

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 6
5351316

BETWEEN ISAAC DAVIS
 Applicant

AND RICHARDSON DRILLING
 LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Jenny Jermy, Counsel for the Applicant
 Alan Knowsley, Counsel for the Respondent

Investigation Meeting: 5 October 2011 at Wellington

Submissions Received: 10 and 21 October 2011 and 1 November 2011

Determination: 17 January 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Isaac Davis was suspended from work on full pay on 26 May 2011. Subsequently, he was dismissed on 7 July 2011.

[2] Mr Davis claimed that the actions of his employer were unjustified. He has claimed reinstatement, lost wages, compensation and costs.

[3] Mr Davis's employer, Richardson Drilling Limited (Richardsons) has denied all Mr Davis's claims. Richardsons contended that the suspension and dismissal were justifiable. It opposed Mr Davis's claim for reinstatement.

Issues

[4] The new s.103A of the Employment Relations Act 2000 (the Act) applies because the employer's actions took place after 1 April 2011.

[5] Pursuant to s.103A of the Employment Relations Act 2000 (the Act), the question of whether a dismissal is justifiable *must be determined, on an objective basis, by considering 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.*

[6] In applying that test the Authority must, in accordance with the provisions of s.103A (3) (a)-(d) and s 103 A (4), consider whether:

- 1) Having regard to the resources available to the employer, the employer sufficiently investigated the allegations;
- 2) The employer raised its concerns with the employee prior to taking action;
- 3) The employer gave a reasonable opportunity for response;
- 4) The employer genuinely considered the explanation before taking action;
- 5) There are any other appropriate factors.

[7] The test cited above involves a key change with the word "could" being substituted for the "would" that previously applied.

[8] In *Air New Zealand v Hudson* [2006] ERNZ 415, 435 the Employment Court held that in the context of considering justification of dismissal the Court of Appeal's use of the word "could" in *W & H Newspapers Ltd v Oram* [2000] 2 ERNZ 448 widened the range of responses open to an employer. In *Hudson* the difference between "could" and "would" was explained as: *The difference between whether a person is able to respond in a certain way or whether a person who is able to respond would actually respond in that way.*

[9] This has been clarified by the Court in *Angus and McKean v Ports of Auckland Limited* [2011] NZ EmplC 160 where it held that *...the new test allows for more than one possible justifiable outcome and more than one possible justified methodology [35].*

[10] At paragraph [37] the Court stated that:

The effect of new s 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.

[11] Mr Davis is seeking reinstatement. As such other new provisions of the Employment Relations Act apply. Reinstatement is no longer the primary remedy but one of a number of remedies in the mix of remedies available under the Act. Consideration of reinstatement must also involve whether or not it is practicable and reasonable.

[12] The issues are:

- (a) What were the terms of employment with regard to the location of work for Mr Davis? Was Mr Davis's position located in Wellington and or Hamilton?
- (b) What were the reasons relied upon by the employer to suspend and dismiss Mr Davis?
- (c) What were the circumstances surrounding the suspension when it occurred?
- (d) What were the circumstances surrounding the dismissal when it occurred?
- (e) Has the employer's actions complied with S.103A sub sections (3)-(5) of the Act?
- (f) 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 suspension and dismissal occurred?
- (g) Is there a personal grievance? If so, what remedies is Mr Davis entitled to;
- (h) Is it practicable and reasonable to reinstate Mr Davis to his position which he claims is in Hamilton;

- (i) Has Mr Davis mitigated his loss of wages;
- (j) Has Mr Davis contributed to the situation giving rise to his personal grievance (applying s.124 of the Act);
- (k) Which party is entitled to costs, and how much?

The facts

[13] Mr Davis was employed by Richardsons as a trainee drill operator. He signed off an employment agreement that recorded his place of work as Ruskin Road, Wellington (Document A/Statement of Problem). The signatories to the agreement were Mr Ross Richardson, director of Richardsons (Mr Richardson), and Mr Davis. Mr Davis was required to move to work on a rig in Hamilton under the terms of the employment agreement, which were:

3. *Places of work ...*

...

3.1 *111 Ruskin Road, Wellington*

3.2 *The employee agrees to work at any other site that the Employer may deem to be applicable to complete the work, noting that frequent travel out of Wellington including overnight stays forms part of this agreement.*

[14] Upon moving to Hamilton, Mr Davis resided in a company house located at 18 Elwood Crescent, Hamilton. In addition, he was paid a daily allowance for this travel arrangement.

[15] During the investigation meeting, when I asked Mr Davis for any written and signed variation to his employment agreement, he produced another agreement. This was the original signed agreement between him and Mr Richardson. However, added in handwriting to that agreement, were the following words:

3. *Places of work*

3.1 *111 Ruskin Road, Wellington or 18 Elwood Cres
Place Hamilton. (Emphasis added)*

3.2 ...

[16] Mr Davis says these words were added by Mr Hugh Nicolson, project manager, upon Mr Davis's arrival in Hamilton and were added during his induction.

Mr Nicolson denied the claim. Also, Mr Richardson denied that he had seen the words in the agreement, even although it was the original document that he had signed. Messrs Nicolson and Richardson did not know whose handwriting it was on the document. Despite cross-examination, this remains unexplained, I hold.

[17] During Mr Davis's employment, two health and safety issues arose. The first involved a pole driving matter onsite. This was not raised by Mr Davis as an issue at the time, but he became embroiled over the photos of the PC300 pile driver and its mast. Mr Davis never reported the matter at the time, and nor did he refer to it in any performance review at the time, particularly on 16 April 2011. The second matter involved a car accident while Mr Davis and another employee (the driver) were on a public road travelling for work purposes. Mr Davis was injured and took issue with having to drive again with the other employee. Mr Nicolson took photos of the accident scene for insurance and for any investigation. He also says he reported it to the Police at the time. There is evidence at least from Mr Nicolson of him following up the matters at the time with Transpower and another contractor (Groundline, a company providing advice to Transpower).

[18] On 23 May 2011, Mr Davis was advised by Richardsons that there would be a reduction in the workload for the Hamilton project. The result of that reduction was that Richardsons needed to relocate resources. Mr Davis was instructed that he would be required, as the trainee drill rig operator, to commence back in Wellington from the week beginning 6 June 2011. Mr Davis became very upset by this decision. He alleged that he was informed by Mr Richardson that, upon being directed to work in Hamilton, that that work would last for at least three years. Mr Richardson denied the claim.

[19] On 25 May 2011 Mr Davis reported sick and took the day off. During the day, Mr Davis decided to approach J P Marshall (another Hamilton firm) for a new job. A person from J P Marshall reported this to Mr Nicolson. Mr Davis also met his wife.

[20] Also, on 25 May 2011, Mr Jared Pierson, leading hand, informed Mr Nicolson that he had learned that Mr Davis was returning to work the next day and that Mr Davis had made a comment the day before about photos that Mr Davis had relating to the PC300 pile driver where there had been an incident with a mast. Mr Davis had obtained the photos at the time of the incident from Mr Pierson. The comment to Mr Pierson was that:

He was going to give the photos to Transpower health and safety people and that would fuck them.

[21] Mr Pierson understood Mr Davis to be referring to Richardsons when he referred to “them”. Mr Pierson reported this to Mr Nicolson. Ten minutes later on the same day Mr Nicolson was informed by a director of Groundline that Mr Davis was discussing Richardsons’ matters and that Mr Davis should have been directing any issues he had through his own line manager at Richardsons. Mr Nicolson raised the two conversations with Mr Ross Richardson who decided that Mr Nicolson was to meet with Mr Davis immediately upon Mr Davis’ return to work from sick leave.

[22] On 25 May Mr Nicolson asked the drilling site manager to contact Mr Davis and inform him not to go on to the site, but to report to his office. Mr Davis says that when he arrived at the site office he saw Mr Nicolson and Mr Billy Richardson, another employee/Mr Richardson’s son (Billy Richardson), and he was very surprised because he expected to see the drilling site manager there. There is some conflict about what happened next, suffice to say, Mr Nicolson says Mr Davis never gave him a chance to raise the matters he wanted to talk to Mr Davis about. There was an attempt by Mr Nicolson to talk to Mr Davis and give him instructions not to talk with other contractors’ personnel. During this process Mr Nicolson suspended Mr Davis on full pay. I hold his reason for this was that Mr Davis kept leaving and persisted in making contact with other people involved from another company on the site a short distance away. Mr Davis had no opportunity for any input into the suspension decision as required under the employment agreement, which reads as follows:

33. Suspension

33.1 The Employer may suspend the Employee from his or her duties if necessary where serious misconduct is alleged or being investigated. The Employer will seek the Employee’s input before suspension. Suspension will be on full pay unless the Employee has failed a drug or alcohol test or has refused to undergo such a test when required to do so under the Drug and Alcohol policies.

[23] There was clearly a tense and difficult situation that occurred and one of the people onsite from the other company tried to diffuse the situation. He advised Mr Davis to go home when that person learned that Mr Davis had been suspended by Mr Nicolson. Mr Davis left the workplace and was collected by his partner.

[24] What followed next can be summarised as follows. Mr Nicolson says he was approached by Transpower's health safety and quality manager who was concerned about allegations that Mr Davis had been making to his personnel about covering up the pile rig and car accident.

[25] As a result Mr Davis was advised in writing of a number of allegations requiring him to explain his behaviour. These allegations were:

- (a) That the allegation against him was of serious misconduct;
- (b) It was alleged he discussed confidential company information with staff/contractors of the head contractor "*Transpower*" that compromised Richardsons' work ethics and reputation;
- (c) It had been reported that Mr Davis had removed company photos from a colleague's laptop and threatened to use them to discredit Richardsons' work practices and procedures;
- (d) While Mr Davis was on sick leave he presented himself in a fit and healthy manner to J P Marshalls, Richardsons' "*subcontractor*", requesting employment.

[26] It was alleged that Mr Davis would be in breach of his individual employment agreement if the allegations were to be found to be correct. He was advised that the consequences could be disciplinary action up to and including dismissal (26 May 2011). Mr Davis was provided with copies of the written statements about the allegations from other people. Mr Davis provided a response in writing explaining his involvement. He denied taking the photos and denied that he was making threats, and he explained that he was only making enquiries when he contacted other people outside Richardsons.

[27] On 22 June 2011 Mr Davis and his father (Mark Davis) met with Mr Richardson and Mr Nicolson in an office of a lawyer in Wellington to discuss the above allegations. It has been alleged that Mr Davis admitted that he had made a comment to Jared Pierson about using the photos and Mr Davis agreed he said that he would use the photos to "*ruin the rep of RD*" (exhibit E). Mr Davis said it was a spur of the moment comment and that he was upset about having to return to Wellington.

[28] Following the discussion, the Davis' engaged a lawyer for assistance. In the meantime, Richardsons set out in writing its findings and tentative decision for Mr Davis to have input and to comment on. The tentative decision was made that Mr Davis had discussed confidential information with staff/contractors of *Transpower*, had threatened to use photos to discredit the employer, and that Mr Davis presented himself to another business requesting work when he was on sick leave. A reply was provided by the Davis' lawyer, after an extension of time (24 June 2011 and 7 July 2011).

[29] On 7 July 2011, Richardsons sent the decision dismissing Mr Davis without notice.

[30] The parties attended mediation. It falls on the Authority to make a determination on the issues.

Determination

(a) Mr Davis's place of work

[31] Mr Davis's position was located in Wellington under the terms of the agreement that he signed when he started his employment. It remains unexplained how the words "...or 18 Elwood Cres ~~Place~~ Hamilton" came about in the original agreement produced by Mr Davis at the Authority's investigation meeting. However Mr Richardson had no part to play in the additional words being entered on the agreement. He was surprised when the document was produced. His reaction causes me to believe he had not seen the changes before and that there had been no discussion with him about them. Given that he signed the agreement off in the first place it is more than likely that his concurrence of any change would need to have been obtained. Therefore the place of work has to be Wellington and on assignment to other places. This is supported by the travelling allowance being paid to Mr Davis while he was in Hamilton.

(b) The suspension

[32] The reason for Mr Davis being suspended was that he kept leaving Mr Nicolson and persisted in making contact with other people from another company on the site, when Mr Nicolson was trying to tell him what he wanted and trying to talk to Mr Davis. Since Mr Nicolson referred to his action as a suspension Mr Davis had no

opportunity for any input into the decision made by Mr Nicolson to suspend him as required under the employment agreement. A fair and reasonable employer could not have made a decision to suspend Mr Davis when it failed to comply with the employment agreement to allow input and comment before a decision was made. The process was defective and fell short of any disciplinary requirements if a suspension was being contemplated. I hold that Mr Nicolson's unilateral decision was initiated by Mr Davis's behaviour leading to the decision. It doesn't matter when the decision was conveyed because there is common ground that Mr Nicolson at some point sent Mr Davis away. As such the situation as it developed was meant probably to be a cooling off period, but Mr Nicolson's use of the word suspension has had an unfortunate connotation, especially since there is a provision to be applied under the employment agreement. Thus Mr Nicolson's action was unjustified in the manner in which he described his response and his failure to abide by the terms of the employment agreement. Mr Davis was disadvantaged by the decision because his employment was less secure. He was also required to leave the workplace. Mr Davis's contribution in regard to his behaviour of walking out on Mr Nicolson and continually approaching other people meant his contribution would have been 100%, because Mr Nicolson honestly concluded that Mr Davis was being disruptive and potentially threatening the standing of the company. The matter was not pursued.

(c) Serious misconduct allegations

[33] Next the employer relied upon three complaints/allegations that were put to Mr Davis. These are entirely separate to the matter of the suspension. First Mr Davis was found to have discussed company information with staff/contractors of the head contractor. This involved discussion on the motor vehicle accident, which Mr Davis admitted. The second issue related to an admission from Mr Davis that he was going to use the photos he had, and the employer concluded that this action was to discredit it with a contractor. This was based on a statement made by Mr Davis to Jared Pierson. Mr Davis's own notes support the conclusion reached by the employer. It was entitled to disallow his explanation that he was only making enquiries and was upset, I hold. From an admission given by Mr Davis and information from the other people involved at the time a fair and reasonable employer could have reached such conclusions at the time, I hold.

[34] Finally (thirdly), Mr Davis did take sick leave, but he was found to have used that time to go and ask another employer for a job and to meet up with his partner during the day, and this is what led Mr Richardson to a conclusion that Mr Davis had misled the employer about being sick, when he was well enough to go and meet his partner and look for another job. Mr Davis told me that he had sufficiently recovered from a headache at the time to go out. He did not contact his employer about what he was doing at the time. The information discovered by the employer and Mr Davis's omission to contact his employer meant that a fair and reasonable employer could have reached a conclusion that it had been misled, I hold. The employer had no difficulty about him looking for another job, but it was his action of doing so while he was sick that led the employer to an honestly held belief that it had been misled. Mr Davis had no supporting medical certificate and had not been to the doctor. His explanation about recovering was not given at the disciplinary meeting.

[35] For completeness, the factors that must be considered by the Authority when applying the test of justification (which all relate to actions taken by the employer before the dismissal or other action) are:

- a) Whether the employer's concerns were raised with the employee. In this case it did raise the issues with Mr Davis and the allegations were put in writing and discussed at meetings;
- b) Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns. In this case it did provide Mr Davis with a reasonable opportunity to respond and be heard. This is supported by the advice provided in the employer's letters outlining the allegations and the process and the arrangements for meetings;
- c) Whether the employer genuinely considered the employee's explanation (if any). In this case it did consider Mr Davis's comments and explanation. This is supported by it deciding not to pursue one of the allegations, coming to a tentative conclusion and providing Mr Davis a further opportunity to reply before the decision was finalised;
- d) Whether there was a sufficient investigation (having regard to resources available to the employer). In his case there was a sufficient investigation. This is supported by statements being obtained, meetings taking place and the

employer's concerns being put in writing, along with the findings, conclusion and tentative decision. Indeed it was accepted by the employer that Mr Davis had been given the photos, and that Mr Davis had not taken them as alleged in the first place. Mr Davis was advised no further action would be taken on that allegation alone (letter 24 June 2011). The issue remained about what he threatened to do with the photos and that he had misled his employer for taking sick leave and then looking for another job;

- e) Any other appropriate factors (s. 103 A (3) of the Act). There have been no other appropriate factors raised except for a consideration of the context in which Mr Davis says he responded to the employer. I hold that the employer was left to make a decision based on whether or not it believed Mr Davis. Given the evidence available to the employer at the time a fair and reasonable employer could have believed Mr Nicolson and Mr Pierson based on the information they had.

[36] The Authority must then determine 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.

[37] Combined the three matters relied upon by the employer at the time amount to serious misconduct and as such the option available to a fair and reasonable employer included summary dismissal without notice in the range of responses available to the employer. This is supported by the employment agreement. The employer's actions and how the employer acted were what a fair and reasonable employer could have done bearing in mind that on a separate matter Mr Davis had been informed that the Hamilton work would cease, he would need to return to Wellington, the background of the two accidents and Mr Davis's behaviour in regard to his employer.

[38] Finally, any decision must still be found justifiable if the sole defects in the process were minor did not result in the employee being treated unfairly (s105A(5)).

[39] The arrangements around the way in which the meeting on 26 May was organised could have been better and Mr Davis should have been given an opportunity to comment before the suspension decision was made and to have a support person present given the decision related to disciplinary action under the employment agreement. However his contribution amounts to 100% because he

refused to listen to Mr Nicolson's instructions and what he had to say. Instead Mr Davis left the meeting causing Mr Nicolson to come to an honestly held belief that Mr Davis was being disruptive and potentially threatening the standing of the company.

[40] There were no other circumstances to impact on the employer's decision to dismiss Mr Davis at the time. The suspension and decision for Mr Davis to return to Wellington were separate matters. Mr Davis has alleged that there was something wrong with the employer's health and safety processes, but he has not been able to establish on the balance of probabilities any cover up, I hold. One example was never reported by him at the time, but able to be explained by Mr Nicolson. Another example was the vehicle accident, which from the evidence, was followed up at the time according to Mr Nicolson. If Mr Davis was only trying to make enquiries of other people about the matters he was concerned about, and if he was upset about moving to Wellington, then he needed to pursue those very differently to the way he actually handled the situation.

Conclusion

[41] The applicant's claims are dismissed.

[42] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority