

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 188
5341840

BETWEEN TYLER HURLEY
Applicant

AND ELECTRONET SERVICES LTD
Respondent

Member of Authority: David Appleton

Representatives: Jo Birney, Advocate for the Applicant
Neil McPhail, Advocate for the Respondent

Investigation Meeting: 24 and 25 November 2011 at Greymouth

Submissions received: 25 November 2011 from Applicant
25 November 2011 from Respondent

Determination: 1 December 2011

DETERMINATION OF THE AUTHORITY

- A. The Applicant was not unjustifiably dismissed and, accordingly, his personal grievance is declined.**
- B. Costs are reserved**

Employment Relationship Problem

[1] The Applicant claims that he was unjustifiably dismissed on 13 April 2011. He claims lost wages, compensation pursuant to s 123 (1) (c) (i) of the Employment Relations Act 2000, and costs.

[2] The Authority investigated Mr Hurley's personal grievance complaint in conjunction with the application by Mr Hurley's former colleague Mr Kurtis Bell, whose personal grievance complaint for unjustified dismissal was lodged under case number 5352171. The evidence in relation to both claims was heard on 24 November

2011 and submissions were presented by the two Applicants' advocate, and by the Respondent's advocate on a joint basis respectively.

The facts

[3] The Applicant was employed under the terms of a Collective Employment Agreement which required the parties to comply with the employer's rules, policies and procedures, and which enabled the Respondent to dismiss any employee summarily for serious misconduct.

[4] The Respondent's Grounds for Dismissal policy gave a non exhaustive list of offences treated as serious misconduct, including acts of misconduct inconsistent with an employee's faithful discharge of his/her duties. The procedure gave the Respondent the right to suspend an employee allegedly guilty of serious misconduct.

[5] The Applicant worked for the Respondent as a linesman and had been employed for around 3 ½ years. In around February 2011 the Applicant commenced working with a small crew in an area called 10 Mile Valley, removing power poles.

[6] On 7 March 2011, the final day of the 10 Mile Valley job, the Applicant was working with Mr Kurtis Bell, a fellow Linesman and charge hand, Mr Royden Dick, a Trainee Linesman and Mr Justin Adamson, a digger driver. Messrs Kurtis and Dick were fellow employees of the Respondent, whereas Mr Adamson was a contractor, employed by Fosters Transport.

[7] As it was their last day, the men decided to have a look around the site. At a time which was unclear from the evidence, the men congregated by prior arrangement by a bobcat that the Applicant and Mr Bell had spotted earlier during the job. It appeared to have been abandoned, and excited the men's interest, although the respective motives for that interest are hotly disputed.

[8] The evidence then differs as to who was the instigator of what ensued, but it is common ground that all four men played parts in:

- (i) attaching strops and chains to the bobcat,

- (ii) using the digger to pull it out of its position,
- (iii) using the digger to lift the bobcat up;
- (iv) attempting to place the bobcat on a Land Cruiser utility vehicle belonging to the Respondent;
- (v) abandoning that attempt when they discovered the bobcat was too heavy for the ute; and
- (vi) taking photographs at various points of the bobcat on their work camera.

[9] The men then finished their work and left the site. On returning to the Respondent's offices, Mr Kurtis Bell spoke briefly to one of the Respondent's supervisors, Mr Steven Bell, who also happened to be Mr Kurtis Bell's father, about what they had seen on site.

[10] On the weekend of 26/27 March 2011 the owner of 10 Mile Valley, and of the bobcat, Mr Alan Spriggs, received information that someone had attempted to load his bobcat onto an Electronet ute around three weeks before. Mr Spriggs then informed the Respondent of what he had heard and told the Respondent that a mining employee and two other men had looked down and witnessed the attempts to load the bobcat onto the ute.

[11] An investigation was launched that day and, over the next two days, all four men were interviewed. In a nutshell, the Respondent found Messrs Dick and Adamson to be more forthcoming in these initial interviews than Mr Bell and the Applicant.

[12] On 30 March 2011 the Applicant and Mr Bell were called into separate meetings where the Chief Executive of the Respondent, Mr Rob Caldwell, was present, along with a minute taker and two union representatives. Mr Caldwell told each man that he proposed suspending them and gave each man the chance to speak to the two union representatives. Having done so, each man agreed that suspension was appropriate and that they would not have contact with the other three members of the crew of 7 March. Each man was subsequently suspended on pay, and a letter sent to each confirming this and warning them that the allegation could amount to serious misconduct which could result in their instant dismissal. Mr Caldwell told the Authority that Mr Dick had also been suspended on the same day.

