

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2015] NZERA Christchurch 124  
5520852

BETWEEN            PAUL FRANK BAINES  
Applicant

A N D                DANIEL SMITH INDUSTRIES  
LIMITED  
Respondent

Member of Authority:    Helen Doyle

Representatives:        Tim MacKenzie and Charlene Sell, Counsel for the  
Applicant  
Daniel Smith, Advocate for the Respondent

Investigation Meeting:    27 May 2015 at Christchurch

Submissions Received:    On the day

Date of Determination:    26 August 2015

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**DETERMINATION OF THE AUTHORITY**

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- A     Paul Baines was unjustifiably dismissed.**
- B     Taking contribution into account Daniel Smith Industries Limited is to pay Paul Baines:**
- (i)     \$5235.23 gross being reimbursement of lost wages under s 123(1) (b) of the Employment Relations Act 2000.**
- (ii)    \$4,800 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1)(c)(i) of the Employment Relations Act 2000.**
- C     Costs are reserved and a timetable set for submissions.**

**Employment relationship problem**

[1] Paul Frank Baines was employed by Daniel Smith Industries Limited (DSI) from 7 April 2014 as a crane operator. He was party to a written individual employment agreement with DSI signed on 2 April 2014. Mr Baines says that he was unjustifiably dismissed from his employment with DSI on 29 August 2014 for using his cell phone while operating a crane. Mr Baines denies using his cell phone while he was operating the crane and says that there was no opportunity for him to give his explanation before he was summarily dismissed.

[2] DSI is a duly incorporated company having its registered office at Rangiora and carrying on the business of crane rental and civil engineering contractors. Daniel Smith and his wife Annette Smith are directors of DSI. Mr Smith made the decision to dismiss Mr Baines. He does not accept the dismissal was unjustified. He says that there were repetitive safety breaches when Mr Baines used his cell phone while operating a crane during work hours and after instructions and warnings not to do this.

[3] Mr Baines seeks reimbursement of three months lost wages from the date his employment was terminated taking into account money received by him after that period, compensation and reimbursement of costs.

**The Employment Agreement and Health and Safety Policies**

[4] Clause 6 of the individual employment agreement between the parties is about health and safety. Clause 6.6 provides that failure to comply with any of the Health and Safety rules and requirements may result in instant dismissal.

[5] Clause 8.4 provides that *Dismissal for serious breaches of the condition of this Contract will be instant and no notice or pay in lieu of notice will be given.*

[6] DSI has a comprehensive health and safety policy.

**Previous incidents referred to in warning letter dated 26 August 2014**

[7] Mr Baines worked at two sites during employment by DSI. The first was the South Base site, 151 Cambridge Terrace and the second was the Ferrymead Bridge site.

[8] On 26 August 2014 Mr Baines received the following letter which provided as follows:

*Re: Important Safety/Employment Contract Notice*

*On/about 10 July 2014 at the South Base site I spoke to you and advised you of a complaint by the client South Base that when you are operating crane you are always using your cell phone/not applying the appropriate concentration/effort to the crane driving task.*

*Again on/about 16 July 2014 at South Base I was on site and observed you in the crane cabin on phone for about 5 to 8 minutes. I approached you and said it was not acceptable and that phones were not be used for the personal use during work hours.*

*On/about Wednesday 13 August 2014, HEB supervisor Werner Du Plessis phoned me with a complaint about your phone use and again on Monday 25 August 2014 requesting that you be replaced with another driver for the reasoning that your continual ongoing use of the phone during work hours is distracting you from crane operations. This is a safety issue.*

*As from today your personal phone is to be left in your car or the smoko room. If it is found that during working hours when operating the crane you are using your phone, your employment will be terminated.*

*You are operating a large 60 ton crane that needs concentration and your full attention for simple safety reasons. Take it seriously and do what you were paid for, to safely and effectively operate crane and complete labouring tasks when crane is not be utilised.*

[9] Mr Baines said that he was surprised to receive the letter and was wondering what to do about the warning as it did not seem to him to be fair but he was then dismissed.

[10] He could not recall being advised of any complaint/concern by South Base about using his cell phone on 10 July 2014. Mr Smith was adamant that there had been a discussion and said that he told Mr Baines that he was paid to drive the crane and not talk on the phone. I accept Mr Smith's evidence as more likely that he did raise a verbal concern with Mr Baines about a complaint of cell phone use on or about 10 July 2014.

