

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 219
5306590

BETWEEN ARTHUR KAIPARA
 Applicant

AND CARTER HOLT HARVEY
 LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Stan Austin for Applicant
 Daniel Erickson for Respondent

Investigation Meeting: 3 February 2011

Submissions Received: 21 February 2011

Determination: 23 May 2011

DETERMINATION OF THE AUTHORITY

- A Mr Kaipara was not subject to an unjustified action which led to his employment or one or more conditions of his employment being affected to his disadvantage.**
- B Mr Kaipara was not unjustifiably dismissed.**
- C Costs are reserved.**

[1] Mr Arthur Kaipara was employed by Carter Holt Harvey (CHH) at the Kawerau Mill from 1981 as a machine operator until his employment was suspended on 19 January 2010. Mr Kaipara's suspension was followed by his dismissal on 29 January 2010.

[2] Mr Kaipara challenges both the suspension and the dismissal, both of which he says, were unjustified. CHH denies the claims.

[3] The issues for the Authority are :

- Did the suspension result in an unjustified disadvantage;
- Was Mr Kaipara unjustifiably dismissed; and
- What (if any) remedies should be awarded.

Background

[4] Mr Kaipara was employed at the Kawerau Mill as a machine operator in 1981. In 2003 he was promoted into a shift supervisor position. Mr Kaipara reported to the Sawmill Manager, Mr Brett Vincent, who in turn reported to the Site Manager, Mr Paul Trow. During Mr Kaipara's employment the Mill underwent a number of changes in ownership. CHH purchased the Mill in 2005.

[5] Mr Kaipara returned to work following the 2009 Christmas/New Year close down, on 11 January 2010. On this day, he attended CHH's annual health and safety start-up re-introduction training.

[6] The training covered CHH's health and safety policies which included the use of personal padlocks/hold cards to isolate machines when fixing jams on the machines. The training also reiterated CHH's policy that under no circumstances were employees to use another employee's padlock to isolate the machines. Those undertaking the training, including Mr Kaipara were advised that disciplinary consequences would result where employees failed to comply with the isolation/hold card/lockout/jam up procedures. Attendees, including Mr Kaipara received a specific isolation handout.

[7] Following the conclusion of his training Mr Kaipara signed off a Supervisor's Health and Safety Verification Record. This recorded Mr Kaipara's confirmation that all employees and contractors supervised by him had demonstrated to him that they understood the correct isolation procedures. As a supervisor Mr Kaipara is responsible for ensuring all those employees and contractors under his supervision adhere to CHH's policies.

The incident

[8] Mr Kaipara was working on 19 January 2010 when a wood jam occurred in the Birdsnest area where Mr Kaipara was supervising the work. Only two employees applied personal isolation padlocks. It was common ground that Mr Kaipara supervised the clearing of the wood jam but failed to apply his own personal padlocks or card holds. It was also common ground that others working under Mr Kaipara's supervision also failed to apply their padlocks and hold cards.

[9] After clearing the wood from the area that could be reached while standing off the machinery, Mr Kaipara and two other employees under his supervision, climbed into the Birdsnest area and began clearing the boards further back. Not one of the three employees, including Mr Kaipara, used their personal padlocks or hold cards before climbing into the Birdsnest area.

[10] Mr Kaipara then instructed one of the two employees who had used their isolation padlocks, to remove the padlock to enable the machine to be started up so that the wood jam could be jogged free. It was common ground that one of the employees under Mr Kaipara's supervision used a chainsaw to assist in freeing the wood jam. While this occurred Mr Kaipara and the two employees remained on the machinery.

[11] After removing the jam, Mr Kaipara and one of the employees stood clear from the line and Mr Kaipara gave instructions for the line to be restarted. One employee remained on the machinery sitting on top of a cross beam.

[12] The machine was then started up and the employee on the cross beam decided it was time to exit the Birdsnest area. He attempted to leave the line through a small opening at the side of the line. Unfortunately this action was misconceived and the employee ended up with his legs jammed between the moving timbers. The machine was de-energised immediately and after about two minutes the employee was freed. First aid was provided following which the employee was taken by ambulance for medical assessment and treatment.

