

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2023] NZERA 28  
3135480

BETWEEN	MAHENDRAKUMAR SURATKAR Applicant
AND	INGHAMS ENTERPRISES (NZ) PTY LIMITED Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Alex Hope, counsel for the Applicant Andrea Dunseath, advocate for the Respondent
Investigation Meeting:	1 and 2 September 2022
Submissions received	21 September, 3 and 10 October 2022
Determination:	20 January 2023

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**DETERMINATION OF THE AUTHORITY**

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**A. Mahendrakumar Suratkar was justifiably dismissed by Inghams and does not have a personal grievance.**

**B. Costs are reserved.**

**Employment Relationship Problem**

[1] The applicant Mahendrakumar Suratkar was employed by the respondent Inghams Enterprises (NZ) Pty Ltd (Inghams) as a registered electrician. He was dismissed for serious misconduct on 18 October 2018, having by then served Inghams for about 13 years.

[2] He raised a personal grievance. When it could not be resolved in mediation, the Authority investigated Mr Suratkar's claim that his dismissal was not justified. At the same time the Authority considered whether he might have a different type of grievance.

[3] The principal witnesses heard in the Authority's investigation were Mr Suratkar, Tanvi his daughter, Rebecca Ogg, Inghams Plant Manager of its Waitoa factory, and Mike Horan, Senior Electrical Technician at Waitoa at the time of Mr Suratkar's dismissal. Counsel Mr Hope and advocate Ms Dunseath questioned all witnesses and provided comprehensive written submissions addressing relevant issues of fact and law.

[4] In the determination that follows, not all the evidence or submissions received by the Authority during its investigation has been referred to. The Authority is guided by s 174E of the Employment Relations Act 2000 (the ER Act) in that regard.

[5] This determination is issued outside the three-month time frame of s 174C of the ER Act. An extension of time has been given by the Chief of the Authority.

### **The repair work**

[6] Mr Suratkar was instructed to repair an electrical supply cable which had become frayed or damaged. He commenced the work at the Waitoa factory on 23 August 2018 during the day shift he was then working. When he was finished Mr Suratkar called Mr Horan his supervisor who inspected the work.

[7] Mr Horan considered that a basic and mandatory safety procedure had not been followed to ensure the flow of electricity was cut off from the repair area.

[8] He reported the incident and Mr Suratkar was interviewed by Ms Ogg the Plant Manager, about the way he had gone about the repair work.

[9] Mr Suratkar was asked to explain his apparent failure to lock out the electrical supply circuit before commencing the repair work.

[10] His actions were questioned by Inghams against written safety procedures or rules, and Company Rules contained in the collective agreement Mr Suratkar was employed under.

## **Safety rules or procedures**

[11] The subject of the relevant rules was a feature found on manually operated industrial electrical switch gear used for turning the flow of current off and on. Because of the risk that current may be turned on while a person such as an electrician is exposed to the risk of electrocution, the equipment is designed and constructed to allow for a padlock to be placed on it, preventing the switch from being moved. The operator turning the current off, places the padlock on the switch – the ‘Lockout’ step - and retains the key to it. Unless the key is used by the operator to unlock the padlock, anyone else would need to deliberately cut it off or pick the lock to remove it and activate the switch.

[12] The safety rules have a further requirement, that the operator is to place on the switch a tag, which is a stiff cardboard sign showing the operators name and a warning not to move the switch – the ‘Tagout’ step. The combined Lockout – Tagout steps are known by the acronym LOTO.

[13] Lockout and Tagout were not alternative steps for an operator to choose one or the other. The rules required both steps were to be taken to achieve a state of LOTO and eliminate or minimise risk. As with all rules whose purpose is safety, their integrity is dependent on them being always adhered to.

[14] Mr Suratkar explained to Ms Ogg why he had decided to take the Tag On step only, which he regarded as safe on its own. As an experienced registered electrician, he should have had no difficulty understanding and following the rules, which were for his safety as well as that of others. The same rules are incorporated into national regulatory standards governing the practice of electricians.

[15] It was argued before the Authority that what Mr Suratkar decided to do in the circumstances was safe, but the Authority considers that what he thought was safe is not the point when he was under a requirement to follow safety rules. He had been lawfully and reasonably directed to obey a certain rule having safety as its objective. He had been instructed and trained in a process his employer considered to be necessary for safety. Mr Suratkar had been given no discretion or permission to exempt himself from the rule, whatever his subjective assessment of his own actions may have been.

[16] Mr Suratkar and other workers had been trained in the requirements for Plant Isolation Lockout-Tagout Training, as recently as April 2018, when they attended a course and received detailed information about LOTO.

[17] The Authority finds that Inghams safety rules were plain, entirely comprehensible and, given the invisibility of electrical current and the unforgiving nature of electrocution, inarguably reasonable. It was not suggested to the Authority that the rules were deficient in the way they were expressed, or that following them could create an unexpected situation of danger.

[18] It was open to Ms Ogg to conclude from her enquiry that Mr Suratkar had breached a safety rule that he and other Inghams employees were required to comply with.

### **Company rules**

[19] Mr Suratkar's conditions of employment with Inghams included House Rules in which there was a list of items constituting..... 'serious misconduct for which the penalty is instant dismissal'. The items included

xi Wilful or deliberate acts affecting quality, safety or health

[20] Also listed in the Rules were items constituting, ..... 'less serious misconduct for which the penalty is a warning'. They included

iv. Failing to observe safe working practices or making proper use of safety equipment or clothing provided

xi. Failure to adhere to all Occupational Safety and Health requirements of the workplace

[21] Disciplinary provisions in the employment agreement allowed for a three-step warning procedure. This assumed importance in the employer's enquiry into Mr Suratkar's actions, because in June 2018 he had been given a final warning at the third step of the procedure. That level of warning was expressed to generally remain in force for 12 months.

## **Final warning**

[22] The June 2018 final warning was expressly for serious misconduct found by Ms Ogg on the part of Mr Suratkar on that occasion. Mr Suratkar did not challenge the final warning by raising a personal grievance.

[23] A final warning letter as a communication in writing between employer and employee, may be read in conjunction with advice contained in the employment agreement

The purpose of the final warning is to make clear to the employee that any further breaches of any nature may lead to dismissal.

## **Circumstances at the time of dismissal**

[24] The circumstances in August 2018 included the fact, as the Authority finds it to be, that in June 2018 an explicit warning had been given to Mr Suratkar as to the possibility of his being dismissed for any further breach committed within 12 months. The June 2018 final warning had been given to Mr Suratkar for poor exercise of judgement in a matter of health and safety. The conduct in August 2018 was of a similar nature.

## **Length of service**

[25] Mr Suratkar's 13 years of service was a circumstance Inghams could have recognised in his favour when considering disciplinary action.

[26] On the other hand, Inghams might have thought that with his length of service he was sufficiently experienced and familiar with safety rules to have known better than to breach them.

[27] During his 13 years there had been no disciplinary problems before receiving the June 2018 warning, and he had not been placed on a formal performance improvement plan. After concerns were raised about his performance, he had recently been assigned to day shift work, so that he could be supervised more closely by Mr Horan.

## **Age**

[28] Mr Suratkar was 64 years old when dismissed. He had been working in a period of approaching retirement when the accumulation of savings from earnings was of increasing importance.

## **Health**

[29] Mr Suratkar had been observed displaying volatility or irascibility from time-to-time, which may have been a sign of an underlying health problem explaining his failure to follow LOTO.

[30] In the Authority's view of this circumstance, what had been witnessed was well short of behaviour requiring the employer to intervene for the protection of the health and safety of Mr Suratkar himself and other Inghams employees.

[31] He did not raise health as an excuse and neither did his daughter suggest this as an explanation for the deficient approach he had taken to LOTO.

[32] Mr Suratkar had not seemed to lack awareness and perception about his actions, for on the day of the repair work incident he had sought photographic evidence of other work he had seen and which he regarded as comparable to his work Inghams had taken him to task about. In doing this he seems to have apprehended his conduct may have provided a basis for criticising his approach to the repair work.

[33] At the investigation meeting Mr Suratkar acknowledged he was partly to blame for what happened leading to his dismissal. He put his contribution at 50%, which has been regarded in case law as significant.

## **Inghams investigation of alleged misconduct**

[34] The Authority finds the employer conducted a thorough and fair investigation. It was unrushed and well documented. Mr Suratkar was given a copy of the record of interviews. His adult daughter was able to attend the interviews in support of him and interpret into Hindi if necessary. It may reasonably be supposed that if there were extenuating circumstances, such as seriously declining health the employer did not know about, a family member would have made the employer aware of those.

### **Conduct was capable of being serious misconduct**

[35] Inghams reasonably concluded that Mr Suratkar had breached safety rules and by doing so had put at risk his safety and that of others. Inghams found there was no excuse or matters of mitigation for his actions. Mr Suratkar had simply exempted himself from obeying the rules and had deemed his actions to be safe.

[36] The failure of Mr Suratkar was capable of being serious misconduct because of the inherent danger presented by live electricity, the flow of which he was trusted to control.

[37] The Authority finds that dismissal on notice was within the range of disciplinary response reasonably open to the employer, in all the circumstances at the time that action was taken.

### **Alternatives to dismissal**

[38] Ms Ogg told the Authority that in reaching her decision to dismiss, the critical factor had been whether Mr Suratkar could be relied upon in future to follow LOTO and safety rules generally. She described as an underlying issue the refusal by Mr Suratkar to accept that the LOTO process had to be followed on all occasions. Without a change in his attitude and approach, she saw a risk remaining that he would repeat the breach.

[39] He was assessed as being unlikely to accept the need to comply with LOTO procedures. This echoed a conclusion expressed in the final warning letter written by Ms Ogg only four months earlier

.... I do not have confidence in your judgement, specifically your approach to health and safety and compliance regulations.

[40] Ms Ogg looked for any indication that Mr Suratkar understood the rules and would in future make every effort to ensure he followed them. A favourable sign may have made the difference between a decision to dismiss and a decision to impose a lesser sanction.

[41] Ms Ogg said alternatives such as redeployment or transfer to a different site were not practical options. Redeployment to non-electrical maintenance work still required adherence to safety rules. There were no positions available at other Inghams plants which did not have the same high level of safety requirements as Waitoa.

### **Disparity of treatment**

[42] Another important matter Ms Ogg considered was whether Inghams had been relaxed about enforcing the rules on some occasions involving other employees. Mr Suratkar raised two instances he said showed a higher standard had unreasonably been imposed on him.

[43] If Inghams was shown to have tolerated breaches of its work-place safety rules, particularly fundamental and well-known rules in which it had trained staff, it could be accused of acting unfairly if it singled out one employee for disciplinary action when others had been allowed to breach the rules with apparent impunity.

[44] Nothing the Authority saw or found indicated this had been a situation existing in Inghams workplace, at the time Mr Suratkar was investigated for not complying with LOTO.

[45] The appearance to the Authority was that the Waitoa workplace was large and well managed, including the work of electricians, maintenance and production staff. It would be surprising if an employer having devoted time and effort to training in health and safety matters, then took no action when it became aware of breaches. That is not to say that such a thing could not happen, only that the Authority has found no evidence of it in Inghams workplace at material times.

[46] Mr Suratkar took a photo of a control panel which had been removed from its normal position mounted on a wall and left resting on a trolley in the production area near people working. Mr Horan, the senior electrician and supervisor of Mr Suratkar, investigated and found the panel was run with low voltage power and no one had been exposed to current.

[47] Mr Horan was also asked to comment on a photo taken by Mr Suratkar of a tag apparently placed by a contract electrician on a Variable Speed Drive (VSD). He advised that the photo, because of the angle from which it has been taken, did not reveal

enough for him to say whether the energy source had been isolated or not, because the energy source was located on the Motor Control Centre (MCC) not shown in the photo.

[48] Even accepting that Mr Suratkar from his observation of the VSD/MCC reasonably believed LOTO had not been followed, a single instance of non-compliance goes nowhere near establishing that Inghams, with knowledge that breaches were occurring, had tolerated or condoned them.

[49] Mr Suratkar had a responsibility to protect himself from harm in the workplace. Even if he had reason to believe that others were breaching the clear safety rules, that did not allow him to ignore those rules he had been trained in as a senior employee and blindly follow others in disregarding them.

[50] The Authority is satisfied that Ms Ogg when inquiring into the breach of Mr Suratkar consulted Mr Horan about the electrical equipment involved and the rules and how they applied, and whether there was any laxity shown in the plant about obeying safety rules. She found nothing that provided a reasonable excuse or explanation for Mr Suratkar's actions.

[51] Ms Ogg said it had been investigated whether there had been a common practice not to remove a particular guard, which had to be done before a padlock could be placed on the switch as required by LOTO. She concluded, reasonably the Authority finds, there was not such a practice. There was nothing to make removal of the IP guard difficult, impracticable or unsafe, and therefore no good reason why Mr Suratkar could not have lifted the guard and applied LOTO.

### **'Proposal to dismiss'**

[52] Inghams concluded its disciplinary investigation by writing to Mr Suratkar on 5 October 2018 to advise that his conduct on 23 August 2018 had been found to be serious misconduct. In her letter Ms Ogg also advised that she was 'proposing' to terminate his employment, but that before confirming any decision she was offering Mr Suratkar an opportunity to provide feedback on her proposal.

[53] Ms Ogg offered to receive feedback to the proposal either in person from Mr Suratkar or in writing.

[54] The Authority finds this was a genuine opportunity offered by Inghams to Mr Suratkar, to ensure that he had put forward everything he wanted to say to explain or mitigate his misconduct. To their ultimate cost some employees will hold back from putting forward matters of excuse or mitigation, so as not to make waves as they may see it, or antagonise the employer, and in the hope that matters will blow over quickly and quietly if they stay quiet instead of speaking up for themselves. It may be too late to do that once dismissal has been decided upon.

[55] Mr Suratkar was afforded an advantage and Inghams procedure in this regard cannot fairly be criticised as some sort of cruel or heartless prolonging of the disciplinary process.

[56] He did endeavour to provide a written response but it was not received by the date Ms Ogg had given. When it was discovered there had been a problem sending the response, Inghams allowed more time for it to be considered. Although the dismissal proposal was confirmed, nothing emerged from the Authority's investigation to show that Inghams was not sincere in giving Mr Suratkar a fair chance to be fully heard as to any extenuating circumstances before a final decision was made.

[57] In this regard the employer's actions were extensive, perhaps going beyond what was strictly necessary, but they should not be criticised for that. Section 103A(3)(c) of the ER Act requires an employer to give an employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action. Inghams fully discharged that obligation, the Authority finds.

### **Justifiable dismissal**

[58] To be justifiable, a dismissal or an action must, objectively, be capable of satisfying the test at s 103A of the the ER Act

S 103A(2)

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred

[59] In a recent judgment of the Employment Court, *QDA v EKD*<sup>1</sup>, the Court agreed that issues of health and safety have a special status when it comes to justification for dismissal and are ‘not just another ingredient in the mix’. The Court agreed that where safety issues are involved, caution should be exercised before a decision contrary to the employer’s is reached.

[60] The Authority is satisfied that the dismissal of Mr Suratkar was justifiable. In all the circumstances the employer’s actions and how the employer acted were what a fair and reasonable employer could have done at the time.

[61] The test of s 103A of the ER Act has been met by Inghams.

[62] It follows that the employment relationship problem must be resolved with a determination by the Authority that Mr Suratkar does not have a personal grievance arising from his dismissal or the circumstances surrounding it.

### **Costs**

[63] Inghams is entitled to costs. Mr Suratkar has been in receipt of legal aid and therefore any order must be made within the parameters of the Legal Services Act 2011, s 45 in particular.

[64] Any application for costs is to be made within 21 days of the date of this determination. Any reply must be made within 21 days after an application has been made.

Alastair Dumbleton  
Member of the Employment Relations Authority

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<sup>1</sup> [2021] NZEmpC 139