[11] Mr Baines did recall a brief discussion with Mr Smith about using his cell phone at work on 16 July 2014. In answer to a question from Mr Smith he agreed that he was using a cell phone but he did not accept it was for personal use but for work related use. Mr Baines said that he was required to have his cell phone with him at all

times in the crane when he was working at South Base construction site. He also said that the crane was not operating at the time when Mr Smith approached him. Mr Smith's evidence was that he had visited the site and observed Mr Baines speaking on the phone for 5 to 8 minutes while the crane was operating and approached him with the advice that it was dangerous and unacceptable to use the cell phone when operating the crane during work time.

[12] Mr Baines said that he would use his phone as an entertainment device but during breaks only.

[13] Mr Baines recalled a telephone call from Mr Smith in July 2014 in which he told him *stop using your bloody phone*.

[14] Mr Baines did recall on or about 13 August 2014 a brief discussion with HEB Construction foreman, Shannon Stuut about concentration on the job while doing crane lifts. Mr Stuut said that Mr Baines was on his cell phone. Mr Baines could not recall if he was on his cell phone on that date.

[15] Mr Baines said that the 25 August 2014 date in the letter of 26 August 2014 related to a safety meeting at which the topic of use of cell phones was discussed at a toolbox meeting but not personally directed towards him but to all those present. I accept that the minutes from that meeting confirm cell phone use was discussed generally.

[16] I tried to establish what communication, if any, there had been before the 26 August warning letter was issued. Mr Smith was sure there had been a telephone call with Mr Baines before the letter containing the warning was provided. If there was I am not satisfied that it provided a proper opportunity for Mr Baines to understand who had made the complaint that he had been using his cell phone and when and where it was alleged to have occurred. Mr Smith it appears accepted that complaints from HEB Construction (HEB) about Mr Baines conduct were justified. HEB was not Mr Baines employer but Mr Smith said that he had a relationship of trust with Mr du Plessis the project manager and Mr Stuut the foreman at HEB. I find that a fair and reasonable employer could have been expected to have carried out its own investigation. There was no real opportunity for Mr Baines to respond to the allegations I find before the warning letter was received.

[17] Mr Smith did make it clear to Mr Baines in the letter of 26 August 2014 his concerns about cell phone use. He said that he relied on the incidents in the letter in making the decision to dismiss.

### **Events leading to the dismissal**

[18] Mr Baines in his oral evidence said that he was advised of the complaint that led to his dismissal by Mr Smith on 28 August 2014. In his written evidence he said that Mr Smith called him on the morning of 29 August 2014 and advised of the complaint. Having heard the evidence I find it more likely that Mr Smith advised Mr Baines on 29 August 2014 about the complaint. That is consistent with the emails from Mr du Plessis to Mr Smith dated 29 and 30 August 2014 both of which refer to a complaint of cell phone use being received on the morning of 29 August 2014.

[19] Mr Baines talked to Mr du Plessis at HEB about the complaint at Mr Smith's request.

[20] Mr Baines said that he advised Mr du Plessis that he was operating the crane at the Ferrymead Bridge on 28 August 2014 and the way it was set up was slightly out of balance so he was keeping an eye on the dials indicating its balance. He looked up and saw an HEB employee signalling for him to lift the crane and he assumed that he probably missed his signal for a second or two as he was watching the dials.

[21] Mr Baines referred in his explanation to Mr du Plessis to the events of 28 August but was a little uncertain if he and Mr du Plessis *were on the same page*. Mr Baines said that he was not told by Mr du Plessis who had complained about him and he did not know what they had seen or said to Mr du Plessis about the incident. I am not satisfied that it was clear to Mr Baines that the complaint related to the incident on 28 August or not. Mr Smith in his evidence said that he thought Mr Stuut had observed Mr Baines. I am not satisfied that Mr Baines was told who had made the complaint. There is no clear evidence for me to conclude who saw Mr Baines and then made a complaint.

[22] Mr Baines felt that Mr du Plessis accepted his explanation although I do not think that likely given what then occurred. Mr Smith also confirmed that Mr du Plessis and Mr Stuut did not accept the explanation.

