**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

[2012] NZERA Auckland 324
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| | BETWEEN | NEIL ADAMS<br>Applicant |
| | A N D | HIREQUIP LIMITED<br>Respondent |

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| Member of Authority: | James Crichton |
| Representatives: | Roger Bowden, Counsel for Applicant<br>Ralph Webster, Advocate for Respondent |
| Investigation meeting: | 8 August 2012 at Auckland |
| Date of Determination: | 14 September 2012 |

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] The applicant (Mr Adams) alleges that he was unjustifiably dismissed from his employment. The respondent (Hirequip) resists that contention.

[2] Mr Adams was employed as manager of the Whangarei branch of Hirequip at the time of his dismissal on 16 June 2010. He had some 6 years experience in the hire industry. He had begun his employment with Hirequip on 12 June 2007 and was promoted to Branch Manager Whangarei on 1 March 2009.

[3] On 5 June 2010, a piece of plant known as a cherrypicker caught fire while on hire. It is common ground that Mr Adams' manager was unaware of this incident until 11 June 2010, fully a week after the incident. There is dispute between the parties as to how the Regional Manager, Mr Nathan Abbott, found out about the incident. His evidence is that he found out about the incident himself by observing the piece of machinery, fire damaged, in the Whangarei branch yard whereas Mr Adams maintains that he told Mr Abbott about the damaged plant at around

2.30pm on the afternoon of 11 June 2010 in the management offices of the Whangarei branch. Either way, formal notification beyond the Whangarei Branch Manager did not happen until 11 June 2010.

[4] Hirequip, referring to Mr Adams' employment agreement and its own policies and procedures, points out that in failing to report the incident, Mr Adams failed in his obligations.

[5] Forthwith on the receipt of the information about the damaged cherrypicker, Hirequip commenced an investigation. A disciplinary meeting resulted on 16 June 2010 and in the result, Mr Adams was dismissed from his employment summarily and that decision was confirmed by letter of even date.

[6] The matter proceeded to mediation without result and came before the Authority thereafter for determination.

**Issues**

[7] The Authority needs to consider the following issues:

(a) What terms of the employment are relevant;

(b) Was the investigation conducted by Hirequip fair and just; and

(c) Are there any other factors the Authority ought to consider?

**What terms of the employment are relevant?**

[8] There are two groups of provisions which the Authority needs to refer to. The first group is the specific terms and conditions of the employment and the second is Hirequip's health and safety policy and procedures.

[9] In fact, the two groups of procedures are effectively linked because one of the key provisions in Mr Adams' employment agreement, to use the language of counsel for the applicant, *"incorporates the company health and safety policy"*. At clause 20 of Mr Adams' employment agreement, there is a provision relating to occupational health and safety. The obligations under clause 20.1 are mandatory, that is, the language is directive. Clause 20.1 begins with the injunction *"You must"* and then lists nine separate injunctions, of which the second is to comply with any safety code of the employer or any government agency. It is accepted by both parties that that

provision constitutes an incorporation of Hirequip's health and safety policy within the employment agreement.

[10] But the employment agreement itself has other relevant provisions which the Authority refers to now.

[11] Three injunctions in clause 20.1 of the employment agreement are especially relevant to the instant matter. They are:

> *(i)* *A requirement to report all faulty machinery or equipment to us;*
>
> *(ii)* *A requirement to report all accidents to us promptly;*
>
> *(iii)* *A requirement to tell us if you become aware of any unsafe practices, equipment or that like.*

[12] For present purposes, and perhaps most important of all, clause 20.2 of the employment agreement is in the following terms:

> *Any breach of this clause 20 is serious misconduct which could result in your dismissal without notice.*

[13] It is that provision which Hirequip relies upon for the dismissal of Mr Adams. Hirequip says that not only did Mr Adams breach the company's health and safety policy (about which more shortly), but also failed to report to it faulty equipment, failed to report an accident, and failed to tell it of any unsafe equipment.