[13] The Applicant states that the union then put pressure on him to resign, although he did not do so.

[14] Further investigative interviews by Mr Caldwell subsequent to the suspensions established that Messrs Dick and Adamson attributed to the Applicant a lesser role than Mr Bell in the activities relating to the bobcat, but had participated willingly.

[15] On 4 April, Mr Caldwell discovered that Mr Spriggs had not been entirely honest in reporting his concerns about his bobcat and that his statement to the Respondent that there had been eye witnesses to the attempt to put the bobcat on the back of the ute had been false. Mr Spriggs stated to Mr Caldwell that he had learned of the attempts from a source he wished to protect and was not prepared to divulge. In their evidence before the Authority both Mr Spriggs and Mr Caldwell stated that Mr Caldwell had tried to convince Mr Spriggs to reveal the source, but that Mr Spriggs had refused. Mr Spriggs told the Authority that the information had in fact come to him indirectly via the digger driver, Mr Adamson.

[16] Upon learning on 4 April that there had been no eye witnesses, Mr Caldwell wrote to the Applicant and Mr Bell advising them of this fact but that he had not pursued that aspect further with Mr Spriggs in light of direct evidence from two of the participants that the events did in fact take place. Mr Caldwell told the Authority that he had felt that he had enough material by that point to conclude that the Applicant and Mr Bell had a case to answer.

[17] The Applicant's disciplinary meeting took place on Friday 8th April, with Mr Caldwell chairing it. The Applicant provided a written statement which stated, amongst other things, that Mr Adamson had played a lead role in the activities with the bobcat, had talked about using it for his kindergarten and hiring it out, and had stolen a set of coal cart wheels on the way out of the site.

[18] The Applicant also stated in the meeting that he had just gone along with the decision to move the bobcat and load it on the ute, that he had just been doing what Justin had told him but that they were all equally involved.

[19] The Applicant's representative, Ms Keogan, sent Mr Caldwell written representations on behalf of the Applicant on the morning of 13 April, and Mr Caldwell reached his decision later that day, that the Applicant had committed serious misconduct, and was to be dismissed summarily with effect from that day. He confirmed his decision by way of a letter dated 13 April.

[20] Mr Caldwell's letter to the Applicant stated that, even on his version of events, the Applicant had willingly participated in the incident knowing that another person had had intentions of obtaining the bobcat for his own use. However, Mr Caldwell had preferred the explanation of Mr Dick, supported by Mr Adamson, that the Applicant and Mr Bell had played a more active role in the incident, and that the Applicant had been fully involved in attempting to remove the bobcat from the site. Those actions, Mr Caldwell considered, amounted to serious misconduct. Mr Caldwell concluded by saying that the breach of trust and confidence was such that summary dismissal was the only realistic option.

Was the dismissal unjustified?

[21] The Applicant claims that his dismissal was unjustified for a number of reasons, which can be summarised as follows:

- (i) the Applicant had not been informed prior to the initial investigation meeting on 29 March that it was to take place;
- (ii) the Applicant had not been informed at the initial investigation meeting on 29 March that disciplinary action could be a consequence including dismissal;
- (iii) the Applicant had not been offered the opportunity of a support person at the initial investigation meeting on 29 March;
- (iv) the Applicant had not been informed prior to the suspension meeting on 30 March that it was to take place;
- (v) the Applicant had not been offered the opportunity of a support person at the suspension meeting on 30 March as the union representatives present had not been there at the request of the Applicant;
- (vi) Mr Caldwell had adopted the wrong approach in deciding between the respective versions of events presented by the Applicant and Mr Bell on the one hand and Mr Dick and Mr Adamson on the other;

- (vii) Mr Caldwell's partial reliance on Mr Adamson's evidence had been misplaced in view of the fact that all three Electronet employees had accused Mr Adamson of stealing coal cart wheels;
- (viii) that there had been inconsistent treatment afforded to the Applicant and Mr Bell on the one hand and Mr Dick and Mr Adamson on the other;
- (ix) that it had not been reasonable for Mr Caldwell to conclude that the Applicant had been involved in an attempt to remove the bobcat when he acknowledges that it would have been impossible to do so using the ute, given the bobcat's weight, that photographs of it had been taken on the work camera and the Applicant could have returned to the site between 7 March and 28 March to steal it with more adequate equipment but did not;
- (x) there had been a number of inconsistencies in the evidence relied upon by the Respondent;
- (xi) the Applicant had not been asked to comment on the decision to dismiss before it had been implemented.

