

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 294
5427205

BETWEEN GREGORY ALAN GOURLEY
 Applicant

AND INDUSTRIAL SITE SERVICES
 CO LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Andrea Twaddle for Applicant
 Simon Scott for Respondent

Investigation Meeting: 30 April 2014 at Hamilton

Submissions Received: By 23 May 2014

Determination: 10 July 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Greg Gourley, brings three claims of disadvantage against the respondent, Industrial Site Services Co Limited (ISS). In particular, Mr Gourley claims that he was unjustifiably disadvantaged because ISS failed to take all reasonably practicable steps to ensure his safety, breached its good faith obligations to him while being investigated over a safety incident, and unjustifiably suspended him or repudiated the parties' employment agreement by failing to provide him with work. Penalties are also sought for each of these breaches.

[2] For its part, ISS denies all of Mr Gourley's original claims.

[3] In submissions, Mr Gourley also sought that recommendations be made to ISS over its health and safety and other workplace policies. ISS does not object to the Authority making any recommendations about its workplace practices.

[4] The issues for determination are:

- (a) What was the real nature of the employment relationship between the parties?
- (b) Did ISS take all reasonably practicable steps to ensure Mr Gourley's safety at work?
- (c) Was Mr Gourley treated fairly throughout the investigative process?
- (d) Was his employment agreement repudiated, or was he unjustifiably suspended?
- (e) What, if any, remedies should be granted?

Factual discussion

[5] Newmont Gold Waihi Limited (Newmont) operates a mine at Waihi. It subcontracts a lot of the general maintenance work at the mine to ISS. Mr Gourley, who had worked for 20 years with Newmont before being made redundant, was engaged by ISS with effect from 27 November 2012, until 16 April 2013. He did a lot of work covering for absences in the Newmont workshop, a position he had previously held with Newmont, but also did general maintenance work as required by ISS.

[6] The site was controlled by Newmont and its health and safety procedures were to be followed by ISS at all times.

[7] When ISS was seeking additional maintenance staff in November 2012, Mr Gourley was seen as a good fit because of his previous experience with Newmont, and it suited Mr Gourley to be working back at the mine. Despite the parties now disagreeing over the nature of the employment relationship, they clearly entered into a written agreement signed by Mr Gourley with effect from 27 November 2012. This was said to be "*casual employment ... on an 'as and when' required basis at all times*". The contract provided for both parties to choose whether or not employment

would be offered and that each period of casual employment would be a separate engagement. Service was not to be continuous and it also stated *“Nothing in this agreement provides any entitlement to further employment beyond each period of casual employment. You should not have any expectation of further offers of casual employment.”*

[8] While Mr Gourley now claims that he had permanent employment, it was clear that the contract was drafted as a casual one at Mr Gourley’s initiative, as he did not want to take up permanent employment until after he had returned from a long trip to Papua New Guinea, which he did every year in or around June. He also wished to attend a fishing competition for a week earlier in the year.

[9] For these reasons, and with him correctly surmising that he would not be entitled to take annual leave to attend both these events, it was Mr Gourley’s suggestion that he enter into a casual employment agreement which was, incidentally, the only type of employment agreement that the ISS site supervisor, Mr Paul Carson, was authorised to enter into. However, Mr Gourley was led to believe that, all going well, his employment would become permanent on his return from Papua New Guinea, which was scheduled for around 18 June the next year.

[10] Mr Gourley therefore had a legitimate expectation that, all going well, he would become a permanent employee of ISS from that date. However, Mr Gourley also accepted that it followed from the above that he took the risk that, should other events intervene during that period, he did not have the protection of permanent employment. On the other hand, an employee of the sort Mr Gourley was is still entitled to fair treatment throughout his employment by ISS.

[11] Mr Gourley worked reasonably regularly in his four months employment with ISS. In fact it appeared that ISS had work for him on every normal working day. On the other hand, Mr Gourley came and went as he pleased without ever applying for leave. In addition to his week off to attend a fishing tournament, he also had a week off for illness, and at least one day off for an appointment at Waikato hospital.

[12] Mr Gourley was paid holiday pay inclusive of his hourly rate, as could only lawfully occur if there was short term employment.

[13] Mr Gourley's employment at the mine was to end over his actions when working unharnessed in conditions deemed to be unsafe by Newmont, based on his subsequent conduct during Newmont's investigation into that incident.

[14] The relevant background to that issue is that Mr Gourley was authorised to work at heights, given that he had passed the course that allowed him to work at heights. Although he was not given the refresher training that Newmont employees were given, this was not necessary to retain certification.

[15] Mr Gourley well knew Newmont's general safety policies, having worked there for around 20 years. He was involved in daily meetings with all Newmont and ISS staff, which dealt with health and safety matters. He was inducted onto the site by ISS for health and safety. At the time he made no complaints about his induction. Mr Gourley did, however, only attend one Positive Attitude Safety System meeting.

[16] ISS used, at Newmont's insistence, a generic standard operating procedure (SOP) and job hazard analysis (JHA), which did not clearly cover the cleaning of tanks, whereby Mr Gourley was working at a height of more than 2 metres without a safety harness. This was a feature remedied following Newmont's subsequent investigation process.

[17] On 21 March 2013 Mr Gourley was reported for working cleaning a tank at an unsafe height within two metres of the edge. Mr Gourley claims that he was simply doing what he had been trained to do by ISS and what other workers always did, and that he lied to Newmont in its investigation when claiming he had worked at heights without a harness as a shortcut, and thus taking personal responsibility, rather than having ISS subject to scrutiny for not following Newmont's procedures. It was very clear from Mr Gourley's evidence that his perception that ISS should have done more for him, given that he had covered up for it, lies at the heart of his grievances. However I have adopted the investigation report conducted by Newmont as the most accurate account of what happened at the time, and in that investigation Mr Gourley accepted that he told Newmont that he had carried out the task in the way he did in an attempt to save time and to finish it quickly. The Newmont account of events is corroborated by Mr Gourley's own letter, addressed below, where he admits to gross misconduct and apologises for his lack of remorse and flippancy.

[18] As a result of the manager observing Mr Gourley's behaviour, Newmont initiated an investigation. As a result Newmont put in place changes to improve safety, which were adopted by ISS.

[19] Mr Gourley and his co-worker were amongst those interviewed. It was Mr Gourley's behaviour during the interview, rather than his actions on the day, that led to his access to the Newmont mine site being revoked by Newmont on 16 April 2013. Significantly, his co-worker was not banned, because he had shown remorse over the incident.

[20] At interview Mr Gourley made it clear that he did not believe that he had done anything wrong, or that he was unsafe or potentially unsafe, unlike his co-worker. According to what Newmont was told by Mr Gourley, he had no remorse over the incident, as he did not think he had anything wrong and could not see that he had done anything wrong. Furthermore he told them that he had knowingly taken the risk of working unharnessed in such circumstances.

[21] After he had had his access removed, Mr Gourley appeared to have had a change of heart, because he wrote to Newmont on 22 April, stating that he wished to apologise for his attitude regarding the safety harness issue. He also stated

On reflection, I can see how my comments and actions would have seemed flippant and not remorseful, for an incident I now see as being a very serious breach of safety standards.

However, in my defence, I think it's important that you are aware of the circumstances that have led to my gross misconduct.

[22] Mr Gourley then referred to certain personal issues he was dealing with at the time, which he did not want to be an excuse, but did have a bearing on his decision making. He also referred to his work history and his desire to be given a second chance. Newmont refused to have him back.

[23] During this whole period Mr Gourley did not have any of the issues or the potential implications for his employment discussed with him by anyone from ISS, even although he continued working for ISS at the Newmont site. On the other hand, neither did Mr Gourley seek any assistance from ISS during the investigation process.

[24] It then appears that ISS took the view that Mr Gourley was a casual employee and when it could no longer offer him work at the Newmont site, and as it had no

other work in Waihi, it did not offer him any more work. However, a month later Mr Gourley contacted the ISS general manager, Mr Bruce Forsyth, to approach Newmont to have the ban lifted on his behalf, which Mr Forsyth later did. Mr Forsyth also acknowledged that Mr Gourley still had a casual employment agreement with ISS and that it would try and find work for him.

[25] However, the parties' focus was on getting him back to work at Newmont, which was ultimately unsuccessful, despite Mr Forsyth offering options such as retraining (which did happen for ISS staff who continued to work at Newmont, Waihi) and other options such as a stand-down, etc. Mr Forsyth also looked at the possibility of there being work in the yard that ISS was going to have to open outside the Newmont mine, as it no longer wanted ISS to be based there. However, no work eventuated there.

[26] On his return from Papua New Guinea in mid-June, Mr Gourley asked Mr Forsyth how his approaches to Newmont had fared. As at that point Mr Forsyth had not heard back from Newmont he approached them again and it was once more confirmed that Mr Gourley would not be allowed back on the site.

[27] Later in June Mr Forsyth arranged for one of his subordinates to raise with Mr Gourley the option of work at its Hamilton head office. Mr Gourley never responded to this approach, because he did not want to travel the 90 minutes each way between his home in Waihi and ISS's base in Hamilton. On 24 July 2013 Mr Gourley started new employment.

[28] The parties attended mediation and attempted to settle matters on their own terms following the investigation meeting, but these efforts were unsuccessful.

Determination

[29] Mr Gourley has not brought a claim for unjustified dismissal, but rather unjustified disadvantage. Mr Gourley was entitled to expect to be offered regular work until he left for Papua New Guinea. An employee in a situation such as Mr Gourley's is also entitled to be treated fairly by his employer. But Mr Gourley must have known that the Newmont investigation could have resulted in him being denied access to the site, resulting in ISS being unable to offer him further work. That is what did occur and therefore ISS could not have offered him any more work there. However the ban did not automatically terminate his employment with ISS and ISS,

as a fair and reasonable employer, was obliged to have some contact with him, which it did not. It was not entitled to simply accept Newmont's findings and decisions without any involvement between it and Mr Gourley. Mr Gourley was also entitled to have issues such as his possible reintegration at Newmont and alternative employment options discussed with him. ISS's actions over both these issues were certainly too late, being only commenced at Mr Gourley's initiative some weeks after the ban was put in place.

[30] Mr Gourley was thus entitled to be notified that his ongoing employment with ISS was at risk and that ISS conduct some sort of investigation into the situation, not to simply rely on Newmont's ban. These omissions were also in breach of its duty to be active and constructive in maintaining a productive employment relationship, including being responsive and communicative.

[31] It therefore follows that Mr Gourley was unjustifiably disadvantaged in his employment by breaches of good faith and the failure of ISS to discuss with him what would happen to his employment when his access to Newmont's Waihi mine was revoked, as well as the process that preceded it.

[32] It cannot, however, be said that Mr Gourley has lost any remuneration as a result. ISS could not employ him at Newmont's Waihi mine because he could not attend work and it had no other work for him in the area. Furthermore, the nature of the employment agreement was such that, following an intervening act such as here, ISS was under no obligation to continue to provide Mr Gourley with any ongoing work. In any event, Mr Gourley was not prepared to move to work in Hamilton, which although a reasonable decision on his part, given its distance from Waihi, indicates that there was no alternative work for him.

[33] Mr Gourley gave cogent evidence of his upset over being not supported by ISS over the loss of his job at the Newmont site and there was no doubt that this was so, given its failure to be responsive and communicate with him about what was happening at his work. Compensation in the sum of \$3,000 is appropriate.

[34] While Mr Gourley was, in his own words, responsible for the loss of his access to the Waihi site because of its attitude, he did not contribute to the lack of support from ISS, even though he was the author of his own demise over the revocation of his access. No deduction for contribution is therefore appropriate.

[35] While Newmont's generic SOP and JHA were not sufficient to ensure best practice was carried out in health and safety terms, that does not constitute grounds for a personal grievance by Mr Gourley who, at the time, did not believe there was any risk to his safety in any event. Mr Gourley was inducted onto the site without complaint (where he had already worked for twenty years), was certified to work at heights, attended health and safety meetings, was subject to Newmont's comprehensive safety and health policies, and denied there being any risk, as well as refusing to take any responsibility at the time for working in an unsafe manner.

[36] It is thus clear from the facts that while ISS's health and safety practices on the Newmont site were not ideal, Mr Gourley was not unjustifiably disadvantaged as a result. In fact he did not believe he had ever been put in an unsafe position. His grievances relate more to his lack of support by ISS, as noted above. I therefore dismiss his claims over health and safety.

[37] The only penalties that could therefore flow are penalties for breach of good faith by ISS over how it failed to deal with the issues of Mr Gourley's employment with it over Newmont's investigatory process and the revocation of Mr Gourley's permission to work on the site. Penalties are not necessary in these circumstances because Mr Gourley has already been properly compensated for the way he was treated in this regard. As a result the claim for penalties is dismissed. Similarly, there is no need for any formal recommendations by the Authority, given that the issues have been clearly determined.

[38] I therefore order the respondent, Industrial Site Services Company Limited, to pay to the applicant, Mr Gregory Gourley, \$3,000 in compensation under s. 123(1)(c)(i) of the Act.

Costs

[39] Costs are reserved.

G J Wood
Member of the Employment Relations Authority