

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 136
5398862

BETWEEN

DANNY BELSHAM
Applicant

A N D

PORTS OF AUCKLAND
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Mitchell, Counsel for Applicant
Richard McIlraith and Kylie Dunn, Counsel for
Respondent

Investigation Meeting: 11 March 2013

Submissions Received: 15 March 2013 from Applicant
15 and 19 March 2013 from Respondent

Date of Determination: 19 April 2013

DETERMINATION OF THE AUTHORITY

A. The dismissal of Mr Danny Belsham by Ports of Auckland Limited was justified.

B. Costs are reserved.

Interim Reinstatement

[1] In a determination of the Authority dated 19 November 2012¹ an order was made for the interim reinstatement of Mr Belsham to his position as stevedore with Ports of Auckland (POAL) pending the hearing of his personal grievance.

¹ [2012] NZERA Auckland 412

[2] Mr Belsham's personal grievance was investigated at a meeting of the Authority on 11 March 2013 and this is the determination.

Employment relationship problem

[3] POAL operates its Auckland port 24 hours a day, 7 days a week to provide shipping and cargo services. Mr Belsham has been employed by POAL as a stevedore for 19 years to load and unload cargo from ships at the Auckland port. Mr Belsham is very experienced, a former team leader and has worked in the shipping industry on and off for 30 years.

[4] The *Oluf Maersk* ship (the ship) was due at Auckland's port on 21 August 2012. Mr Belsham, was likely to be rostered as one of its three ship foremen, probably on the north crane. There had been a chemical spill on the ship a number of days before it was due at the port and Mr Belsham and the shift manager Mr Ian Kitching had discussed the spill which had affected a container.

[5] Issues with the spill were satisfactorily resolved before the ship was due at the port. As it turned out, the ship was to come into port on 21 August, bow south not bow north. This meant that as ship foreman on the north crane, Mr Belsham would not be handling the affected container on the ship.

[6] Ms Vivian Flynn is an allocator and her role is to prepare rosters and allocate tasks for stevedores according to POAL's shipping schedule. On 20 August, Ms Flynn received the shipping schedule for the week which showed only two ship foremen were required on the ship not three as had been expected. This was an unusual situation and meant Ms Flynn had to reallocate one of the men who had expected to be ship foreman on the day, to drive a straddle crane instead.

[7] Normally each of the three men, who were former team leaders, would be allocated to a leading hand role including that of ship foreman. Driving a straddle was not a leading hand duty. However, one of the men was not trained to drive a straddle and the other was training another stevedore to be a ship foreman. In these circumstances, Ms Flynn rostered Mr Belsham to drive the straddle and the final roster was published at about midday on 20 August.

[8] Mr Belsham refused to drive the straddle as rostered on 21 August until he had spoken to the senior shift manager, Mr Michael Kirwan. Mr Belsham says this was

because he had concerns over the dangerous goods issue on the ship. Mr Belsham was summarily dismissed on 16 October for refusing to carry out a clear work instruction and he claims his dismissal was unjustified.

[9] POAL say following Mr Belsham's refusal to drive the straddle, it carried out a full investigation. POAL concluded that Mr Belsham did not have a genuine concern about dangerous goods on the ship. Rather, he refused to drive the straddle until after he had discussed his allocation as straddle driver with Mr Kirwan. POAL say Mr Belsham refused a clear instruction to drive the straddle in breach of the terms of his employment, this amounted to serious misconduct and his summary dismissal was justified.

Issues

[10] The Authority must determine the following issues:

- (a) Was Mr Belsham's dismissal by POAL unjustified?
- (b) If so, what remedies (if any) should be awarded?
- (c) If remedies are awarded, should there be a reduction on the grounds of Mr Belsham's contribution (if any) and by what extent?

First issue

Was Mr Belsham's dismissal by POAL unjustified?

[11] Mr Belsham and a small group of long serving stevedores, who were formerly team leaders have certain protected terms of employment with POAL under the Grandparented Leading Hands Schedule (the Schedule) to the expired collective agreement between the Maritime Union of New Zealand (MUNZ) and POAL (the collective agreement).

[12] Former team leaders named in the Schedule such as Mr Belsham are normally rostered to leading hand roles. However, if required to and if they have the necessary skills, they can be allocated other tasks.

[13] Mr Belsham was allocated as a straddle driver on the first shift of 21 August. Mr Belsham did not check the roster and reported to work expecting to work as ship foreman on the north crane. Mr Belsham was astounded to find he had been allocated

to drive a straddle and was not ship foreman. Mr Belsham refused to drive the straddle.

[14] Mr Belsham claimed POAL removed him as ship foreman because he would have ensured POAL dealt with the dangerous goods issue on the ship properly and ensured POAL followed correct health and safety processes. POAL considered this claim when it conducted its investigation into Mr Belsham's refusal to drive the straddle. POAL did not accept Mr Belsham's explanation to be genuine. POAL determined that Mr Belsham knew before arriving at work on 21 August that the dangerous goods issue had been dealt with by POAL and he also knew if he was ship foreman on the north crane he would not be handling the affected container on the ship.

[15] Following Mr Belsham's refusal to drive the straddle on 21 August, POAL initiated a disciplinary process.

[16] On 24 August, Mr Jonathan Hulme, Stevedoring Manager, wrote to Mr Belsham. Mr Hulme set out what he believed the facts to be:

On Tuesday 21 August at approximately 0630 when you came in for the shift, you advised Ian Kitching that you should have been on the ship and not allocated to a straddle. Ian Kitching asked you 'to man' your straddle as per the roster and that you speak to Mike Kirwan about it when he got to work. You said that you had a problem with allocations and that you would not man the straddle and would instead wait for Mike Kirwan to arrive. You then waited in the mess room until Mike arrived at approximately 0750. ...

You then raised the issue with Mike Kirwan, with your support person Ronald Bell. During that meeting Mike repeatedly asked you if you were going to man your straddle. Your response was that you were happy to go and do the job you should have been allocated to. At the conclusion of that meeting Mike again asked you if you would man your straddle and at that stage you did. ...

As a result of your actions the operation on this shift was hindered with one less straddle operating. In total you did not work for one hour forty minutes.

I would like to discuss whether your actions by not manning the straddle and waiting in the mess room were a refusal to work. Further, I would like to discuss the fact that you did not raise this issue in an appropriate way. We consider that the appropriate way to address your allocations concern would have been by manning your straddle and then discussing the issue on your next break when management had arrived at work.

Accordingly, I intend to commence disciplinary proceedings against you on the grounds your actions may be a breach of clause 4.2.7(a) of the collective agreement (main document) applicable to your employment concerning 'conduct that may constitute serious misconduct and may warrant instant dismissal' and specifically 'Refusal to carry out proper work instructions'. ...

Given the seriousness of the allegation, disciplinary action could result, which could include summary dismissal.

As this is a serious matter, I anticipate you will move quickly to make the necessary representation arrangements

[17] Mr Hulme attached Mr Kitching's email dated 21 August summarising the meeting he had had with Mr Belsham in the morning. Mr Hulme also attached Mr Kirwan's notes of his meeting on 21 August with Mr Belsham.

[18] A disciplinary meeting was held on 5 September. Mr Belsham attended with his lawyer, Mr Simon Mitchell, and provided POAL with a written statement. Mr Belsham provides an explanation for not driving the straddle in paras.3 and 4 of his statement. He says:

3. *It is correct that when I arrived at work at 6.30, I did not want to operate a straddle. I had been rostered previously in a ship foreman job. I was very surprised at the request.*
4. *I believe that I was moved from the ship foreman job for a specific reason. That is, we were aware that there had been a spillage on the ship. We were told that it was corrosive 8. There were also environment hazard stickers on the spilled mater. This situation needed to be addressed properly. The company knew that I would expect this. I believe that the company had decided not to follow the proper procedures in terms of the dangerous goods and had decided to remove me, as they believed that I would ensure that the matter was dealt with properly.*

[19] Mr Hulme considered Mr Belsham's explanation and found it to be unacceptable. In his letter to Mr Belsham's lawyer on 7 September 2012, Mr Hulme set out his initial view that Mr Belsham's refusal to drive the straddle was because he was concerned about his allocation rather than any health and safety issues with the ship. He states:

The focus of your complaint to Mike was the allocation issue – that your removal was a 'set up' due to the container issue. You did not in that meeting raise any concerns relating to the health and safety of your colleagues as you subsequently imply in your statement of 5 September.

[20] Following a complaint by Mr Belsham's lawyer, Mr Hulme stood aside from the investigation and Mr Raoul Borley, Acting General Manager, Terminal Operations took over the investigation. Mr Borley in a letter to Mr Belsham's lawyer on 24 September reiterates the allegation being investigated by POAL that Mr Belsham's conduct on the morning of 21 August was a *refusal to carry out proper work instructions and could therefore be considered to be serious misconduct under the Collective Agreement*.

[21] Mr Borley sets out the steps he has taken in the investigation and on page 2 of his letter addresses Mr Belsham's explanation that he had health and safety concerns. Mr Borley states:

You have said that you raised these issues as health and safety concerns with Ian and Mike on the morning of 21 August. I have discussed this with Ian and Mike. Ian does not recall you raising this matter. Mike's notes record you did, but this does not appear to be the main factor. Rather, your concern appears to be that you have the right to be allocated a leading hand task.

[22] Mr Belsham was given the opportunity to respond and did so. In a letter dated 2 October Mr Borley set out his conclusions regarding what he believed occurred on 21 August. On the basis of his conclusions Mr Borley made a finding that Mr Belsham had committed serious misconduct in refusing to carry out proper work instructions. In essence, Mr Borley found that Mr Belsham had no reasonable grounds for refusing to drive a straddle when instructed to do so and the grounds he did advance for not doing so had *no factual basis and lacked credibility*.

[23] Mr Belsham was provided with a further opportunity to respond before a final decision was made in relation to appropriate disciplinary again.

[24] Following its investigation, POAL concluded Mr Belsham's refusal to drive the straddle was because he disputed his allocation. His refusal was not because Mr Belsham had any genuine health and safety concerns regarding the spill. This was a conclusion open to POAL in my view.

[25] A briefing session was held with stevedores before the shift began on 21 August. Everyone except Mr Belsham went to work following the session. Mr Belsham says he did not go to work on the ship because of the serious and imminent danger to his life and others posed by the dangerous container. This was new evidence and not in any of the material filed in the Authority in support of either

Mr Belsham's applications for interim or substantive relief. This was a surprising omission. Further, Mr Belsham did not attempt to prevent any of the other stevedores going to work on the ship, if Mr Belsham's health and safety concerns were genuine, he would have done so. He did not.

[26] After the briefing session Mr Belsham spoke to Ms Flynn about his allocation and asked her if she had been told to remove him from the roster. Mr Belsham then went to speak with Mr Kitching. Ms Flynn followed Mr Belsham as she was concerned if he did not drive the straddle she would need to find a replacement at short notice.

[27] Mr Kitching's email to Mr Kirwan later on the morning of 21 August records the conversation and makes no mention of Mr Belsham raising any health and safety issue. Ms Flynn's file note of the conversation made shortly after the meeting makes no reference to health and safety concerns being raised by Mr Belsham.

[28] Mr Belsham says he discussed his allocation with Mr Kitching and was told to wait in the mess room to talk to Mr Kirwan. Mr Kitching disputes this and says:

... I twice told Danny to man his straddle ... He refused and said he was going to wait for Mike to arrive ... I have no doubt that I directed Danny to drive a straddle and he refused ... He could have driven his slot and then spoken to Mike.

[29] Mr Kitching's email to Mr Kirwan on the morning of the incident stated:

At 0645 this morning Danny Belsham told me that he had an issue with the allocation of the job he had been given. He said that his allocated job should be on the ship as a leading hand and not in a straddle as he had been allocated too[sic]. I then asked him to man his straddle as per the roster and he could speak to Mike Kirwan when he arrived in. At this stage Viv Flynn had come into the office and told Danny that Mike Harvey was training Tat Lambert on one crane and Wayne McGregor on the other as he had requested to come on to 1st shift due to his wife's illness. At that stage I asked again for Danny to man up his straddle and his reply was that he would not and was going to wait for Mike Kirwan to arrive. At this point our discussion was finished and Danny went into the messroom to wait for Mike to arrive at work.

[30] POAL concluded that Mr Kitching asked Mr Belsham twice to drive the straddle. Mr Belsham refused and told Mr Kitching he would wait in the mess room for the senior shift manager, Mr Kirwan.

[31] Mr Belsham and Mr Kirwan met just after 8am to discuss the matter. At one point in the meeting Mr Belsham said to Mr Kirwan;“...*This was a set up I was misplaced because of the Dangerous Goods issues they didn't want me on the ship*” . POAL concluded correctly in my view that the focus of the discussion was Mr Belsham's allocation. POAL concluded that Mr Belsham raised the issue of dangerous goods on the ship during the meeting but not as a reason for refusing to drive the straddle. Mr Belsham's concern was his allocation on the roster, not health and safety or dangerous goods. Accordingly, Mr Belsham did not work the first straddle slot on 21 August.

[32] Mr Belsham was summarily dismissed. In a letter dated 16 October, POAL set out its reasons for taking such action.

I have formed the view that on 21 August you refused to carry out proper work instructions. You have said that you did not drive the straddle on 21 August as you were raising a health and safety issue. I do not consider this explanation to be genuine. I have formed the view that you refused a clear work instruction to drive a straddle until Mike Kirwan arrived at work. This was serious misconduct pursuant to clause 4.2.7(a) of the collective agreement ...When weighing up your conduct, I consider I no longer have trust and confidence in you continuing in your employment with Ports of Auckland. I have therefore decided to summarily dismiss you for serious misconduct.

[33] It is my view that this was a decision open to a fair and reasonable employer in all the circumstances.

Test of Justification

[34] The decision to dismiss Mr Belsham on the basis of serious misconduct must be justifiable in accordance with the test as set out in s103A of the Employment Relations Act 2000 (“the Act”) which states:

For the purposes of section 103(1)(a)and(b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (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.

[35] In applying this test, the Authority must also consider four factors specified in s103A(3) as well as any others it considers appropriate.

[36] Section 103A was considered by the full court of the Employment Court in *Angus v Ports of Auckland*². The test requires the Authority in this matter, to determine whether on an objective basis Mr Belsham's dismissal was within the range of responses open to a fair and reasonable employer. If the dismissal was within the range then it will be justified.

[37] Mr Belsham was asked by the shift manager, Mr Kitching twice on the morning of 21 August to drive his straddle, as he had been rostered to do. The instruction, I find, was a reasonable one. Mr Belsham was employed by POAL as a stevedore, he had the skills to and did, among other duties, drive a straddle.

[38] Under clause 6 of the Schedule, POAL has considerable flexibility in the rostering of duties to its employees. Clause 6(a)(i) states:

Any employee may be required to perform any work for which they have the necessary skills and to undertake work at any location.

[39] As a result of its investigation, POAL concluded that Mr Belsham did not have reasonable grounds for refusing to drive the straddle and that the reasons advanced for not driving the straddle (ie health and safety) were not genuine. I accept the submission made on behalf of POAL by Mr McIlraith "*that there was a reasonable basis for POAL to conclude that Mr Belsham had refused to drive a straddle.... as a result of a dispute regarding the role to which he had been allocated*".

[40] Clause 4.2.7(a) of the collective agreement provides:

The following are examples of conduct that may constitute serious misconduct and may warrant instant dismissal;

Refusal to carry out proper work instructions.

[41] Mr Belsham refused a reasonable instruction to drive a straddle and under clause 4.2.7 of the collective agreement, this is conduct that could amount to serious misconduct. After carrying out a full investigation, POAL was entitled to form the view that Mr Belsham's conduct in refusing the instruction amounted to serious misconduct for which he could be summarily dismissed. Summary dismissal was within the range of responses open to a fair and reasonable employer.

² [2011] NZ EmpC160

[42] Mr Mitchell submits that even if Mr Belsham was in breach of clause 4.2.7, missing one driving slot, does not amount to serious misconduct.

[43] In *Northern Distribution Workers Union v BP Oil NZ Ltd*³ Hardie Boys J observed that the conduct necessary to justify a summary dismissal is always a matter of degree, and “usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship”.

[44] The Court of Appeal in *W&H Newspapers Ltd v Oram*⁴ made it clear that a single act of negligence could justify dismissal as long as the conduct is sufficiently serious to impair trust and confidence.

[45] POAL did not accept Mr Belsham’s explanation for refusing to drive the straddle on the morning of 21 August. POAL did not believe Mr Belsham and regarded his explanations concerning health and safety issues not to be genuine. POAL no longer had trust and confidence in Mr Belsham.

[46] This was confirmed in Mr Borley’s letter dated 16 October 2012 notifying Mr Belsham of his decision regarding Mr Belsham’s conduct. Mr Borley states:

I consider that I no longer have trust and confidence in you continuing in your employment with Ports of Auckland. I have therefore decided to summarily dismiss you for serious misconduct.

[47] I find that POAL had a sound basis for reaching this view.

[48] Section 103(A)(3) of the Act requires the Authority, when deciding if a dismissal is unjustified, to consider whether before dismissal the employer:

- (a) Sufficiently investigated the allegations;
- (b) Raised concerns it had with the employee;
- (c) Gave the employee a reasonable opportunity to respond to the employer’s concerns;
- (d) Genuinely considered the employee’s explanation

³ [1992] 3 ERNZ 483 at 487

⁴ [2000] 2 ERNZ 448

[49] I am satisfied the investigation by POAL was a full and thorough one which complied with each of the above elements of s103A(3). I find Mr Belsham's summary dismissal justified.

[50] If I am not correct in determining that POAL could form a view that Mr Belsham's conduct amounted to serious misconduct for which summary dismissal was appropriate, I find that Mr Belsham wholly contributed to his dismissal.

[51] Section 124 of the Act requires the Authority when considering remedies to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If the employee's actions did contribute to the situation, then the Authority can reduce the remedies that would otherwise have been awarded.

[52] It is my view, in the event Mr Belsham's dismissal was unjustified, his contributory conduct was such as to deny him the remedy of reinstatement. Mr McIlraith has referred me to *Angus v Ports of Auckland Limited*⁵, a decision of the Employment Court which considered the effect of an employee's contribution on the remedy of interim reinstatement. At paragraph [75] Judge Colgan stated:

...As already noted, s124 of the Act deals expressly with the significance and consequence of culpable fault in remedies for dismissal. The section does not exclude, in appropriate cases, the remedy of reinstatement and so logically neither does it preclude interim reinstatement. That is not to say that in some cases contributory fault may be so substantial and significant that in a particular employment, the Court or the Authority will not, on balance and taking into account all other relevant factors, reinstate, even on an interim basis...

[53] While the Court has held in *Angus* that contributory conduct may preclude reinstatement, the contributory fault must be "substantial and significant". The contributory fault by Mr Belsham was in my view substantial and significant to preclude reinstatement. Similarly, any award of compensation would be reduced by 100%.

⁵ [2011] NZEmpC 125

Costs

[54] Costs are reserved. The respondent has 14 days within which to file and serve a memorandum as to costs and the applicant has 14 days from receipt to file and serve his reply.

Anna Fitzgibbon
Member of the Employment Relations Authority