

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 31  
5336773

BETWEEN                      PETER GREEN  
   Applicant  
  
AND                                C3 LIMITED  
   Respondent

Member of Authority:      Paul Stapp  
  
Representatives:            Graeme Ogilvie, Advocate for the Applicant  
   Luke Stewart, Counsel for the Respondent  
  
Investigation Meeting:     Tuesday 18 October 2011 at Wellington  
  
Submissions:                1 and 16 November 2011 and 19 December 2011  
  
Determination:              4 April 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     C3 is involved in the picking up and moving of logs at a yard in Seaview and the wharf. The employment relationship problem arises from an accident that occurred on 18 January 2011. The accident involved a loader being damaged at C3 Limited's Seaview site that was being driven by Mr Green. In addition, it was discovered that a retaining pin had come loose, and while it was still in place, the boom had separated from the fork housing. Mr Green was suspended by the branch manager, and dismissed by Mr Warren (Baz) Pritchard the employee relations manager/general manager, for serious misconduct. Mr Green has claimed that the actions of the employer were unjustified.

[2]     C3 Limited (C3) has accepted that Mr Green was suspended, and was dismissed from his employment. It denied Mr Green's claims.

## The Issues

[3] The primary issue in this employment relationship problem is whether the employer acted as a fair and reasonable employer would have acted in all the circumstances. In particular the test of justification applies under s.103A of the Employment Relations Act 2000 (“the Act”) as it was before 1 April 2011:

### *103A Test of justification*

*For the purposes of s.103(1)(a) and (b), the question of whether a dismissal or an action was 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 would have done in all of the circumstances at the time the dismissal or action occurred.*

[4] The actions complained about by Mr Green relate to incidents prior to 1 April 2011. In particular the following issues arise:

- (a) A scrutiny of the employer’s actions in suspending Mr Green; and dismissing Mr Green. Also, this is a matter where C3 has relied upon a conclusion that Mr Green’s behaviour amounted to negligence to justify a conclusion that Mr Green’s behaviour was serious misconduct.
- (b) What were the matters arising out of a meeting held on 25 January 2011?
- (c) Did Mr Green admit he was negligent and should have seen the pin working loose?
- (d) Which party is entitled to costs, and how much?

[5] Where allegations of misconduct are particularly serious, then the evidence in support of such allegations must be as convincing in its nature as the charge is grave (*Honda NZ Ltd v. NZ (with exceptions) Shipwrights etc. Union* [1990] 3 NZILR 23 (CA)).

[6] In *Chief Executive of the Department of Inland Revenue v. Buchanan and Symes (No.2)* [2005] ERNZ 767, the Court of Appeal held that what was necessary in the test for serious misconduct was an evaluation of whether a fair and reasonable

employer would characterise the offending conduct as deeply destructive of the basic confidence and trust essential to the employment relationship, thus justifying dismissal.

[7] It is not the role of the Authority to substitute its decision for that of the employer, even if a later more thorough investigation by it may have led to a different conclusion to that reached by the employer at the time. There is no absolute requirement for a two step process for an employee to have an opportunity to comment on the disciplinary action that might be proposed in a separate meeting. In other words there will be times when a combined meeting and process for any disciplinary action and penalty will be justifiable.

### **The facts**

[8] Mr Green was employed from 5 July 2010 in a full time role as a driver machine operator by C3 at its Seaview site. At the time of his dismissal he was paid \$18.50 per hour. He worked an average of 56.13 hours per week.

[9] Mr Green had an accident in a CAT 966g vehicle unloading logs on 18 January 2011. The day before he had asked the mechanic to inspect a grease problem. It is common ground that Mr Green completed the paperwork for a pre start check/inspection of the vehicle. He did not check with the mechanic before starting work. He discovered that a pin on the right-hand bottom of the fork of the vehicle had come loose. He reported the damage caused by the loose pin. The damage was observed by the branch manager and two drivers at the scene at the time.

[10] On 19 January 2011 Mr Green had a drug and alcohol test that proved negative.

[11] It is common ground that Mr Green was suspended from duties on 19 January 2011 by the branch manager for a formal investigation to be carried out. The branch manager advised Mr Pritchard that Mr Green had been operating machinery unloading logs from trucks. It is common ground that a grapple gave way and twisted, apparently because of the pin working loose. An incident report was completed by the branch manager and Mr Green.