[23] Mr Baines received a further call from Mr Smith on 29 August 2014 to say that the matter was serious and could result in a loss of job. Mr du Plessis had sent an email at 10.59am to Mr Smith in which he had referred to the conversation of 25 August and that day [29 August] about receiving another complaint of Mr Baines on his phone during lifting operation. There was a request that Mr Baines be replaced with immediate effect. Mr Stuut was mentioned as being available to operate the crane for the remainder of the day.

[24] Mr Smith said that between 11.00am to 12.15pm he made the decision to dismiss Mr Baines. A copy of Mr du Plessis' email was sent to Mr Baines by text at 1.36pm on 29 August.

[25] Mr Baines carried on working until about 5pm when Mr Stuut came to relieve him. Mr Baines received a letter by way of email from Mr Smith when he returned home that provided his employment was terminated from 4.30pm on 29 August 2014 for serious breaches of the employment agreement.

[26] The serious safety breach was described in the letter of termination as:

*Your non-compliance and continual use of your cell phone during work and when operating the crane is a 'dangerous action. You have been warned on multiple occasions but unfortunately you have not taken the necessary actions to stop you cell phone usage. This is a serious 'safety' breach of the conditions of you Employment Contract.*

### **The issues**

[27] The issues for the Authority to determine in this matter are as follows:

- (i) Was Paul Baines dismissal justified?
- (ii) If he was unjustifiably dismissed then what if any remedies is he entitled to and are there issues of mitigation and contribution?

### **Was Paul Baines dismissal justified?**

[28] Section 103A of the Act provides the test of justification which I must apply. That test requires the Authority to objectively assess whether the actions of DSI and

how it acted were what a fair and reasonable employer could have done in all the circumstances at the time Mr Baines was dismissed.

[29] There are four procedural fairness tests in s 103A (3) of the Act that the Authority must consider together with other factors that it thinks appropriate under s 103A (4). The Authority must not determine a dismissal to be unjustified if the defects in the process were minor and did not result in an employee being treated unfairly under s 103(5) of the Act.

[30] A fair and reasonable employer will also comply with statutory good faith obligations.

[31] Procedural fairness under s 103A of the Act requires sufficient investigation of allegations, raising of concerns and giving an employee a reasonable opportunity to respond. The employer needs to genuinely consider that response before dismissing or taking actions such as issuing a warning.

[32] Mr Smith did not undertake his own investigation of the allegation on 29 August 2014. Mr Baines had no opportunity to explain the situation to him and Mr Smith therefore could not consider any explanation from Mr Baines before he proceeded to dismiss him. Mr Smith relied exclusively on Mr du Plessis's view that the complaint was made out. Mr Baines I find was not provided with any information as to who had made the complaint and what they saw. He could not properly and sensibly answer the allegation.

[33] The absence of compliance with the four procedural fairness requirements in the test undermines the ability of DSI to justify Mr Baines dismissal.

[34] The defects in the process also undermine the substance or reason for the dismissal. A fair and reasonable employer could conclude use of a cell phone whilst operating a crane to be a serious health and safety concern which may justify termination of employment particularly where there had been previous justified warnings.

[35] Mr Smith needed to be satisfied notwithstanding any warnings that Mr Baines had engaged in conduct on either 28 or 29 August that justified dismissal. Mr Baines denied that he had and I do not find, in the absence of a fair process which involved hearing from Mr Baines, Mr Smith could be satisfied that he had used his cell phone.

[36] As to the warnings, Mr Smith had two serious discussions in July 2014 with Mr Baines about using his cell phone whilst operating cranes or working but I could not be satisfied that they were approached as part of a disciplinary process. There was no express notice to Mr Baines in July that further use of the cell phone would put the employment relationship in jeopardy. Such notice was important because at the South Base site Mr Baines was told he should have his cell phone with him as a means of communication. The important issue was when it is appropriate to use a cell phone and Mr Smith had to have confidence in Mr Baines that he would limit any use of his cell phone appropriately.

[37] Mr Smith had no first-hand knowledge of the August matters and Mr Baines no notice of the exact allegations or an opportunity to respond before he received the warning letter on 26 August 2014.

[38] I find in conclusion that Mr Baines dismissal was not procedurally or substantively justified. The lack of process fundamentally undermines the substantive justification of the dismissal. Objectively assessed a fair and reasonable employer could not in all the circumstances have reached the decision to dismiss. Mr Baines has a personal grievance that he was unjustifiably dismissed. I now turn to remedies.

### **What if any remedies should be awarded?**

#### *Lost wages*

[39] Mr Baines attempted to mitigate his loss and obtained work initially on a casual basis and then permanently shortly before Christmas. Mr Smith accepted that DSI operates cranes at other sites so I am not satisfied that the fact he could no longer work on the Ferrymead site effectively ended any employment with DSI.

[40] Mr Baines seeks reimbursement of three months lost wages through to 28 November 2014. I find the fairest way to assess lost wages is to average Mr Baines earnings from DSI for the full four months he worked and excluding April which was not a full month worked and the holiday pay at 8% of gross earnings paid in August 2014.

[41] Once that is done the average earnings for May, June, July and August Mr Baines received from DSI were \$6,875.68 gross.

[42] Mr Baines received earnings in September, October and November 2014 from Daniel Morris Earthworks of \$14083.00. \$6,875.68 multiplied by three is \$20,627.04 gross. I have then taken away from that amount the earnings Mr Baines received for the three month period of \$14083.00 which leaves \$6544.04.

[43] Subject to any findings as to contribution Mr Baines is entitled to be reimbursed the sum of \$6544.04 being lost wages under s 123(1)(b) of the Act.

#### *Compensation*

[44] Mr Baines said that he was annoyed and angry when he was dismissed as he had not had a chance to put his side of things to Mr Smith. He said that he had really enjoyed working at DSI. Mr Baines partner, Catherine Cowie, confirmed Mr Baines enjoyment of the role at DSI. She said that when he first obtained the role with DSI he was *over the moon*. She recalled that they were both shocked about the dismissal and Mr Baines was really annoyed for some time about it. It spoiled Mr Baines birthday which was that weekend.

[45] Mr Baines was distressed by his dismissal and the lack of ability in particular for him to give an explanation to Mr Smith before his dismissal. Mr Baines was able to obtain employment reasonably quickly although not immediately on a permanent basis. Subject to any finding about contribution I find a suitable award is the sum of \$6000.

#### *Contribution*

[46] I could not be satisfied on the balance of probabilities that Mr Baines used his cell phone whilst operating the crane on either 28 or 29 August 2014.

[47] Mr Baines was instructed in the warning letter of 26 August 2014 to leave his personal phone in the *car or smoko room*. Mr Smith did not on 29 August ask Mr Baines where his cell phone was. Mr Baines told me that his phone was in his work bag in the cab of the crane.

[48] I do find a causal connection between Mr Baines failure as instructed to leave his cell phone outside of the crane and the personal grievance on 28 or 29 August. He had by that stage received the letter of 26 August 2014. He knew that there was considerable concern on the part of Mr Smith about the cell phone use and the

complaints he had received from HEB. Mr Smith instructed him not to have the phone with him in the crane at all. That was a very sensible instruction and would have protected both Mr Baines and DSI.

[49] I do not imagine it is easy from the ground to see what a crane operator is doing. If there is a slight delay on the part of the operator so that it appears that the operator is distracted adverse conclusions may be reached as to what the crane operator is doing. If Mr Baines had been able to say to Mr du Plessis or Mr Smith that he could not have been using his cell phone because it was in the car or somewhere else outside of the crane then the grievance may not have arisen. I find that there was some blameworthy behaviour because Mr Baines did not leave his cell phone outside of the crane as he was instructed to.

[50] The above remedies are to be reduced by 20%.

### **Orders made**

[51] Taking contribution as assessed into account I make the following orders:

- a. I order Daniel Smith Industries Limited to pay to Paul Frank Baines the sum of \$5235.23 gross being reimbursement of lost wages under s 123(1) (b) of the Employment Relations Act 2000.
- b. I order Daniel Smith Industries Limited to pay to Paul Frank Baines the sum of \$4,800 without deduction being compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Employment Relations Act

### **Costs**

[52] I reserve the issue of costs. Mr MacKenzie is to lodge and serve submissions as to costs by 9 September 2015 and Mr Smith is to lodge and serve submissions in reply by 23 September 2015.

Helen Doyle  
Member of the Employment Relations Authority