Determination

[22] The starting point is that the recently amended test of justification set out in s103A of the Employment Relations Act 2000 is to be applied to this dismissal as it occurred after 1 April 2011. It has been recognised by the Employment Court in *Angus v Port of Auckland Limited* [2011] NZEmpC 125 and in *McKean v Ports of Auckland Limited* [2011] NZEmpC 128 that the circumstances in which an employer can justify a dismissal have been widened.

[23] S103A (3) of the Act sets out the factors that the Authority must consider in applying the test. These relate to the employer, before dismissing or taking action against the employee:

- (i) carrying out a sufficient investigation, having regard to the resources available to the employer;
- (ii) raising its concerns with the employee;
- (iii) giving the employee a reasonable opportunity to respond to its concerns;
and
- (iv) genuinely considering the employee's explanation in relation to the allegations.

[24] In addition to the factors described above, the Authority may consider any other factors it thinks appropriate.

[25] S103A (5) of the Act provides that the Authority must not determine a dismissal to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[26] In respect of the submissions of the Applicant set out at 21 (i) to (xii) above, I find as follows.

The initial investigation meeting

[27] The explanation of the Respondent for the suggested flaws referred to in 21 (i) to (iii) is that the initial investigation meeting had been intended to be an initial enquiry to determine whether there was a case to answer and had not been disciplinary in nature. Having considered what was said at the initial meetings and heard from all four of the men involved in the bobcat incident on 7 March, Mr Caldwell did conclude that there was a case to answer by the Applicant, Mr Bell and Mr Dick. He also informed Mr Adamson's employer.

[28] The Authority accepts that it was reasonable for the Respondent to speak to the four men to establish whether there was any substance in the complaint by Mr Spriggs, and that, as such, such an initial inquiry had not been intended to be disciplinary in nature, obviating the need for prior notification of the meeting, warning of possible disciplinary consequences and representation.

[29] It could be argued that the meeting formed part of the overall disciplinary process because Mr Caldwell's evidence is that his decision to dismiss the Applicant was partially based on the inconsistency he observed between the Applicant's first statement made at the initial investigatory meeting (where no mention was made by the Applicant of trying to put the bobcat on the ute, or of Justin leading the enterprise) and the later statement made by the Applicant of admitting that the men tried to put the bobcat on the ute and essentially blaming Justin. Therefore, the statements made by the Applicant during this initial meeting did play a part in the final decision and so,

arguably, it formed part of the disciplinary process. That could lead one to conclude that the Applicant's complaints of the flaws set out in 21 (i) to (iii) are valid.

[30] However, Mr Caldwell's evidence before the Authority was that the Applicant's explanation about why the crew put the bobcat on the ute (to have a better look at it) struck him so forcibly as lacking credibility, that it was the dominant factor in his decision. Therefore, whilst the change in the story of the Applicant between the initial meeting and his later, more elaborated statement formed a part in Mr Caldwell's decision, it was not a pivotal part. Furthermore, the Applicant had a full opportunity at the disciplinary hearing on 8 April, with representation of his choice, to explain himself.

[31] The Authority is satisfied that, when the initial investigation meeting was arranged, there was no intention for it to form part of any disciplinary process. It was only later that the decision maker partially relied on the statements made by the Applicant, an occurrence which is by no means unusual. It is doubtful that this retrospectively made the initial investigation meeting disciplinary in nature, but even if it does, the Authority is satisfied that the Applicant was not disadvantaged by the flaws referred to by the Applicant, as any disadvantage was rectified at the 8 April meeting.

The suspension meeting

[32] The Authority accepts that the Applicant had no idea what the nature of the suspension meeting was to be before he was called into it. It also accepts that the Applicant was not given a free choice of representative at that meeting and that, after the meeting, the Applicant probably wished that he could have had different representation. If the suspension meeting had been a disciplinary meeting, there is no doubt that these aspects of the suspension meeting (identified in 21 (iv) and (v) by the Applicant as flaws) would have rendered the process fundamentally unfair.

