IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 341A/09
5278468

	BETWEEN	RAY CLAYTON Applicant
	AND	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell for Applicant Richard McIlraith for Respondent
Investigation Meeting:	15 December 2009
Determination:	18 December 2009

DETERMINATION OF THE AUTHORITY

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[1] Ports of Auckland Limited (POAL) dismissed Ray Clayton from his job as a stevedore on 10 August 2009. POAL managers decided Mr Clayton's explanations about two workplace incidents – one on 9 July 2009 and one on 26 July 2009 – were unacceptable.

[2] On both occasions he was driving a 'straddle', a large machine which lifts up to three containers at a time to move them around the wharves. Sitting in the straddle cab, about three stories high, Mr Clayton had switched his radio to a different channel than the one on which instructions to straddle drivers were being transmitted by the dispatch control centre. He had done so because he had formed the view it was safer to hear the information transmitted on channel 1B to other employees working in the area rather than the transmissions to straddle drivers on channel 1C.

[3] The managers investigating these incidents found that he failed to follow

standard operating procedures and he had subsequently refused to follow instructions to keep his radio on channel 1C. They decided Mr Clayton's actions were serious safety hazards and amounted to serious misconduct in breach of his terms of employment.

[4] Mr Clayton claims his dismissal was unjustified and seeks orders for permanent reinstatement, lost wages, distress compensation and his costs. An application for interim reinstatement was declined (AA 341/09, 22 September 2009).

The Authority's investigation

[5] For the purposes of the Authority's investigation written witness statements were lodged by:

(i) POAL senior shift manager for stevedoring, Mike Kirwan, and stevedoring manager, Jonathan Hulme, who both met with Mr Clayton in five disciplinary meetings about these incidents and made the decision to dismiss him; and
(ii) POAL shift manager Ian Kitching; and
(iii) POAL dispatch controller Stefan Reynolds; and
(iv) POAL operational performance coach Eddie Haretuku.
(v) POAL human resources manager Jon Baxter; and
(vi) POAL health and safety manager Peter Branch; and
(vii) Mr Clayton; and
(viii) Maritime Union secretary Russell Mayn who attended three disciplinary meetings with Mr Clayton; and
(ix) Union executive member Graham McKean who attended a meeting with Mr Clayton and Mr Kitching on 26 July 2009.

[6] Each witness attended the investigation meeting and under oath or affirmation confirmed the contents of their statements as correct. Mr Hulme, Mr Kirwan, Mr Reynolds, Mr Haretuku, Mr Clayton, Mr McKean and Mr Mayn were also asked and answered questions about their statements. The representatives provided oral closing submissions with written synopses.

The circumstances

[7] Mr Clayton worked for POAL for 15 years, the last ten on a permanent basis. His duties included work as a straddle driver, yard leading hand and general duties.

[8] On 23 January 2009 Mr Clayton's supervisor took him to Mr Kirwan's office to discuss an incident earlier that shift. While driving that day Mr Clayton had suddenly stopped his straddle requiring following straddles to take evasive action. Mr Clayton's explanation was that he did not agree with a recent change of procedure which allowed for straddles to keep driving through an area where a crane was operating to remove or replace hatch covers on a ship. He considered the procedure unsafe. Mr Kirwan reminded Mr Clayton the new procedure had been considered by the health and safety committee. He followed this up with a memo, dated 23 January, to Mr Clayton which included the following two points of advice to him:

> *I expect that from this point onwards you will follow the procedures as required. If you do not follow the procedures then this may be seen as misconduct or serious misconduct and may need to form part of a disciplinary investigation. …*
>
> *If you identify any further hazards please follow the existing procedure and raise this in a hazard report to the duty shift manager or shift supervisor as soon as practical.*

[9] On 15 June Mr Clayton handed in two forms – one headed "*hazard reporting*" and one headed "*near miss reporting*" – complaining there had been no radio warning about a utility vehicle being driven onto the berth area around 8.30pm and this "*ute*" had "*no head lights on*". He included a note reading: "*There is a brake (sic) down between 1xB and 1xC channel*".

[10] The ute was driven by the same supervisor who raised the 23 January safety concern with Mr Clayton.

[11] Mr Kirwan spoke to both that supervisor and Mr Clayton about the 15 June incident. He decided there had been a failure by the supervisor to follow procedure. The supervisor was given specific coaching about that procedure and steps were taken to remind all supervisors and managers to wait for an 'all clear' after radioing

Dispatch before driving onto the berth.

[12] Mr Kirwan also arranged for another supervisor and Mr Haretuku to talk with Mr Clayton about the procedure. These discussions occurred in the following weeks. Mr Haretuku recalls Mr Clayton restating concerns that using radio channel 1C was dangerous because he believed the dispatch controllers did not always pass on to 1C channel users all necessary information that was provided to and from users of channel 1B.

[13] Mr Haretuku advised Mr Clayton that the proper way to pursue that concern was through the health and safety delegates. Mr Clayton accepts he was told that by Mr Haretuku but he did not raise the matter with those delegates or any union official.

[14] On 9 July 2009 Mr Kirwan received a report about an incident involving Mr Clayton that day. For around 15 minutes Mr Clayton's straddle was stationary and he used his onboard computer to reject a number of instructions from the electronic dispatch system to do certain jobs. Mr Clayton had not responded to calls from the dispatch controllers who were calling him on channel 1C because, unknown to them, he had his radio switched to channel 1B.

[15] The following day Mr Kirwan wrote a letter to Mr Clayton calling him to a "*formal meeting to discuss concerns about your behaviour while driving a straddle*". It noted the issue was "*serious*" and could result in disciplinary action of a warning or in some situations dismissal.

[16] For various administrative reasons that meeting was held 17 days later on 27 July. On the morning of 27 July Mr Kirwan received a report that a further incident involving Mr Clayton had occurred during the previous evening.

[17] The dispatch control room had reported a problem getting hold of Mr Clayton on the radio. A controller contacted shift manager Ian Kitching to complain that Mr Clayton was operating on channel 1B and had refused four requests to switch to channel 1C. Mr Kitching called Mr Clayton on channel 1B and told him to come to his office. Mr Kitching arranged for a union delegate to sit in on the meeting.

[18] Mr Kitching's evidence is that during the discussion Mr Clayton twice refused to use channel 1C, despite Mr Kitching saying Mr Clayton had to follow usual procedure for straddle drivers.

[19] Mr Kitching was aware of the disciplinary meeting scheduled for the following day (about the 9 July incident) and decided to stand down Mr Clayton on full pay until that meeting. He told Mr Clayton the 26 July incident would be addressed at the 27 July meeting.

[20] Shortly after Mr Clayton returned with another delegate, Mr McKean. A brief discussion following in which Mr McKean told Mr Kitching that Mr Clayton would now comply with the requirement to change channels.

[21] There is a sharp difference of evidence on whether that promise of future compliance was made solely by Mr McKean. Mr Kitching says Mr Clayton neither spoke during that brief discussion nor acknowledged what Mr McKean said. Mr McKean says Mr Clayton told Mr Kitching he was happy to operate on channel 1C. Mr Clayton says that while Mr McKean did most of the talking, he "*agreed to move to 1C*" and did acknowledge what Mr McKean was saying.

[22] That conversation ended with Mr Kitching saying the stand down was to remain and Mr Clayton could discuss the issue with Mr Kirwan the next day.

[23] There is detailed evidence in the witness statements of Mr Clayton, Mr Mayn, Mr Hulme and Mr Kirwan about four disciplinary meetings held on 27 July, 31 July, 4 August and 7 August. At a fifth meeting on 10 August Mr Hulme and Mr Kirwan dismissed Mr Clayton.

[24] There is no real dispute about what was said in those meetings so I need not set out all details of the discussions. I note the following relevant facts.

[25] Firstly, in the 27 July meeting, after some argument about whether Mr Clayton's own earlier safety concerns were being addressed, Mr Clayton

acknowledged he had "*created a bigger problem doing what I have done*". His suspension on pay was continued while the company conducted further investigations.

[26] Secondly, in a letter following that meeting Mr Kirwan noted Mr Clayton had told Mr Kitching on 26 July he "*would now comply with the requirement to change channels*".

[27] Thirdly, the following extract from Mr Kirwan's notes of comments made by Mr Hulme in the 31 July meeting summarises POAL's concerns:

> *The problem is we are dealing with someone who has decided to put in their own procedures. As managers … [w]e cannot afford to have people making up their own rules as they rightly or wrongly don't agree with policy.*
>
> *On the 26th July we had all our other staff driving on 1 Charlie with no problems, with one person (a maverick as* (sic) *you will) deciding he would do what he felt like doing. The trust that an employer should have for their employees is not there in [Mr Clayton's] case at the moment and his behaviour and refusal to obey a fair and reasonable request is why we are here today. It is serious enough to result in dismissal.*

[28] Fourthly, Mr Mayn presented new information to the 7 August meeting about some factors which he said may have affected Mr Clayton's judgement and contributed to his behaviour in those incidents. They concerned some domestic relationship difficulties Mr Clayton had experienced along with working additional shifts, which combined with the relationship stresses, affected his sleep and were said to have contributed to "*out of character*" behaviour.

[29] At the meeting on 10 August Mr Hulme, according to Mr Kirwan's notes, said they had made the decision to dismiss because they did "*not have trust in [Mr Clayton] to follow process*".

The issues

[30] The issues for resolution by the Authority are:

(i) whether POAL's investigation of Mr Clayton's actions of 9 and 26 July disclosed conduct that a fair and reasonable employer would

conclude amounted to serious misconduct; and

(ii) whether, having found Mr Clayton's actions were serious misconduct, POAL did what a fair and reasonable employer would have done in all the circumstances at the time by deciding to dismiss him; and

(iii) if there is a finding that POAL's actions were unjustified, what remedies are required, including whether reinstatement is practicable.

Were Mr Clayton's actions serious misconduct?

[31] It is the seriousness rather than the facts of Mr Clayton's conduct that is in dispute. By operating his radio on channel 1 B on 9 July and 26 July Mr Clayton did not comply with POAL's established procedures for the safe movement of people and machinery around the port. On 26 July he was asked by the control room to either switch to or stay on channel 1C but repeatedly returned to or remained on 1B. Later that evening, when talking to Mr Kitching, Mr Clayton was adamant, at least initially, that he would not operate on channel 1C for safety reasons.

[32] Through their investigation Mr Hulme and Mr Kirwan concluded this behaviour was serious misconduct because it was contrary to clearly-understood operating procedures in which Mr Clayton had been trained and worked under for some time. His contrary actions, they concluded, were within the scope of two examples of serious misconduct given in the applicable collective agreement: refusal to carry out proper work instructions and failure to observe safety rules.

[33] I find their conclusion was one a fair and reasonable employer would reach.

Was dismissal justified in all the circumstances?

[34] Mr Clayton's challenge to the justification for his dismissal centres on whether POAL properly took account of all the circumstances surrounding his actions. As the

Employment Court noted in *Air New Zealand v Hudson*:[1]

> *All the circumstances of the case includes not just the employer's reaction to the misconduct which it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer.*

[35] Emphasising the context of his expressed concerns about health and safety, Mr Clayton submits his dismissal was "*unnecessary*" and "*an over the top response to his actions*" given that he had subsequently shown a willingness to amend the position he had taken. He submits the matter should have been addressed through health and safety channels rather than through a disciplinary process.

[36] While the need to consider the context or totality of the situation is not in dispute, there is an issue as to the extent of that context. Mr Clayton submits the starting point is the 15 June incident about which he had genuine concerns, put in a hazard report in the manner he had been directed to by January memo, and then formed a sincere belief that those concerns had not been properly addressed.

[37] However I find that consideration of all the circumstances must take the starting point as, at least, from the January incident. On that occasion Mr Clayton took what really amounted to individual protest action about a procedure with which he did not agree. Taken in context with his conduct on 9 July and 26 July, a fair and reasonable employer would reasonably be concerned about a pattern or course of conduct by an employee deliberately choosing to flout standard operating procedures. Mr Clayton chose to repeat the kind of conduct in July that he was very clearly cautioned against six months earlier, as the following extract from the 23 January memo to him demonstrates:

> *While you may not agree you must at all times follow this procedure as you[r] failure to do so may put yourself and other[s] at further risk of harm. Due to the busy and complex nature of the operations here at the terminals it is critical all staff comply [with] operational procedures to ensure the safety of themselves and others and any failure to do so is a serious breach of the duty of care we owe to one another and the trust and confidence we must place in our employees.*

[1] [2006] ERNZ 415 at [142]:

[38] The deliberate or intentional nature of Mr Clayton's actions must also be assessed as part of the circumstances. He breached standard operating procedure on the two days in July identified by the employer and – as he admitted in answer to questions in the Authority – had done the same on some, if not all, other days he worked that month. His failure to comply with proper procedure on all these days was not because of inadvertence, oversight or negligence but done deliberately in the knowledge that he was not doing what his employer required and expected of him.[2]

[39] Mr Clayton's conduct (and its outcome) can be contrasted with what happened to his supervisor who had breached procedure in the 15 June incident. That supervisor – according to Mr Kirwan's evidence – accepted correction, did not continue to question or deliberately breach the procedure, and faced no further disciplinary consequences.

[40] From his conversation with Mr Haretuku Mr Clayton was aware there were other, proper channels through which he could continue to pursue his concern over whether the matter he had raised in June was, in fact, adequately addressed by POAL. Failing to use those channels, and adopting an idiosyncratic course, put at risk his own safety and that of other workers.

[41] It is in that context that a fair and reasonable employer would assess his apparent contrition and statement about future compliance. Based on his own evidence Mr Clayton made two key statements:

(i) he agreed when Mr McKean told Mr Kitching that Mr Clayton would operate on 1C in future (26 July); and

(ii) he accepted that he had created a bigger problem by his actions than the one he believed he was seeking to solve (27 July)

[42] In making their decision to dismiss, Mr Hulme and Mr Kirwan did not accept those assurances from Mr Clayton. Mr Hulme and Mr Kirwan – to paraphrase their evidence – were not convinced Mr Clayton really meant what he said or could be relied on to do what he said he would do. Rather they saw those statements as being

[2] See *Angel v Fonterra Co-operative Group* [2006] ERNZ 1080 at [81] (EC).

coached by the wiser heads of Mr McKean and Mr Mayn and not really reflecting the true view or likely future actions of Mr Clayton. They based this view on what Mr Clayton had done about procedures with which he did not agree in both January and July. I am satisfied that it was an assessment that was open for a fair and reasonable employer to make in all the circumstances at the time.

[43] Having also heard Mr Clayton's answers to questions in the Authority's investigation meeting about his obligation to follow directions from the Port dispatch control centre, I accept Mr Hulme and Mr Kirwan could reasonably have had those doubts. Mr Clayton remained equivocal about the extent to which he would comply with operational procedures and insistent that this depended on his own assessment of what was and was not safe at any particular time.

[44] A fair and reasonable employer would have considered whether its decision should be tempered by mitigating factors such as whether Mr Clayton's behaviour had been affected by relationship difficulties. I accept that Mr Hulme and Mr Kirwan did so but were not required to change their decision on the basis of that factor alone.

[45] While POAL's decision-makers could have opted for a less severe outcome, the Authority's jurisdiction is limited to whether POAL's actions were within the boundaries of a fair process, reasonable decision and acceptable industrial practice concerning safety issues.[3] In these matters the power of the Authority, and the courts above it, are "*limited to ensuring justice rather than imposing generosity*".[4]

Determination

[46] For the reasons given above, I find that POAL's decision to dismiss Mr Clayton and how it went about making that decision was what a fair and reasonable employer would have done in all the circumstances at the time. Accordingly Mr Clayton's personal grievance application is declined.

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[3] *Fuiava v Air New Zealand* [2006] ERNZ 806 at [86].
[4] *Wellington Road Transport IUOW v Fletcher Construction Co Limited* ERNZ Sel Cas 59, 89 per Judge Williamson.

Costs

[47] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves. In the event they are not able to do so, POAL may lodge and serve a memorandum on costs within 42 days of the date of this determination and Mr Clayton will have 14 days to lodge and serve a memorandum in reply. No application will be considered outside that timeframe without prior leave.

Robin Arthur
Member of the Employment Relations Authority