

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 153/09
File Number: 5133704

BETWEEN Jon Knight
 Applicant

AND Offshore Marine Services (NZ)
 Limited
 Respondent

Member of Authority: Denis Asher

Representatives: Barry Henderson for Mr Knight
 Noel Henderson for the Company

Investigation Meeting New Plymouth, 13 October 2009

Submissions Received On the day of the investigation

Determination: 16 October 2009

DETERMINATION OF THE AUTHORITY

The Problem

[1] Mr Knight says he was unjustifiably dismissed by the Company on 31 March 2008. He seeks reinstatement, any unpaid entitlements, unspecified lost remuneration and \$20,000 compensation for humiliation, and costs.

[2] The Company says Mr Knight's dismissal was, after a fair investigation, substantively justified.

- [3] This problem was not resolved at mediation on 12 December 2008.
- [4] In a telephone conference on 22 July the parties agreed to a one day investigation in New Plymouth on 13 October 2009.

Background

- [5] On 10 October 2007 Mr Knight commenced employment for the Company as an assistant mechanic: the Company provides services for offshore rigs.
- [6] Prior to 27 February 2008, while on the rig, Mr Knight received a verbal warning when he went for breakfast and left a diesel transfer pump running resulting in diesel being spilt on the rig deck. During his previous hitch (work period on the rig) he had also been spoken to by the offshore installation manager for not adhering to the mechanics job list in that work was not being completed or was only partially completed.
- [7] On 27 February 2008 Mr Knight commenced a routine work pattern on the rig, starting his shift at 1800 hrs. It was his 6th two-week hitch. During that shift an incident occurred and the engines that powered the rig closed down resulting in an on board black out.
- [8] After testing the alarms to ensure all systems were correct, the Company arrived at a preliminary view that the black out was possibly due to Mr Knight not switching cooling fans back on. The applicant was called to a meeting on the rig with its offshore manager for counselling, on 1 March: Mr Knight refused to sign the counselling notice, i.e. he declined to acknowledge his actions caused the black out.
- [9] As a result of its subsequent investigation, and by notice of summary dismissal dated 31 March 2008 (but which the Company accepts may be properly dated 1 April), it terminated Mr Knight's employment for "*Allowing the main engines on the (rig) to overheat and shut down*" (document 5 in the applicant's bundle).
- [10] That failure was described as serious misconduct by way of disobedience, negligence or gross incompetence. Mr Knight's actions were described as compromising his employer's duty to provide a safe environment for the

Company's client's, employees, contractors and visitors and poor safety performance and attitude towards co-workers and work instructions (above).

Applicant's Position Summarised

- [11] Mr Knight has a background in motor machining, is a senior motor mechanic, spent several years in the merchant navy, holds a mechanical engineering qualification (NZCE) and has worked as a mechanical fitter and welder. He says he made several approaches to the Company seeking work before obtaining employment with it in 2007.
- [12] His role as assistant mechanic was, during his twelve hour shifts, to assist in keeping the rig running. Duties included reactive maintenance, log readings, fuel transfer, preventative maintenance etc.
- [13] The 27th of February 2008 was Mr Knight's first day back at work. He was working with a chief mechanic for the first time. At the time of shift handover he received instructions from that person. While he agrees he acknowledged the instructions at the time, Mr Knight says the instructions were inadequate as they were not set out in writing and resulted in the incident for which he was dismissed. He also says that his induction and/or instruction in respect of the systems he was maintaining were too brief.
- [14] Mr Knight says that a primary alarm system failed to activate and that the secondary system then closed down the engines that powered the rig.
- [15] In his counsel's letter of 23 June 2008 to the Company (doc 7 in the applicant's bundle) the claim is made on Mr Knight's behalf that he had *"been made the sacrificial lamb ... and your company has simply taken the easy way out and brought Mr Knight's employment to an end to appease the principal contractor"*.
- [16] During the Authority's investigation Mr Knight advanced the view that, as the engines were working at low capacity they could not have overheated and they therefore turned off because of a problem in the secondary system. He also alleged he had been subjected to disparity in that another employee had caused a longer black out but had not been dismissed. Finally, Mr Knight also alleged during the Authority's investigation that, at the commencement of

the employer's investigation, he was not warned it was a serious matter that could result in his dismissal.

The Company's Position Summarised

- [17] The 27 February 2008 incident was extremely serious. Had the rig been in a well control phase at the time the consequences could have included loss of life and/or a major environmental disaster.
- [18] Because of the seriousness of the incident a thorough investigation was undertaken. The investigation established that the engines had overheated due to the radiator fans not being switched back on after the water maker was turned off: this routine requirement was the applicant's responsibility.
- [19] During the investigation Mr Knight was interviewed on at least five occasions; during the latter four interviews he was represented by his union organiser. Mr Knight repeatedly changed his recollection of events, including denying being inducted or introduced to a self paced safety programme and the competency assessment programme then later admitting he was. Mr Knight was inducted and introduced to the cap system.
- [20] Because of the evidence available to it and having given the applicant every opportunity to provide an explanation, the Company made the decision to summarily terminate Mr Knight's employment.
- [21] There was no disparity arising out of the decision to dismiss Mr Knight as – unlike the applicant – the other employee who caused a black out immediately accepted responsibility for the event, and agreed to be counselled (a form of performance management) so that it might not happen again.
- [22] Mr Knight was warned by the Company at the outset of its investigation that the matter was serious and his employment was at risk.

Discussion and Findings

- [23] The Authority's role is not to determine why the rig experienced a black out on 27 February 2008 or the 'truth' of who or what caused it. Instead, by way of s.

103A of the Employment Relations Act 2000, my task is to test the justifiability of Mr Knight's dismissal: i.e. on an objective basis, and in all the circumstances at the time, were the Company's actions those of a fair and reasonable employer? Mechanical matters will feature in this evaluation but only to the extent necessary to contextualise the Company's decision to dismiss.

- [24] Mr Knight agrees that, at the time of his shift handover, he was instructed 'to turn on the fan' if he turned off a water maker: because of the chief mechanic's gesture (and his own lack of knowledge of the system) he understood that the fan to be turned on was the engine room ventilation or induction fan. As it happened, the chief mechanic was instructing Mr Knight to turn on radiator cooling fans which cooled the rig's engines.
- [25] The radiator cooling fans were not turned on after the water maker was turned off, but were turned on shortly after the black out. Power was lost for about 30 minutes. The Company has not claimed losses or sought damages arising out of that loss of power.
- [26] The Company does not dispute Mr Knight's claim that the shift handover on 27 February took place in a noisy environment and was hurried. It does say that, notwithstanding those realities, it remained Mr Knight's responsibility to ensure he was properly briefed and ready to resume responsibilities. If he was not sure of the instructions, because of noise or lack of familiarity with the system, it was incumbent on the applicant to either detain the chief mechanic (and ensure he was adequately briefed to take over the shift) or go to other, more senior managers if problems remained.
- [27] Similarly, the Company says, having regard to Mr Knight's qualifications and experience and its induction programmes, it was incumbent on the applicant to be familiar with the rig's operations and to competently manage activities onboard at the time of his 27 February shift, i.e. he should have appreciated the chief mechanic's reference to fans was a reference to the radiator cooling fans.
- [28] The primary warning system comprises audible (a buzzer) and visual (flashing lights) warnings. The claim raised by Mr Knight that the system did not work was actively tested by the Company (e.g. light bulbs and power

connections were examined, etc). The engines were also brought up to a point where they triggered the system. The Company was unable to establish any evidence in support of Mr Knight's claim the primary system had failed. It doubts the credibility of Mr Knight's claim.

- [29] Similarly, the Company has no evidence of problems with the secondary warning system that might cause it to shut down the rig's engines other than when they are overheating.
- [30] In his statement to the Company dated 17 March 2008 (attachment to statement of problem) Mr Knight explained that, almost immediately following the black out, the chief mechanic *"turned the radiator cooling fans on ... it was at this stage we thought we knew what had happened"* (last par, 2nd page) and, *"At this stage our thinking was the shut down was due to engine over temp"* (first par, last page). In other words, at the time and in his account to the Company before it can to a decision to terminate his employment, Mr Knight believed the problem was one of overheating and did not put forward his subsequent and unproven claim of a problem in the secondary system.
- [31] In the same statement Mr Knight makes clear his view *"there must be a fault in the (primary) alarm system ... because I know (this system) did not come (on) prior to the black out or at all for that matter"* (2nd par, last page). He reiterates *"the fact that I did not know the radiator cooling fans had been shut off until after the black out ..."* (3rd par, last page). As is made clear above, the Company has tested the system without replicating Mr Knight's claim the primary system failed to work. In light of that testing I accept, on the grounds of probability and fairness and reasonableness, the Company's implied rejection of his claim.
- [32] Mr Knight does not dispute the Company's claim that the black out was a serious incident. I am satisfied from the investigation that loss of power on an offshore rig poses significant risks to life, limb and the environment, as well as the respondent's commercial interests.
- [33] The evidence clearly supports the Company's position that Mr Knight was properly inducted and that it was incumbent on him to ensure he understood his handover instructions and the operation of the systems for which he was responsible.

[34] On a balance of probabilities basis the Company fairly and reasonably attributed the black out to Mr Knight's failure to start up the radiator cooling fans, i.e. 'he allowed the main engines to overheat and shut down' (doc 5 in the applicant's bundle).

[35] In *Bagchi v The Chief Executive of the Inland Revenue Department* unreported, Colgan CJ, 26 Sep 2008, AC 40/08 the Court said:

Counsel for the CEO reminded the Court that it was not to be the arbiter of standards set by the employer or with the employer's judgment of the question whether the standards had been met. The Court should not normally interfere with a judgment honestly reached by an employer following proper and adequate procedures. Judgments such as Airline Stewards and Hostesses of NZ IUOW v Air NZ Ltd [1990] 3 NZILR 584 confirm that in cases of dismissal for incompetence, significant latitude should be allowed to an employer for the exercise of professional judgment about such issues. I accept and have applied these principles.

[36] The Company decided that the applicant's failure was the result of serious misconduct because of negligence or gross incompetency. Despite being impressed by Mr Knight and his evident abilities, and painful as the consequences are in respect of the applicant's standing, pride and employment prospects, I find no reason to overturn the Company's conclusions.

[37] I do not accept that Mr Knight has been subjected to disparate treatment: unlike the other incident he did not accept responsibility for an event that, ultimately, and fairly and reasonably, the employer concluded was caused by his non-action.

[38] I have no evidence to support the claim Mr Knight has been scapegoated so as to appease the respondent's client.

[39] Finally, I am satisfied that Mr Knight enjoyed a fair investigation process by the Company, particularly as he was represented on all occasions when he met with the respondent's decision maker who terminated his employment and had a number of opportunities to address the latter's clear concerns.

Determination

[39] Mr Knight's grievance does not succeed.

[40] As requested, costs are reserved.

[41] As indicated to the parties during the investigation, subject to their submissions, this appears to be a case of costs following the event.

[42] The investigation took less than the day set aside, with a significant portion of the time taken up with the parties' (unsuccessful) attempts to settle the matter on their own terms.

[43] Costs awards by the Authority for half day investigations typically do not exceed \$1,500.

Denis Asher

Member of the Employment Relations Authority