[14] Turning now to the health and safety policy and procedures of the employer, the Authority refers now to clause 14 of Hirequip's health and safety policy and procedures. That clause is entitled *"Incident reporting, recording and investigation"*. The essence of the provision is to cast an onus on all staff to report work injuries to the manager or supervisor, at the time of the incident and for the manager or supervisor to take immediate remedial action.

[15] More importantly for our purposes, *"near miss incidents"* must also be reported to the manager or supervisor, even where there is no injury and the manager or supervisor must record details of the incident on the appropriate form *"which is required to be sent to the Regional Manager and the Health and Safety Manager within 24 hours of the incident"*.

[16] The Authority interposes at this point to note that Hirequip's case is that Mr Adams, as the Branch Manager, had an absolute obligation under the terms of this policy to notify the Regional Manager and the Health and Safety Manager within 24 hours of the incident, which he failed to do.

[17] Critically, for the purposes of the present dispute, the company's policy goes on to define the circumstances in which such reporting must take place as including *"any serious potential incident"*, whether or not injury occurred. That sub-paragraph makes clear by way of example that fire or explosion, or fall from height, ought to trigger the desired response.

[18] Given that the factual matrix involves a serious potential incident, the fact that no one was actually hurt is beside the point. The subject unit caught fire and it caught fire with the hirer in the cherrypicker with its lift extended, so, at the time that the machine caught fire, the hirer was in the basket at the top of the cherrypicker and therefore with the fire underneath him. Mercifully, he was able to extract himself without injury but it is conceivable that there could have been a situation involving *"fall from height"*, for instance. The Authority notes that that very phrase is included in Hirequip's policy as being an example of a serious **potential** incident. Of course, there was an actual fire and that in itself ought to have attracted the appropriate response.

[19] By way of summary then, it is plain that both in terms of the employment agreement itself and the health and safety policy and procedures of Hirequip which are effectively incorporated into the employment agreement, Mr Adams had certain explicit obligations which his failure to observe could result in a finding of serious misconduct and dismissal without notice.

**Was the investigation fair and just?**

[20] It will be recalled that Mr Adams maintains that he told the Regional Manager, Mr Abbott, of the fire in the cherrypicker at 2.30pm or thereabouts on 11 June 2010. Mr Abbott rejects that claim out of hand and says that he discovered the damage to the cherrypicker himself while inspecting the yard of the Whangarei branch on a visit. But even if Mr Adams' recollection of events is accepted (that is, it is accepted that he told the Regional Manager about the fire on 11 June 2010), that is still fully a week

after the fire happened and well outside the 24 hour rule stipulated in the health and safety policy.

[21] It is common ground that Mr Adams did not notify Hirequip within 24 hours. He says that was an inadvertent omission occasioned simply by him being busy. Hirequip says that the omission was wilful and characteristic of the health and safety issues in the branch. Counsel for Mr Adams urges on the Authority the view that the general performance of the branch in health and safety matters cannot be called in aid by Hirequip and the Authority agrees with that submission. The reason that the Authority accepts that submission is that it is plain on the evidence that Hirequip did not rely on the "slack" health and safety culture which it says existed at Whangarei branch to support the disciplinary action against Mr Adams. Hirequip simply proceeded on the footing that Mr Adams had certain obligations under his employment agreement and he failed to honour them.

[22] But even on the narrow basis that that analysis allows, Hirequip is able to rely on the clear terms of the employment agreement, the relevant terms of which are mandatory and breach of which is expressed to constitute serious misconduct.

[23] It is plain that Mr Adams had certain specific obligations which he failed to perform in a timely manner, if at all.

[24] To review the context of this matter, it is illustrative to go through the timeline which was put before the Authority during the investigation meeting. On 7 May 2010, the cherrypicker at the centre of this employment relationship problem was hired to Phoenix Boats. It was returned to Hirequip on 18 May 2010 with the customer complaining there was a fuel leak. What should have happened then was that the machine should have been "red-tagged" to identify the fact that the machine was defective.

[25] Instead of that, no steps were taken in respect of the reported fuel leak and in particular, Mr Adams, as the branch manager, was not informed of the position.

[26] The machine was re-hired on 28 May 2010 to another party, apparently without incident.

[27] Then on 4 June 2010, the subject machine was hired back to Phoenix Boats and the following day, while its operator was in the basket 9 metres above ground, the

machine caught fire. The operator had to make the choice of slowly descending towards the fire using the device's own process, or jumping out and taking his chances. In the result, he allowed the machine to take him down partway and then jumped. Thankfully,he was unhurt. He then extinguished the fire with a fire extinguisher.

[28] Subsequently, the client kept using the machine as he had work that he required it for but he had somebody standing by with a fire extinguisher to protect him after the initial problem had occurred on Saturday, 5 June 2010. The machine was returned to Hirequip on Wednesday, 9 June 2010 and a staff member who received the cherrypicker back into Hirequip's possession reported the incident to Mr Adams.

[29] Clearly, Mr Adams cannot be held responsible for failing to notify his superior of the incident until he himself knew about it. It is common ground that he first became aware of the incident around 3.30pm on Wednesday, 9 June 2010 and accordingly, he ought to have notified the employer by 10 June 2010, but by common consent failed to do so.

[30] Mr Adams also protests that he should not be held responsible for the series of failings of other staff in the way in which they dealt with this particular piece of machinery, particularly when it had been reported as being defective the previous month, but nothing was done to remedy the problem then.

[31] Mr Adams' argument on this point can only be taken so far. Certainly, there is something to be said for his contention that other people let him down. But given the primacy accorded to management roles in the health and safety policy and the important additional obligations that managers and supervisors have under that policy, the argument Mr Adams advances has its limits. It could be said on Hirequip's behalf that Mr Adams, in failing to ensure that his staff knew what ought to be done when there was a problem, was himself culpable.

[32] In any event, the short point is that whatever happened prior to Mr Adams finding out about the problem, it is plain that he did not fulfil his obligations once he knew there was a problem with this particular machine. What is more, there is dispute about whether he ever affirmatively told his manager about the problem at all. Mr Abbott, the Regional Manager, was adamant that he found out about the problem himself by seeing the machine in the yard, and that Mr Adams had not told him about

it. On balance, the Authority prefers Mr Abbott's recollection of events. Mr Abbott no longer works for Hirequip and gave his evidence by a telephone link up from Australia. There would be no reason for him to make up a story that Mr Adams had not told him something when he had, given that he (Mr Abbott) was no longer in the employment and therefore had absolutely nothing to gain from advancing an inaccurate proposition like that.

[33] What is more, the Authority did not find Mr Adams' evidence particularly persuasive about this aspect. Furthermore, the claim by Mr Adams that he had told his manager about the problem before Mr Abbott found the machine himself is inconsistent with the other evidence about Mr Adams' behaviour. In particular, Mr Adams took no steps whatever to inquire into the circumstances of the fire. It seems to the Authority that if Mr Adams had started making inquiries, it would have been more likely that he would have reported to his regional manager, but in fact he certainly had taken no steps at all to investigate.

[34] Mr Adams would say that he did not have time to conduct investigations because he was involved in management meetings away from the branch, but clearly, he knew at 3.30pm on Wednesday afternoon and he could have initiated inquiries immediately, if he had been minded to and if he had given the matter the importance that the company policy required.

[35] On balance then, the Authority thinks it more likely than not that Mr Adams did not tell Mr Abbott about the fire. Certainly, the conclusion reached by Hirequip when it did its investigation was that Mr Adams had not reported the matter at all and had taken no steps to investigate the matter either. To support that conclusion, the Authority notes the evidence it heard from Mr Abbott was to the effect that Mr Adams had never claimed before the Authority's investigation meeting that he had told Mr Abbott about the accident to the machine. Nor had Mr Adams claimed at the time of the incident that he had logged the incident on Hirequip's intranet, although he made that claim too in his evidence to the Authority.

[36] When Mr Adams was first interviewed by Mr Abbott on 11 June 2010, his explanations for not advising of the incident promptly (as soon as he heard about it), was that he was *"working on a spreadsheet and thought it was late and that he would raise it the next day at our meeting (a management meeting in Auckland)"*.

[37] Mr Abbott reports Mr Adams as saying that he never considered filling out an incident report and that the matter was not serious because the customer was not injured.

[38] Based on his concerns about the incident and the fact that there had been no investigation of it, Mr Abbott then commissioned a full report from Hirequip's National Safety Manager, Mr Hinton, and that report issued on 16 June 2010. Its principal finding was that the event was an extremely serious one and that there was an actual risk of extreme harm to the customer and a potential risk of a fatality.

[39] A final disciplinary meeting was held on the same date as that report issued. The final disciplinary meeting is characterised by a series of admissions by Mr Adams in which he confirmed that he had let his regional manager down, admitted that he should have reported the matter immediately, that his failure to report was *"a major oversight"*, and that he had read and understood the company's health and safety policy. He concluded by indicating that he understand that the role of branch manager was critical in establishing the culture in the branch and he understood the need to *"lead by example"* and that there was no excuse for what he had done.

[40] Mr Adams had a support person at the second disciplinary meeting and had every opportunity to offer any explanation he chose to the employer. The notes of the meeting, which were not challenged, disclose a willingness on Mr Adams' part to accept wrongdoing but fail to offer any credible explanation about why he did not give the matter the priority it deserved. Mr Adams appeared to accept that as the branch leader he was responsible for the culture in the branch and the fact that this very incident had disclosed failures by other staff members would, by implication, reflect negatively on him as well.

[41] In all the circumstances, the Authority is satisfied that the employer undertook a proper process. There was an initial inquiry to establish the facts and then a full safety audit followed which identified the seriousness of the situation which Mr Adams had failed to respond to. Then a formal disciplinary meeting was undertaken where Mr Adams had a support person present. In that meeting, Mr Adams appears to have accepted wrongdoing without offering any viable explanation.

[42] In the end, Mr Adams committed fundamental breaches of his employment agreement and of company policy relating to health and safety matters. The way in which the various provisions are expressed are mandatory and on the face of it, very little residual discretion is contemplated where a breach is identified. That is, in itself, unremarkable. The Health and Safety in Employment Act imposes very serious obligations on all parties to the employment relationship and an employer is right to emphasise the primacy of those obligations in the obligations that it requires of its staff in the employment relationship. Those obligations are all the more onerous where management roles are in question. Here, on the facts, there was a complete failure of Mr Adams to fulfil any of his obligations in respect of this incident. This is not simply a failure to file an appropriate report. Rather, this is a failure to undertake a basic duty of a branch manager to ensure the safety of co-workers and clients.

**Are there other matters the Authority needs to consider?**

[43] Hirequip argued that the health and safety culture in the Whangarei branch under Mr Adams' leadership was poor and that that was a factor that ought to be brought to bear in respect of the employment relationship problem between the parties. The Authority has already made clear that it does not agree with that thesis. There is no evidence that the health and safety culture in the branch was put into issue during the disciplinary inquiry led by Mr Abbott save to the extent that it related to the particular incident which led to findings of fault against Mr Adams.

[44] While the Authority was happy to have the evidence presented to it in relation to the context in which the employment relationship problem developed, the Authority accepted Mr Bowden's contention that Hirequip's anxiety about the general performance of the branch in health and safety matters could not be a factor that was relevant to justifying Mr Adams' dismissal because it was never put to him fair and square during the disciplinary process.

**Determination**

[45] The Authority is satisfied that a fair and reasonable employer would have dismissed Mr Adams after the conducting of a proper investigation: s.103A Employment Relations Act 2000 (old test) applied.

[46] As the Authority has already indicated, this was not an insignificant failure to file a report but a fundamental breach of a central obligation of a branch manager to

ensure and contribute to the safety of clients and colleagues. By failing to fulfil his obligations in terms of his employment agreement, Mr Adams fundamentally breached his responsibilities to his employer and fell clearly within the terms of the explicit provision in his employment agreement which allowed a finding of serious misconduct to be made. The decision of Hirequip to summarily dismiss is a decision which was available to Hirequip to make.

[47] It follows from the foregoing paragraphs that Mr Adams' claim fails in its entirety.

**Costs**

[48] Costs are reserved.

James Crichton
Member of the Employment Relations Authority