[13] Following the incident Mr Kaipara partially completed an incident report in which he recorded that the incident could have been prevented by "...communications and isolation".

The suspension

[14] At about 9.30am Mr Kaipara was called to a meeting with Mr Trow and Mr Vincent and was asked to explain what had happened. Mr Kaipara admitted failing to comply with CHH's isolation procedures when clearing the Birdsnest area. Mr Kaipara admitted he did not have any isolation in place. Mr Kaipara was therefore in breach of the isolation procedures.

[15] After speaking with other employees present at the Birdsnest area Mr Trow and Mr Vincent met again with Mr Kaipara for a second time to discuss whether he [Mr Kaipara] should be stood down from work pending an investigation into the incident. A decision was made to suspend Mr Kaipara and this was confirmed to him in writing on 21 January 2010.

[16] Mr Kaipara says at no stage was he advised that the meeting would or could lead to a disciplinary investigation nor was he advised to have a support person present. He claims one or more conditions of his employment have been affected to his disadvantage as a result of the suspension which he says was not the actions of an employer acting fairly and reasonably in all the circumstances.

[17] With regards to the justification for suspension the Employment Court has stated:¹

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.

[18] The Court considered its decision in *Tawhiwhirangi v A-G in respect of Chief Executive, Department of Justice*² where the Court confirmed a flexible and sensible approach should be taken.³

[19] From the evidence given to the Authority I am satisfied Mr Trow sought feedback on his decision to suspend Mr Kaipara prior to acting on it.

[20] The suspension impacted negatively on Mr Kaipara's employment, in that he was not allowed to work, however, the action of suspending Mr Kaipara was not

¹ *Graham v Airways Corporation of New Zealand Limited* [2005] ERNZ 587 at [104].

² [1993] 2 ERNZ 546.

³ See *Supra* n 1 at [104].

unjustified. Mr Kaipara admitted he did not follow the isolation procedures. He had recently been retrained in the isolation procedures and signed a document confirming all those under his supervision in the workplace also understood the isolation procedures. Removing Mr Kaipara from the workplace to ensure no further health and safety incidents occurred during the investigation into the incident was what an employer acting fairly and reasonably in the same circumstances would have done.

The dismissal

[21] Mr Kaipara attended a meeting with Mr Trow, Mr Vincent and Ms Kay Mead, the Health and Safety Manager on 26 January 2010 at 3pm. Mr Kaipara arranged to have a support person at the meeting with him.

[22] Mr Kaipara says he was told when he arrived for the meeting and after the end of the meeting that he would be all right and that he should not worry. Mr Kaipara says he took this assurance literally to mean that his job was secure. I am satisfied that the comment was made in the context of attempting to calm a situation in which Mr Kaipara appeared to be nervous and before a decision had been made as to whether Mr Kaipara would be required to attend a disciplinary meeting. The meeting was conducted by Ms Mead and was part of CHH's health and safety investigation into the incident from 19 January 2010.

[23] After the health and safety investigation meeting Mr Kaipara received a letter from CHH requesting him to attend a disciplinary meeting on 29 January 2010. The allegations to be discussed at the meeting were set out in the letter, which were that Mr Kaipara had not followed CHH's lockout/isolation policy and procedures and that he had failed to ensure his direct reports applied their personal lockout tags to the equipment whilst clearing the timber jam.

[24] Mr Kaipara was advised that dismissal was a possible consequence and that he should have a representative or support person at the meeting with him.

[25] Mr Kaipara has never denied that he did not follow the isolation procedures on 19 January 2010. At the meeting on 29 January 2010 Mr Kaipara advised CHH that in the future he would do things differently. After a short adjournment, Mr Trow advised Mr Kaipara that he was dismissed.

[26] Mr Kaipara raises a number of issues with regards the process of the investigation and his dismissal. His concerns include:

- that Mr Trow had already made up his mind and the decision to dismiss was pre-determined;
- that not all the documents, relied on by CHH, were provided to Mr Kaipara for his information and explanation; and
- that the Regional Manager, Mr Arnie Federink had input into the decision to dismiss him, but did not hear from Mr Kaipara.

Pre determination

[27] Mr Mita Hona was Mr Kaipara's support person during all the meetings regarding the 19 January 2010 incident. He was, at the time, employed by CHH as a Mobile Plant Supervisor. Mr Hona no longer works for CHH having resigned on 14 May 2010.

[28] Mr Hona says that at the meeting on 26 January 2010 Mr Trow stayed only long enough to make introductions and returned after Ms Mead had nearly completed her questions. I am satisfied that the meeting on 26 January 2010 was not disciplinary in nature. This was the first meeting called by the company to investigate the possible health and safety breach and the injury of an employee on 19 January 2010. The investigation was undertaken by Ms Mead. The decision to undertake a disciplinary process had not been made at that stage.

[29] Mr Hona says that at the next meeting, on 29 January 2010, Mr Trow seemed to have already made a decision and so there seemed little point in discussing the events with him. Instead he and Mr Kaipara concentrated on pointing out all Mr Kaipara's good qualities including his long and loyal service to the Mill.

[30] I am satisfied Mr Kaipara's early acknowledgement that he had not followed the correct procedures (this is recorded in the incident report completed by Mr Kaipara on 19 January 2010) combined with his lack of a suitable explanation as to why he had not, was sufficient for Mr Trow to reach a conclusion that the isolation procedures had been breached. I am satisfied that the evidence shows that Mr Trow heard Mr Kaipara's explanations and responses and that he then gave careful consideration to

them. I find the allegation that Mr Trow had pre-determined the decision to dismiss Mr Kaipara has not been established.

Lack of disclosure of documents during disciplinary process

[31] CHH has produced a large number of documents in support of its decision to dismiss Mr Kaipara. The bundle contains documents which both Mr Kaipara and Mr Hona say were not supplied to them as part of the disciplinary process.

[32] Mr Kaipara also complains that he was not provided with video footage of the incident, whereas Mr Trow had viewed it and therefore he ought to have been given a similar opportunity.

[33] As already set out in this determination, there is no dispute that Mr Kaipara breached the isolation procedures. The breach was serious enough to cause harm to an employee under Mr Kaipara's supervision and control. I am satisfied that there was nothing in any of the documents produced to the Authority which contradicts the evidence of both parties with respect to Mr Kaipara's early admission of fault. Mr Kaipara was provided with a full opportunity to explain his conduct at the meeting on 29 January 2010.

[34] Further, the video footage was not relied on by Mr Trow in coming to his conclusions in this matter. The video provides only a limited view of what occurred due to the angle of the camera. With regards to the allegations made against Mr Kaipara, the video provided not assistance at all.

Mr Federink's involvement

[35] Mr Kaipara says Mr Federink had input to the decision to dismiss him, but did not hear his explanation. Mr Trow told the Authority that before he made his decision to dismiss Mr Kaipara, he sought feedback from a number of people including Mr Federink to ensure he did not make a decision which would be contradictory to other decisions made in similar circumstances within CHH.

[36] I find the decision to dismiss was made by Mr Trow after hearing Mr Kaipara's explanation and responses and that Mr Federink did not have any role to play in that process other than to confirm that the decision was consistent with decisions made in other parts of CHH.

Conclusion

[37] I find the decision to dismiss Mr Kaipara was a decision a fair and reasonable employer would have made in all the circumstances of this case. Mr Kaipara was well aware on 11 January 2010 that CHH was serious about reducing its workplace deaths and accidents. Mr Kaipara had been fully trained in the isolation procedures and was expected to enforce these procedures with those under his control. He failed to do so and his failure resulted in an injury to an employee.

Costs

[38] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, CHH may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Kaipara will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[39] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority