

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 404
3084052

BETWEEN	GARY BOUDETTE Applicant
AND	ISO LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Andrea Webster, advocate for Applicant
Kate Ashcroft, counsel for Respondent

Investigation Meeting: 6 August 2020

Submissions Received: 14 August 2020 from Applicant
21 August 2020 from Respondent

Determination: 7 October 2020

DETERMINATION OF THE AUTHORITY

- A. Mr Boudette was not unjustifiably dismissed and is not owed any arrears of wages.**
- B. Costs are reserved.**

Employment relationship problem

[1] ISO Limited (ISO) is an international port logistics company, providing Stevedoring, Marshalling, Warehousing, IT and total supply chain solutions to port industries throughout New Zealand including the Port of Tauranga where Mr Boudette was employed to work.

[2] Mr Boudette worked for ISO as a Stevedore in a casual capacity from 19 June 2006 before being made a permanent employee on 9 April 2007. The terms of Mr Boudette's employment were set out in an individual employment agreement which incorporated the terms of the collective agreement between ISO and Amalgamated Stevedores Union Inc. together with ISO's Rules and policies relating to health and safety, drug and alcohol testing, vehicle use and credit card use, among others.

[3] Mr Boudette's employment was terminated on 21 June 2019 summarily, that is without notice, for serious misconduct. Mr Boudette challenges his dismissal which he says was unjustified. He also claims one or more conditions of his employment were affected to his disadvantage by the unjustified actions of ISO, and that he is owed arrears of wages relating to the treatment of his annual leave which he says was wrongly used to top up his fortnightly earnings.

[4] ISO denies the claims and says the Authority has no jurisdiction to investigate and determine Mr Boudette's claim for unjustified disadvantage because it was not raised within the statutory 90-day period.

Issues

[5] In order to resolve Mr Boudette's application I must determine the following questions:

- a) Was Mr Boudette unjustifiably dismissed?
- b) Did Mr Boudette raise his claim for unjustified disadvantage within time?
- c) If the answer to b) is yes, were one or more conditions of his employment affected to his disadvantage by the unjustified actions of ISO?
- d) Is Mr Boudette owed arrears of wages for outstanding holiday pay?
- e) If Mr Boudette was unjustifiably disadvantaged and/or unjustifiably dismissed, what if any remedies should be awarded?

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence received I have carefully considered all relevant material lodged with the Authority.

Health and safety

[7] ISO's operations have a high risk of serious harm or fatalities if employees fail to conduct themselves in a safe manner while at work. The importance of ensuring a safe work environment is stressed throughout clauses contained in Mr Boudette's individual employment agreement and the collective agreement.

[8] Mr Boudette's individual employment agreement states at clause 22.1:

The Employer is committed to providing a safe work environment. The Associate agrees to take responsibility for ensuring their own safety and the safety of others in the workplace, including complying with all health and safety requirements, policies, procedures, training, guidelines and recommendations.

[9] Health and safety is dealt with at clause 4 of the collective agreement the relevant provisions recording the following terms:

4.1 ...The intention is that all work will proceed in a safe, responsible and efficient manner in accordance with the requirements of all relevant legislation.

4.2 There is a mutual commitment to achieve a safe working environment, and avoid discrimination, harassment or duress and to equal employment opportunity.

...

4.4 All shifts commence 15 minutes prior to the end of the outgoing shift during which time incoming Associates are required to attend a paid pre-shift "Safety Briefing" [see clause 26].

4.5 All Associates must accept responsibility to identify hazards as they may arise and to assist in the elimination isolation or minimisation of circumstances that could give rise to the risk of harm being caused to any person.

...

[10] Clause 26 of the collective agreement provides for pre-shift briefings or tool box meetings to be led by the person in charge of each shift prior to the commencement of work. This provides an opportunity for health and safety issues including hazards to be raised and discussed.

[11] A signed copy of the safety briefing is submitted with the daily job-sheet. The record includes what was discussed and all relevant comments and feedback received from Associates. Failure to attend or participate in the pre-shift safety briefing is a breach of the collective agreement, the penalty for which may be disciplinary action.

[12] ISO has published a disciplinary policy which describes conduct that may justify warnings or summary dismissal. Under the heading of serious misconduct ISO has identified that a failure to follow or adhere to Standard Operating Procedures (SOPs) is a serious breach of conduct that may justify summary dismissal and is likely to deeply impair the basic trust and confidence essential in the employment relationship. The disciplinary policy makes it clear that SOPs are there to ensure employees are safe.

[13] ISO has also published a Policy statement regarding health and safety at its worksites. The policy defines worksites which includes the entire working section of a vessel. The policy also references the safety briefings held prior to the start of each shift and as provided for in clause 26 of the collective agreement.

[14] The policy sets out the items to be covered at each briefing which includes safety issues relevant to the ship or worksite and recent alerts, safety bulletins or incidents that may have occurred at other worksites that may be of relevance.

[15] In addition, the policy states that relevant health and safety information will be distributed through the use of Safety Alerts and Bulletins distributed by email and posted on notice boards and the ISO intranet.

2017 Workplace accident

[16] In November 2017, an excavator operator fell from the deck of a vessel when he was climbing a stanchion ladder. The rung on the ladder was rusty and broke in his hand. The operator survived but suffered serious injuries.

[17] Following the accident, ISO banned the use of any stanchion ladder in any circumstances. The ban was communicated to employees, including Mr Boudette on at least three occasions:

- a) During a pre-shift briefing on 20 December 2017;
- b) Via a Safety Bulletin released on 20 December 2017; and
- c) During an SOP refresher in October 2018.

[18] The signed record of the safety briefing held on 20 December 2017 records (verbatim):

WITH IMMEDIATE EFFECT FROM NOW NO STAFF ARE TO CLIMB THE STANCHION LADDERS ON VESSELS.

[19] The Safety Bulletin dated 20 December 2017 states (verbatim):

As a result of this unfortunate incident, ISO Limited is suspending all use of permanent stanchion ladders until further notice. **THIS MEANS THAT WITH IMMEDIATE EFFECT, ALL ISO STEVEDORING OPERATIONS NATIONWIDE ARE TO CEASE ALL USE OF THE STANCHION LADDERS TO ACCESS THE STOW ON DECK.**

[20] On 10 October 2018 Mr Paul Cameron, a Director and the Chief Executive Officer, wrote to each employee including Mr Boudette expressing concerns about employees making risky decisions that put themselves at harm. Mr Cameron advised employees that with immediate effect there would be a zero tolerance to at risk behaviour.

[21] At around the same time ISO updated its SOP dealing with hazards for Stevedoring of logs by adding into the SOP the instruction: "Do not use permanent stanchion ladders". Mr Boudette has signed an acknowledgement that he was made aware of the amendment.

Events leading to the dismissal

[22] On 2 May 2019 Mr Boudette was working on a vessel named “Bunun Justice”. He had stopped for a smoko break at 11 am. According to the pre-shift briefing record Mr Boudette’s smoko break was not due until 11.30 am.

[23] When he stopped for his break Mr Boudette found that he and another employee could not leave the ship. Mr Boudette instructed the other employee to remain where he was and he would try to get the attention of others to assist them off the ship.

[24] Mr Boudette climbed down the stanchion ladder to the side deck to get the attention of workers on the wharf. He was seen by the wharf crew who arranged for a forklift to lift both employees off the ship.

[25] The incident was witnessed by the Port Operations Manager and an incident report was completed. Following an investigation ISO determined Mr Boudette was in serious breach of its health and safety requirements and he was summarily dismissed.

Was the dismissal justified?

[26] The onus falls upon ISO to prove that its actions in dismissing Mr Boudette were justified. The applicable legal standard required is the balance of probabilities.

[27] I must objectively determine whether ISO’s actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹

[28] In applying this test, I must consider the matters set out in s 103A(3)(a)-(d) of the Act. These matters include whether, having regard to the resources available, ISO sufficiently investigated issues, raised its concerns with Mr Boudette, gave him a reasonable opportunity to respond and genuinely considered his explanation prior to making the decision to dismiss him.

[29] The Authority must not determine an action unjustifiable solely because of defects in the process if they were minor and did not result in Mr Boudette being

¹ Employment Relations Act 2000 (the Act), s 103A.

treated unfairly.² A failure to meet any of the s 103A(3) of the Act tests is likely to result in an action being found to be unjustified.

[30] Relevant to the Authority's investigation is also the ongoing mutual obligation of good faith. Section 4(1A)(c) of the Act provides that where an employer is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment, the employee must be provided with access to relevant information and an opportunity to comment on it before the decision is made.

Initial investigation

[31] ISO conducted a fact finding meeting on 8 May 2019. The meeting was attended by Mr Boudette and his union representatives. The purpose of the meeting was to seek an initial explanation from Mr Boudette about an alleged breach of the SOP when he used the stanchion ladder on 2 May 2019.

[32] Mr Boudette maintained during the meeting that he did not know climbing down the stanchion ladder was a breach of the SOP. He denied being present for a refresher of the SOP early in 2019 and could not recall receiving the letter from Mr Cameron setting out his expectations of a zero tolerance of risky behaviour. He explained he had no choice but to use the stanchion ladder because the crane drivers had left the vessel and he could not see anyone on the wharf area.

[33] ISO did not accept Mr Boudette's initial explanations. Its view was that Mr Boudette had an option to call the Shift Manager over the radio in the digger but chose not to.

[34] ISO wrote to Mr Boudette on 14 May 2019 setting out its initial findings and inviting Mr Boudette to a disciplinary meeting. ISO provided Mr Boudette with copies of the following documents:

- ISO Disciplinary Policy
- Incident investigation report;
- Meeting notes taken on 8 May 2019;
- The SOP dated October 2018;
- Safety bulletin dated 20 December 2019;

² The Act, s 103A(5).

- The pre-shift Safety briefing dated 20 December 2017.

[35] Mr Boudette was advised disciplinary action up to and including dismissal may be taken and was invited to bring a representative with him to the scheduled meeting.

Disciplinary process

[36] A disciplinary meeting was held on 17 May 2019 to seek Mr Boudette's explanation for using the stanchion ladder. Of particular concern was that Mr Boudette had knowingly breached the SOP and the prohibition on using the stanchion ladder.

[37] Mr Boudette maintained his explanation from 8 May 2019 saying he had no option but to climb down the ladder to get his colleague's attention on the wharf to assist him to leave the vessel. Mr Boudette maintained he was not aware that using the stanchion ladder was a banned practice. In response to questions about his signing the amendment to the SOP in October 2018 Mr Boudette said he was simply given the signoff sheet and signed it. He said he was not told or shown what the changes were.

[38] By way of further explanation Mr Boudette said that climbing down the stanchion ladder was a spur of the moment thing and he only used it because everyone else had left the vessel. He said the crane drivers, who were responsible for lifting the workers off the deck in an approved man cage, had left the vessel leaving him with no safe way to exit the deck. Mr Boudette explained that there were no inboard ladders he could use and he could not walk off the vessel.

[39] After the meeting further investigations were conducted by ISO including interviewing witnesses and reviewing the CCTV footage of the incident. The CCTV footage showed Mr Boudette had climbed down the stanchion ladder while others, who he could have called to for help, worked around him. It also showed that the forklift man cage which lifted Mr Boudette and his work colleague off the vessel was moving around the wharf.

[40] On 7 June 2019, ISO wrote to Mr Boudette amending an earlier letter dated 24 May 2019. ISO summarised Mr Boudette's explanations from the 17 May 2019

meeting and the information it had obtained during its additional investigation which included reviewing the CCTV footage of the incident. Copies of statements taken during the further investigation were attached to the letter for Mr Boudette's information. The CCTV footage had already been provided.

[41] ISO identified two further questions Mr Boudette was required to answer:

- a) Why Mr Boudette claimed his reasons for climbing down the stanchion was that everyone had vacated the wharf and he needed to get someone's attention when the CCTV footage shows people still working on the wharf; and
- b) Why Mr Boudette claimed he was not properly briefed when the trainers had confirmed they recall the SOP briefing and taking Mr Boudette through the SOP changes.

[42] A second disciplinary meeting was held on 13 June 2019 to allow Mr Boudette the opportunity to provide an explanation to the further information provided to him on 7 June 2019. Mr Boudette's explanations remained largely unchanged.

[43] On 17 June 2019 ISO wrote to Mr Boudette setting out its preliminary findings and conclusions. ISO considered Mr Boudette's explanations to be unsatisfactory on two grounds:

- a) Firstly, Mr Boudette was fully aware of the ban on the use of the stanchion ladders. The ban had been in place since December 2017 and there had been numerous references to the ban at meetings Mr Boudette had attended.
- b) Secondly, ISO was satisfied others could be seen working on the berth in front of the vessel at the time Mr Boudette decided to climb down and there was no reason for him to undertake such an unsafe act in order to get someone's attention.

[44] In its letter ISO explained to Mr Boudette it had reached a preliminary decision that the appropriate sanction was summary dismissal. Mr Boudette was invited to respond to ISO's preliminary findings by 19 June 2019 and to provide:

- a) Any alternatives to summary dismissal;
- b) Any factors that should prevent him from being summarily dismissed;
and/or
- c) Any other reasons why he should not be dismissed.

[45] In response, Mr Boudette asked ISO to reconsider summary dismissal and instead to issue him with a written warning. Mr Boudette asked ISO to take into account statements made by witnesses that largely supported his explanation that neither he nor his co-worker could be seen by anyone on the berth given their location on the vessel.

[46] Mr Boudette asked ISO to take into account his long service of over 14 years, his high level of skills, his willingness to travel at the request of the company, his good working relationships and asserted that he was trustworthy and reliable.

[47] After considering Mr Boudette's response ISO confirmed its decision to summarily dismiss Mr Boudette for serious misconduct on 21 June 2019.

Was dismissal warranted?

[48] An assessment involving behaviour said to justify summary dismissal requires the Authority to stand back, consider the factual findings and evaluate whether a fair and reasonable employer could characterise the conduct as deeply impairing, or destructive of the basic trust and confidence essential to the employment relationship justifying dismissal. What must be evaluated is the nature of the obligations imposed on the employee, and the nature and circumstances of the breach.³

³ *Emmanuel v Waikato District Health Board* [2019] NZEmpC 81 at [58].

[49] This involves a two-step approach. The first step is to consider whether the conduct is capable of amounting to serious misconduct; if it is, then the second step is to consider whether dismissal is warranted in all the circumstances.⁴

[50] Mr Boudette was keen to get to his smoko break which was still 30 minutes away. He believed he had been left stranded, but the evidence before me shows that not to be the case. When he climbed down the stanchion ladder a cage was already on its way to lift him off the vessel.

[51] I have accepted the evidence from ISO that there were other means of exiting the vessel if Mr Boudette needed to do so, rather than use the stanchion ladder. I find it is more likely than not that Mr Boudette did not consider or look for any alternative method to exit the vessel.

[52] Mr Boudette was fully aware of the ban on using stanchion ladders and had been fully trained about the ban and the reasons for it.

[53] In the context of ISO's operations and responsibilities I am satisfied Mr Boudette's actions amounted to serious misconduct.

[54] Having regard to the procedural requirements of s 103A of the Act, I am satisfied ISO has properly complied. Mr Boudette was given proper notice of the allegation against him, provided with all information taken into account and was given time to respond.

[55] The decision to dismiss was a reasonable response in all the circumstances and one a fair and reasonable employer could make. Mr Boudette was justifiably dismissed. Accordingly, his application for remedies is declined.

Did Mr Boudette raise personal grievances within 90 days?

[56] In his original statement of problem lodged on 18 December 2019 Mr Boudette claimed only one personal grievance. That was that he had been unjustifiably dismissed.

⁴ Ibid at [59].

[57] On 21 February 2020 Mr Boudette lodged an amended statement of problem in which he claims one or more conditions of his employment were affected to his disadvantage. No details about how or when Mr Boudette's employment was affected to his disadvantage were set out in his amended statement of problem.

[58] On 3 April 2020 Mr Boudette was directed to particularise this claim including how he was disadvantaged and when he raised his disadvantage with ISO. In the Notice of Direction, I noted that Mr Boudette had not sought leave to raise his personal grievance out of time.

[59] Section 114 subsections (1) and (2) of the Act deal with the timeframe for the raising of personal grievances in the following terms:

114 Raising personal grievance

- (1) Every employee who wishes to raise a personal grievance must, subject to subsections (3) and (4), raise the grievance with his or her employer within the period of 90 days beginning with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless the employer consents to the personal grievance being raised after the expiration of that period.
- (2) For the purposes of subsection (1), a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[60] Section 114(2) makes it clear that a grievance is raised with an employer as soon as the employee has made, or has taken reasonable steps to make, the employer or a representative of the employer aware that the employee alleges a personal grievance that the employee wants the employer to address.

[61] There is no formality involved in notifying a grievance to an employer.⁵ However, it is insufficient, and therefore not a raising of the grievance, for an employee to advise an employer that the employee simply considers that he or she has a personal grievance or even by specifying the statutory type of the personal grievance as, for example, unjustified disadvantage in employment.⁶

[62] In order to properly raise a personal grievance the employee needs to have conveyed to the employer enough information, so that the employer is in a position

⁵ *GFW Agri-Products Ltd v Gibson* [1995] 2 ERNZ 323.

⁶ *Creedy v Commissioner of Police* [2006] ERNZ 517 at [36].

where it is able, to respond on the merits of the alleged grievance, with a view to resolving it at an early stage.⁷

[63] It was not until Mr Boudette lodged his amended witness statement with the Authority on or about 15 May 2020 that it became clear that Mr Boudette's disadvantage grievance related to the treatment of his annual holidays during his employment.

[64] As required by s 114 of the Act Mr Boudette had 90 days from the date the action alleged to amount to a grievance occurred or came to his attention, whichever is the later. In his oral evidence Mr Boudette told me he became aware of his grievance relating to his holiday pay, after he received the wages and time and holiday and leave records from ISO. This conflicts with his written evidence where he says ISO became aware of his grievance during discussions over his final pay.

[65] I investigated Mr Boudette's claim during the investigation meeting but he was unable to provide me with any oral evidence which assists me in identifying when he raised his grievance with ISO.

[66] The wages and time and holiday and leave records were made available to Mr Boudette between 21 and 28 January 2020. The first indication that he may have a grievance occurred through Mr Boudette's amended statement of problem dated 21 February 2020. However, there were no particulars in the amended statement of problem about the grievance and this prevented ISO from being able to properly address it. The information was not provided to ISO until Mr Boudette's amended witness statement dated 15 May 2020 was served during the course of these proceedings.

[67] Even if I accept that the action giving rise to the personal grievance came to Mr Boudette's attention at the latest, by 28 January 2020, the 90-day period expired on 27 April 2020. Mr Boudette's amended witness statement is dated 15 May 2020 which is outside the requisite 90-day period.

[68] Mr Boudette has not established to my satisfaction that he has raised a personal grievance for unjustified disadvantage within the requisite statutory period.

⁷Above n 1.

[69] As recorded in the Notice of Direction dated 3 April 2020 Mr Boudette has not sought leave to raise his grievance out of time. Accordingly, the Authority has no jurisdiction to investigate and determine this aspect of his claim.

Arrears of wages

[70] Mr Boudette claims he is owed arrears of wages for holiday pay. The statement of problem does not particularise this claim. Mr Boudette alleges he was required to use his annual leave as a top up for his fortnightly earnings and this was a breach of the Holidays Act. He has not provided any further particulars but simply states that a dispute arose about the calculation of his final pay and his annual leave assessment.

[71] In support of his claim and in his written evidence Mr Boudette told me:

- a) He often worked more than five days per week and would work anywhere between 2 and 12.25 hours each time.
- b) If he was not given enough work to make ends meet and pay his bills that pay period, he would request a “top up” meaning that he could utilise days not worked by taking them as annual holidays and receive payment for the days.
- c) In order to be “topped up” he would call the administration office and request to top up. He would be provided with the details of the days of the pay period he had not worked and, if he chose, he would complete the appropriate form requesting annual leave for those days.

[72] In his submissions, Mr Boudette says the use of his annual leave in this way was a breach of ss 3 and 28A(2)(b) of the Holidays Act 2003. These specified breaches were not raised before or during the investigation of these proceedings and no penalties have been claimed.

[73] For the sake of completeness I have considered whether ISO has breached its obligations under the Holidays Act.

[74] Section 3 of the Holidays Act sets out its purpose of providing a balance between work and other aspects of employee's lives and in particular for annual holidays to provide the opportunity for rest and recreation.

[75] Section 28A of the Holidays Act allows employees to request that his or her employer pay out a portion of the employee's entitlement to annual holidays. Such requests must be in writing and may be made on more than one occasion until a maximum of one week has been paid out in each entitlement year.

[76] Section 28A was inserted into the Holidays Act on 1 April 2011.⁸ The policy intent of this addition was articulated in the explanatory note to the Holidays Amendment Bill 2010. The additional provision is to recognise there may be some individual circumstances where an employee would prefer to exchange up to one week of his or her annual holidays for payment. Allowing a portion of an employee's annual holiday entitlement to be paid out provides employees with more choice about how they exercise their minimum entitlement.⁹

[77] There is no dispute that Mr Boudette made retrospective written applications for days to be treated as annual leave for days that he did not work during a particular pay period.

[78] As noted above, the Holidays Act allows for a situation in which an employee can request an employer to pay out a portion of their entitlement to annual leave, however that is not what happened with Mr Boudette. Mr Boudette requested approval for certain days to be treated as annual leave days. He has never requested a portion of his annual holidays to be paid out to him.

[79] It was Mr Boudette's choice as to whether he utilised annual leave for days he did not work during a pay period and his requests were always subject to approval. The Holidays Act does not limit the requests for annual leave to only forward looking applications. The Holidays Act only requires that annual holidays are taken by agreement and an employer must not unreasonably withhold consent to an employee's request to take annual holidays.¹⁰

⁸ Holidays Amendment Act 2010 (2010) No 126.

⁹ Holidays Amendment Bill 2010 (195-1) explanatory note at 2.

¹⁰ Holidays Act 2003, s 18.

[80] Mr Boudette has not established to my satisfaction that he is owed any arrears of wages in respect to the treatment of his annual holidays. Accordingly his claim is declined.

Costs

[81] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so ISO shall have seven days from the date of this determination in which to file and serve a memorandum on the matter. Mr Boudette shall have a further seven days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[82] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority