2018] above at n2.

<sup>5</sup> Section 124 of the Employment Relations Act 2000.

<sup>6</sup> *Xtreme Dining Ltd v Dewar* [2016] NZEmpC 136

[49] In satisfaction of these grievances Paul Smith Earthmoving must pay Mr August the following amounts, which have been reduced by 30% for contribution:

(a) \$6,046.00 (gross) for lost remuneration pursuant to s 123(1)(b) and s 128 of the Employment Relations Act 2000; and

(b) \$15,400.00 without further deduction for compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

### **Costs**

[50] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[51] If they are not able to do so and a determination on costs is needed, any party seeking an order for costs may lodge and serve a memorandum on costs within 14 days of the date of this determination. The other party will then have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen  
Member of the Employment Relations Authority