[33] However, the suspension meeting had not been of the nature of a disciplinary meeting, and the Applicant had been given the chance to say whether or not he accepted suspension as appropriate. He agreed that it was. Indeed, in a case where

there is an allegation of attempted theft of a valuable item, and where different witnesses have been giving different versions of the events, suspension is appropriate.

[34] The representatives were also union representatives who are normally present on such occasions, and who are normally acceptable to the employees participating in such meetings. It is not accepted, as alleged, that Mr Caldwell sought to persuade the representatives to talk the Applicant into resigning, and insofar as the representatives overstepped the mark in doing so, this cannot be visited on the Respondent.

[35] In light of this, I do not find that the alleged flaws identified by the Applicant rendered the suspension or the eventual dismissal unjustifiable.

Wrong approach in deciding between the respective versions of events

[36] The Applicant argued that Mr Caldwell ignored discrepancies and inconsistencies in the accounts given by Messrs Dick and Adamson but concentrated on alleged discrepancies given by the Applicant and Mr Bell.

[37] Whilst there were minor discrepancies in the accounts given by Messrs Dick and Adamson, Mr Caldwell's decision was primarily based on two factors; the fact that both Mr Dick and Mr Adamson separately identified the Applicant as playing an active role in the activity with the bobcat which, they said, was motivated by Mr Bell's desire to somehow cash in on it, and the lack of credibility in the Applicant's story that the men had tried to put it on the ute just to have a better look at it.

[38] Therefore, Mr Caldwell saw far greater consistency and logic in the version of events given by Messrs Dick and Adamson than by Mr Bell and the Applicant. I do not see that Mr Caldwell's conclusion was unreasonable.

Misplaced reliance on Mr Adamson's evidence

[39] The Applicant asserts that it was unreasonable for Mr Caldwell to place any weight on Mr Adamson's evidence when the Applicant, Mr Bell and (later) Mr Dick all stated that they saw him steal a set of cart or trolley wheels from the 10 Mile Valley Site.

[40] Mr Caldwell did not investigate the cart wheel allegations and so did not reach any conclusion as to whether they were true. However, it is certainly arguable that such an allegation should have alerted Mr Caldwell to the possibility that Mr Adamson's evidence may be questionable.

[41] However, Mr Caldwell relied more heavily on the evidence of Mr Dick (whose evidence Mr Caldwell said was supported by that of Mr Adamson) and considered but rejected the possibility that Mr Dick and Mr Adamson had colluded in their evidence. Coupled with his disbelief in the explanation of the Applicant for his actions, I am satisfied that the evidence of Mr Adamson was not determinative in Mr Caldwell's decision, and so even if it was more inherently questionable, it does not render the overall finding unjustifiable.

Inconsistent treatment

[42] The Applicant points out that the Respondent treated him and Mr Bell differently from the way Mr Dick and Mr Adamson were treated. Inconsistency of treatment without an adequate explanation, where the dismissal is not otherwise justifiable, will result in an unjustifiable dismissal.

[43] However, I am satisfied that the difference in treatment between the Applicant and Messrs Dick and Adamson is justified. Mr Dick had identified himself as "the boy of the truck", with only around 6 months' service. Although the Applicant has pointed out that Mr Dick had stated that everyone had played an equal part in the activities involving the bobcat, Mr Dick's junior status means he cannot bear equal responsibility with the Applicant. It would be unrealistic to have expected him to have played no part at all, given that he was with two more senior employees, but no one's evidence suggested that Mr Dick had had any intention to play a dishonest part in what happened. It was not at all unreasonable therefore for Mr Caldwell to have issued Mr Dick with a warning instead of dismissing him.

[44] Mr Adamson was accused by the Applicant and Mr Bell of having instigated and led the activities involving the bobcat, to have evinced a dishonest intent and to have stolen items on the way out of the valley. The Applicant states that the

Respondent was unreasonable in still allowing Mr Adamson on site in light of this, whereas he and Mr Bell were dismissed. Mr Caldwell's answer to this is that he advised Mr Adamson's employer of the allegations, and let him investigate and take such disciplinary action as he saw fit. Mr Caldwell stated that he understood that Mr Adamson's employer had taken disciplinary action against Mr Adamson, and had allowed him to return working with Electronet employees provided he was supervised. If Mr Adamson had been an employee of Electronet, I would have expected it to have dismissed him as well on the evidence of his involvement, and a failure to have done so by Electronet would have called into question the fairness of the dismissal of Messrs Bell and Hurley. However, Mr Adamson is not an employee of the Respondent, and I can accept that Mr Caldwell is satisfied with the measures which he has described are in place to protect the company and its customers from any future similar conduct.

[45] The evidence of Messrs Adamson and Dick in relation to the respective intent and involvement of Mr Adamson directly contrasted with the evidence of the Applicant and Mr Bell. Mr Caldwell had to decide who was more likely to be telling the truth, and his decision to prefer the evidence of Messrs Adamson and Dick was not unreasonable.

The unlikelihood of an intent to steal

[46] The Applicant has relied on the fact that would have been impossible to have stolen the bobcat using the ute as the bobcat was far too heavy for it, and Mr Caldwell should have taken this into consideration. However, Mr Caldwell gave evidence that the putative explanation of the Applicant for attempting to put the bobcat on the ute was that they wanted to *have a better look at it* just made no sense to him as they could have had a perfectly good look at the bobcat without going to the trouble of lifting it up and putting it on the ute. Indeed, just having lifted it up at all would have afforded that opportunity. Furthermore, the Applicant obviously did not realise that the bobcat was too heavy for the ute when the men tried to put it on the ute to *have a look at it*, so would not have so realised that if they had intended to steal it. This argument does not, therefore, invalidate Mr Caldwell's decision.

[47] The Applicant's second argument is that the men would not have photographed the bobcat and shown the pictures to Mr Bell's father (a supervisor) if they had had an intention to steal it. Mr Caldwell agreed that that action was incompatible with an intention to steal, if the Applicant had been thinking through his actions. However, Mr Caldwell stated that he did not preclude the probability that the Applicant had not been thinking through his actions properly, and that the lack of credibility of the explanation that they were intending to *have a look at the bobcat* when they put it on the ute overrode that argument in his mind. I do not find that an unreasonable conclusion to have reached.

[48] The third argument, that the Applicant could have returned at any time to steal the bobcat in the three weeks before Mr Spriggs complained to the Respondent, does not prove that the Applicant did not have the intention to steal the bobcat when he was involved in the attempt to place it on the ute.

Inconsistencies in the evidence relied upon by the Respondent

[49] The Applicant's advocate made much of inconsistencies with the evidence of Mr Dick, but I do not feel they are material to the central allegation. I am satisfied that the statements of Messrs Dick and Adamson were consistent in all material respects and that it was not unreasonable for Mr Caldwell to have given them weight in his decision making.

The Applicant was not asked to comment on the decision to dismiss

[50] The Employment Court has held that an employer should allow an employee to know of its conclusion of serious misconduct and to have an input into the question of sanction for it. *The Chief Executive of Unitec Institute of Technology v Kathleen Joan Henderson*, AC 12/07 [19 March 2007] at [55].

[51] It is true that the Applicant was not given the opportunity to comment on the decision to dismiss after it had been reached. However, the Applicant had been asked prior to the decision being made what the appropriate penalty would be if serious misconduct were found. The Applicant's representative answered *a slap over the knuckles*. The Applicant was therefore asked about the possible sanction and, whilst

this question was not asked after the decision had been made, this more likely than not would have made no difference to the decision to dismiss. It did not therefore result in unfairness to the Applicant.

Conclusion

[52] The purpose of the Authority's investigation is not to determine whether the Applicant had an intention to steal the bobcat, but whether it was reasonable for the Respondent to conclude that he did.

[53] The Applicant was an experienced linesman who, whilst not the most senior employee on the job, still regularly worked on the properties of the Respondent's customers on his own or with a more junior employee. The actions of assisting in the moving of the bobcat and placing it on a ute when another person was talking about doing it up and using it for personal gain, whether that person was a contractor or another employee, were not the reasonable actions of an employee who needed to be entrusted with carrying out work on a customer's site without supervision. In the light of those actions, and the evidence collected by the Respondent, I conclude that Mr Caldwell's decision that the Applicant had committed serious misconduct was reasonable in all the circumstances. I am also satisfied that the requirements of s103A (3) were satisfied, and that summary dismissal was justified.

[54] The personal grievance is therefore dismissed.

Costs

[55] Costs are reserved. Any claim for costs should be made by lodging and serving a memorandum within 28 days and the other party may have a further 14 days to lodge and serve any reply.

David Appleton
Member of the Employment Relations Authority