[12] Mr Pritchard says that the branch manager informed him that he had stood down Mr Green on full pay while the incident was investigated.

[13] On 20 January 2011 the branch manager wrote to Mr Green as follows:

***REQUEST FOR A FORMAL MEETING TO INVESTIGATE  
DAMAGE TO OUR C3 LOADER ON TUESDAY THE 18TH OF  
JANUARY 2011 IN THE SEAVIEW YARD***

*As you are aware from our discussion Wednesday 19th, the Company is investigating this matter as set out below. As part of this investigation process I would like to meet with you formally so you can put forward your explanation of events.*

*The matters to be investigated are:*

1. *Any actions or failures by any person to carry out proper procedures that may have resulted in an serious safety, error or damage situation.*

*Attached are copies of the relevant policies and copies of the evidence gathered from our investigation so far.*

*The purpose of this meeting is to ensure the company has sufficient details about the events before any decision as to whether disciplinary action against yourself and/or other employees are to be commenced.*

*The meeting will be conducted by...and... [names withheld] will be in attendance to take notes. We would like to meet with you on Tuesday 25th 9am in C3 office.*

*You are entitled to have a support person or representative present at this meeting.*

*Should disciplinary action be necessary after our investigation meeting the employee's affected will be formally notified and a disciplinary meeting will be held.*

*As you are aware, you are to be suspended on pay pending the outcome of our investigation or until such time we believe it is appropriate to return to duties. You have the right to appeal this.*

[14] The decision to stand Mr Green down was a suspension from work. The decision was made to stand him down and the letter confirmed it (Pritchard SOE 7). Mr Green did not appeal the suspension at the time. Appeal rights and the procedure to appeal are contained in the C3 code of conduct that Mr Pritchard believes was provided by virtue of the letter in [13] above, although he could not confirm that the document was actually provided.

[15] C3's defence is that Mr Green did not raise any issue with this approach at the time, although he now is complaining about the procedure followed. Mr Green was advised of the suspension in writing, and that the first time the complaint was made

was in a letter from Mr Green's advocate on 9 February 2011. The company relied on the seriousness of the incident that had occurred for the suspension, requiring an investigation. It was decided to investigate because of Mr Green's previous safety record (Pritchard statement of evidence ((SOE) 7). As Mr Green never raised an issue about this at the time I hold that that makes it more than likely he accepted being stood down and suspended during the investigation.

[16] On 25 January the meeting took place and notes were kept by the C3. Detailed notes confirm that the branch manager and assistant branch manager/second in charge and Mr Green attended. The notes indicate that during the discussion Mr Green had an opportunity to respond to a witness statement from two other witnesses in regard to his driving of the vehicle on Tuesday 18 January 2011. The drivers' statements do not refer to their observations about the loose pin.

[17] The notes also record that Mr Green was requested as to whether or not he wanted a support person present with him and/or a representative. He has accepted that the matter was raised although he says it was not said that he had the right to a representative. He now says that he did not understand what a support person meant. Whether or not that was the case at the time he did not make much of an issue about it. I hold he would have had time to make sufficient enquiries to find out the level of help he would require. This is supported by his comment at a latter stage that he would need a lawyer.

[18] The essence of Mr Green's response to the situation was:

- That he carried out a pre-start check. It is accepted that he completed a pre check form.
- That there was mud in the bolt hole; and that he was not sure if the bolt was in or out because of the amount of mud covering the machine area;
- That there was an absence of grease;
- That he found the fuel line had been tied up;
- That he had requested maintenance.
- That the pin had come loose previously and had been fixed by the mechanic.

[19] Mr Green produced during the Authority's investigation meeting a written summary of events and his explanation that he says he had provided to Mr Pritchard at the time. He says he gave this to Mr Pritchard during the meeting on 25 January, but from thereon it was apparently overlooked. Mr Pritchard says he can not recall seeing it at the time, but accepted that it outlined the events and what Mr Green says happened. I hold that it got lost in the process and was overlooked.

[20] The assistant site manager/second in charge wrote the notes for the 25 January meeting. The notes were provided and typed up. Mr Pritchard relied on the branch manager informing him that *the pin coming loose is a long process and a machine operator of any standard would have noticed changes to the machine. The pin is only a few metres away from the operator and the noise of the pin working loose would have been unbearable.* Also, Mr Pritchard has relied on advice from a branch manager from another port and that person's experience that a pin coming out of a machine would be very rare, that the pin would have been seen by the operator, that the operator would have felt a change in the operating of the machine and that the machine would have been noisy. Mr Green was not informed of this advice and did not learn of it until the Authority's investigation meeting. He denied that he would have seen the pin moving and coming out. He says he heard nothing and did not feel any change in the operation of the machine.

[21] Also, Mr Pritchard had an earlier discussion with a senior operator regarding pins working loose and that person could only recall it happening in his experience coming completely out of the housing once. Mr Pritchard says that the senior operator believed that an operator would have noticed the pin dislodging by a number of means:

- by seeing it in the pre start check;
- the behaviour of the log head during an operation;
- by seeing the pin during normal operation; and
- by the noise of it squeaking as the machine moved about the yard.

[22] Mr Pritchard relied on the expert opinion of these two people.

[23] Following the 25 January meeting the branch manager and Mr Pritchard discussed what occurred and concluded that further investigation was needed, and that a formal disciplinary meeting was required. They concluded that that might potentially lead to disciplinary action depending on the findings of the investigation.

[24] A letter dated 31 January 2011 was drafted advising Mr Green of the need to proceed to a formal disciplinary meeting regarding the allegation of serious misconduct. That letter reads as follows:

***DISCIPLINARY ACTION – FORMAL MEETING REGARDING ALLEGATION OF SERIOUS MISCONDUCT***

*Further to my discussion with you on the 25th January, you are required to attend a formal disciplinary meeting to discuss your conduct in relation to the allegations of serious misconduct set out below.*

*The allegations are:*

- 1. It appears you have failed to properly check your machine prior to work resulting in serious damage to that machine and exposure to yourself and others in regards to safety.*
- 2. Or it appears that your driving manner may have caused the locking pin to work free resulting in the serious damage and serious safety issues mentioned above.*

*Attached are copies of the relevant policies and copies of the evidence gathered from our investigation so far.*

*The meeting will be conducted by Baz Pritchard our Employee Relations General Manager. I will be in attendance to take notes. We would like to meet with you on Thursday 3rd February at 10am in my office.*

*As this matter may affect your employment you are entitled to have support person or representative present at this meeting.*

*You will be given every opportunity to give your explanation at the disciplinary meeting. Full consideration of your explanation will be given before any decision is made concerning your employment.*

*As you are aware, you are to be suspended on pay pending the outcome of our investigation and disciplinary process or until such time as we believe it is appropriate to return to duties. You have the right to appeal this.*

*I am required to advise you a disciplinary meeting could result in a warning or in termination of your employment.*

[25] That meeting did take place. Notes were prepared that confirmed the attendance of Mr Pritchard, the branch manager and Mr Green. Mr Green was given the opportunity for a support person and/or a representative to attend, which he declined. He disputed that there was any reference made to him being able to get a representative. He provided his explanation which was much the same as that that he gave in the earlier meeting. I hold that at the time it is probable that Mr Green did not make any admission of any fault and or any negligence given his explanation and the matters he put in writing in his statement.

[26] When the meeting concluded Mr Pritchard and the branch manager continued to discuss the information that they had gathered and they decided that Mr Green would be dismissed. They met with Mr Green again, and with his agreement, agreed to convey the decision to him at the time. The decision to dismiss him was confirmed in a letter dated 7 February 2011. That letter reads as follows:

***Outcome of disciplinary meeting – dismissal***

*I refer to our meeting held on 3rd of February 2011.*

*As discussed with you C3 considered the allegations of serious misconduct against you. I have set out the allegation(s) below together with a summary of your explanations, followed by the company's decision;*

- 1. We determine that you failed to properly check your machine prior to work and/or during the operation of the machine during the day failed to notice a pin working loose resulting in serious damage to that machine and exposing yourself and others to serious safety issues.*
- 2. You believed in explanation that you should have noticed the pin working loose and therefore it had happened in a very short space of time.*

*The allegation of serious misconduct was then upheld against you. Your employment was terminated with notice effective from Friday 4th of February.*

*We will calculate your final pay entitlements and provide you with your final pay slip in the coming days.*

*You are entitled to appeal this decision within three days of receiving this letter. If you wish to lodge an appeal, you must notify Graham Wyllie in writing the specific grounds upon which you wish to appeal the decision.*

*If you have any questions please do not hesitate to raise these with me.*

[27] The letter was signed by Mr Pritchard.

[28] It has been discovered that the final pay for notice was not made at the time, and this has now been acted upon by C3. Mr Green did not appeal in house either the decision to dismiss him, or the suspension, until his representative wrote to C3 on 9 February 2011. In a letter dated 9 February 2011 Mr Green's representative raised Mr Green's desire to appeal in house and requested copies of any appeal procedures that applied.

[29] Instead of an appeal a claim of personal grievance was made based on C3's failure to consider the circumstances explained by Mr Green at the meeting and that C3 failed to carry out a proper investigation into the matter. C3 was informed that it had not given any reason why or how the view was reached that Mr Green failed to carry out a proper check of the machine or that the pin was loose to the extent that he should have noticed it.

[30] Mr Green initially applied for reinstatement to his position. Reinstatement is no longer being pursued, and has been withdrawn. He is seeking lost wages, compensation and costs. The parties attended mediation. It now falls to the Authority to make a determination.

### **Determination**

[31] I hold, first, that the suspension was justified as a standing down from work at the time on full pay. This was the action of a fair and reasonable employer setting about to investigate a serious situation where machinery had become damaged and involved Mr Green while he was driving the loader and unloading logs. There was also damage to the machine when the boom had separated from the fork housing and a grapple gave way and twisted, apparently because of the pin working loose. It was a matter for an accident report. There were photos taken and a discussion at the site at the time involving Mr Green, the branch manager and two drivers. The ability to suspend an employee on pay pending the outcome of an investigation exists under C3's code of conduct/house rules.

[32] The reason for Mr Green being stood down is consistent with the letter dated 20 January and Mr Pritchard's evidence on the reason for the suspension. Mr Green was not disadvantaged because he was stood down on full pay pending an investigation in regard to a matter he was directly involved in. Furthermore Mr Green

was provided with information in regard to the investigation in the letter. This included his right to appeal, and in the time available he chose not to get a representative. It is also likely he had been given the code of conduct as referred to in both letters since he received the drivers' statements. Indeed, I hold that the two letters with references made to a support person and or a representative and Mr Pritchard's evidence confirm that Mr Green in all likelihood would have been told that he was entitled to a support person and or a representative. Even if he did not understand what a support person meant at the time he had the time to find out, I hold. Mr Green accepted being stood down and suspended during the investigation. He made the choice to proceed. Any unjustified disadvantage action concerning the suspension has more to do with the background of the employer's conduct in the employment relationship problem and the real issue is about Mr Green's dismissal.

[33] Ordinarily it is assumed, and is often made clear under the terms for suspension in employment agreements, that an employee gets an opportunity to have some input and comment before the decision is made. That is not provided for in the C3 code of conduct/house rules. The opportunity did not happen here. Thus, there is a greater onus on the employer to justify its action where deciding to suspend without hearing from the employee. I am satisfied the C3's action was justified to suspend Mr Green because Mr Green was the driver; there was damage to his machine, safety issues were involved and an investigation was required.

[34] For completeness I hold that the matters in the incident were serious: there had been an accident involving Mr Green's driving witnessed by two other drivers before it was noticed that the pin had come out of the bolt hole. There were considerable potential costs relating to the damage and there was a safety issue. A fair and reasonable employer, given the right under the code of employment to consider suspension, would have acted this way. I am satisfied although the employer did not seek Mr Green's input and comment before making a decision to suspend Mr Green he was not disadvantaged given he was kept on full pay, had been informed of the investigation and his rights to get a support person and/or a representative and he had agreed to proceed. Mr Green fully co-operated at the time. Furthermore an investigation and disciplinary meeting followed with proper notice and advice in regard to the information available at the time, I hold. Mr Green probably accepted being stood down at the time because he was driving the machine involved, he had been involved in an inspection of the machine, there had been damage to the machine

and an investigation was to take place. Considering the defect in the procedure the same outcome would have resulted, I hold, because Mr Green agreed with it at the time.

[35] Next, the meeting on 25 January stopped when Mr Green mentioned that he might need to get a lawyer because negligence was mentioned by the branch manager.

[36] Mr Pritchard says it was for this reason he attended the next meeting held on 3 February, although the first time he mentioned this reason was at the Authority's investigation meeting. I accept his evidence as it was genuine and consistent. I am satisfied that this was the reason he had at the time to be involved. Also, Mr Green accepted he did say at the close of the 25 January meeting that he needed to consider getting a lawyer.

[37] Mr Green agreed that he chose to continue in the meeting on 3 February. He was not told that Mr Pritchard had received advice from another senior operator and port manager on what would have been seen, heard and felt if a pin was moving out of its housing. A fair and reasonable employer would have provided the sources for this advice and that his conclusions were based on another person's advice. Although the issues were discussed at the time and Mr Pritchard relied on this information from these people as his experts, he did not disclose the sources of the advice and that his conclusions were based on the advice. Without knowing that at the time Mr Green had no chance to propose any checks of his own, or to ensure the information that Mr Pritchard was giving them was accurate and/or reflected what Mr Green was saying, for example about the mud on the machine, to influence their responses. Also, Mr Green's written statement/notes could have been provided to Mr Pritchard's experts if it had not been overlooked, which a fair and reasonable employer would have ensured was done to ensure such advice was independent and properly formed on all the information available at the time. This is especially so when Mr Green provided an explanation about the pre-start check and the reason why in working on the machine he might not have seen the pin working loose. Whether or not Mr Green was right could have been commented on by the experts. These people were not called to give evidence and there were no written statements taken from them at the time. Also, the site mechanic was not involved in the investigation and he could have added something useful when he apparently had fixed the machine previously when a pin had worked free and there was an issue about the grease levels. Thus, a fair and

reasonable employer would not have made a decision that negligence occurred given these circumstances, I hold. These factors and the omissions mean that Mr Pritchard has not been able to produce the required evidence to support his conclusions in regard to the allegations as grave as they are. It may well be that his information is correct and indeed reliable, but he has not completed the process to the required standard, I hold.

[38] There is a dispute as to whether or not Mr Green admitted he was negligent and should have felt and seen the pin working loose. This is a matter of opinion between Mr Pritchard (based on the information he had) and Mr Green. Mr Pritchard is supported by the file notes. Since Mr Green has challenged the accuracy particularly of the assistant manager's notes (25 January) it is difficult to reach a conclusion. Mr Green and Mr Pritchard genuinely believe what they are saying. A fair and reasonable employer would not have left its reliance on any such admission being open to this degree of challenge, without calling the witnesses (the experts) and involving the mechanic given Mr Green's opinions. The one witness that was called had never met Mr Green before and was only recounting information put to him by C3. Therefore, I hold the evidence and support for such an allegation is not as convincing in its nature as the charge is grave. As a fair and reasonable employer C3 has not been able prove the allegation with the degree of certainty required to justify dismissal under the terms of the employment agreement.

[39] Mr Green has a personal grievance for unjustified dismissal.

[40] He is entitled to lost wages and compensation for hurt and humiliation. His lost wages for 12 weeks, as agreed, amounts to \$12,461.76. He has attempted to mitigate his loss by getting casual work and full time work. I am satisfied he did attempt to get new work even although he was choosy about the type of work and the pay. The reasons for the pin working loose and the cause of the accident from Mr Green's driving are inconclusive and it has not been established that Mr Green was negligent. The evidence of Mr Green's conduct has been assessed as a matter of opinion only. I am not satisfied that C3's witnesses had the necessary access to any input from Mr Green to balance any opinion on the matter. The only evidence is Mr Green's omissions in noticing anything wrong at the prestart check stage and saying after the accident that "*there hasn't been a bolt in there for a while*". I'm not sure that Mr Green meant for the time after the check and before the accident or for much

longer. Also the day before Mr Green had noticed that the auto greaser needed to be filled and called for the mechanic who could not deal with it until the next day. During the inspection of the damage various matters such as the mud, lack of grease and the fuel line problem were raised by Mr Green. I have considered the evidence of the Nelson port manager on the matter, but have to say his evidence needs to be seen in context that he had not seen and not referred to Mr Green's notes, not taken into account the mud and the grease level and not taken into account any information that the site mechanic may have been able to add. Mr Green failed to properly ensure the mechanic had checked his machine before starting when he had called for the mechanic the day before because of the grease problem. This puts his contribution in the range of 20%, I hold. Mr Green would be entitled to \$12,461.76 lost wages less 20% for contribution.

[41] Mr Green has claimed \$15,000 compensation for shock and the financial impact on him of losing his job. I award him \$6,000 compensation less 20% contribution for the impact of hurt and humiliation on him that is linked to his dismissal.

[42] In summary C3 Limited is to pay Mr Green:

- 1) \$9,969.41 lost wages; and
- 2) \$4,800 compensation for hurt and humiliation.

[43] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority