

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 88
5638936

BETWEEN JORDAN MASON
 Applicant

A N D CARDINAL LOGISTICS
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Mr Mason represented himself
 Justine Foden, Advocate for the Respondent

Investigation Meeting: 13 March 2018

Submissions Received: At the investigation meeting, and further evidence
 provided on 16 March and 13 April 2018

Date of Determination: 13 June 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

Employment relationship problem

[1] Jordan Mason claims that Cardinal Logistics Limited (Cardinal) unjustifiably dismissed him from his job as a storeperson on 12 May 2016. Mr Mason worked at an Asaleo Care (Asaleo) site. Asaleo was Cardinal's client. However, Cardinal remained Mr Mason's employer.

[2] Mr Mason claims Cardinal should compensate him by paying him wages he lost because of the dismissal, and \$8,000 for humiliation, loss of dignity and injury to his feelings.

[3] Cardinal says that it dismissed Mr Mason justifiably after following a fair process.

Background facts

Before the incident

[4] On 14 April 2016, Mr Mason was driving his forklift when there was an incident involving a truck in the same area Mr Mason was driving his forklift. Cardinal considered that he had breached a site rule and concluded he was in breach of a safe operating instruction and was at fault. Cardinal issued a formal warning to Mr Mason on 18 April 2016.

[5] Mr Jury wrote in the warning notice that:

Jordan has put his safety and the safety of another team member at high risk by operating a forklift in an unsafe manner. Jordan accepts he made a bad choice and accepts responsibility for his actions.

Failure to comply with company policy or any other type of offense may lead to a final warning.

[6] Mr Mason and Mark Jury, Cardinal's Warehouse Manager, signed the written warning on 19 April 2016. Mr Mason has not challenged this warning.

The toolbox meeting incident

[7] On 4 May 2016, a forklift driver carrying two pallets full of paper towels drove into a parked forklift without an operator on it. Cardinal and its client, Asaleo, concluded that the collision happened because the driver of the moving forklift could not see the parked machine. The following morning Asaleo and Cardinal held a toolbox meeting at which Mr Mason was present. The previous day's incident was discussed. The following corrective actions were put in place:

- Pallets are to be carried no more than one pallet high when driving the Bendi forward. This includes stubbie and full height pallets. Therefore 2 pallets maximum can be carried with the Kooi forks extended.
- Always wear your seatbelt – it is law that you must wear a belt on a machine provided with it and it is also in the site rules. If you are seen not wearing a seatbelt, your manager will be informed and you will go through the discipline process.
- Always apply the handbrake to a machine you are not using and turn the key off – otherwise the machine is not controlled.

- Do not leave MHE¹ or pallets sitting in traffic flow areas.

[8] At the investigation meeting, I asked Mr Mason what he took out of the meeting. He told me:

they said if you can't see, the rule is to de-stack, so take four pallets down to two.

[9] However, he also told me that, in his mind, Chep pallets are different because when they were empty he had a 'line of sight' through them so his view was not completely obstructed.

Mr Mason's incident

[10] The following day, on 6 May 2016, Mr Mason was carrying two stacks of 20 empty Chep pallets out of the warehouse into another building. When stacked that high the pallets are above the operators head. He was carrying the pallets while proceeding forwards. On his fourth trip, Mr Mason drove straight into the back of a parked trailer without braking. The trailer was parked in the same place when Mr Mason undertook his first three trips. After hitting the trailer, Mr Mason stopped and re-loaded both stacks of pallets on to his forklift and carried them to where he had originally intended to put them.

[11] After the collision, Mr Mason made another two trips, also carrying two stacks of 20 Chep pallets.

[12] The forklift had particular safety software, called Fleet Focus, installed. Fleet Focus measure G forces, and automatically locks a forklift when it stops running if significant enough G force was measured. An operator cannot then start the forklift without a key or a code that only a supervisor can supply. After Mr Mason finished shifting the Chep pallets from the warehouse he stopped his forklift.

[13] Dave Tapara was Mr Mason's supervisor. Mr Mason went to see him and told him that he had 'nipped' the parked trailer with his load and asked for Mr Tapara's key to unlock his forklift.

[14] There is no accurate record of how long after the incident Mr Mason told Mr Tapara about it. However, it is clear it was not immediate because it was after Mr Mason made a further two trips.

¹ Material Handling Equipment.

Cardinal's response to the incident

[15] Mr Tapara spoke to Mark Jury, at the time Cardinal's warehouse manager. Mr Tapara advised Mr Jury to look at the CCTV video footage of the incident.

[16] The following working day, Monday, 9 May 2016, Peter De Valk, of Asaleo, told Mr Jury that he had received a notification of the incident through Fleet Focus. He told Mr Jury that the impact was 'red level': a severe impact.

[17] Mr Jury decided to commence an investigation into what he considered a serious incident. He asked Mr Mason to undertake a post-event drug test, which he did. The results of the drug test were negative.

[18] On 9 May, Mr Jury wrote a letter inviting Mr Mason to a meeting to investigate the following allegations:

1. Repeated Engaging in unsafe act
2. Not reporting a H & S incident
3. Refusal to accept or follow lawful and reasonable instructions.

[19] The letter told Mr Mason that Cardinal considered the allegations, specifically the allegations that he had repeatedly engaged in unsafe acts and refused to accept or follow instructions, to be serious misconduct. Therefore, it informed Mr Mason if the allegations were established against him Cardinal might decide to dismiss him instantly.

[20] Mr Mason was advised he was welcome to bring a support person or representative to the meeting if he wished to and to take advice about the letter.

The first meeting

[21] The meeting took place on 11 May 2016 with Mr Mason and his support person present along with Mr Jury, Wayne Fenton, who took notes, and Dennis Aquino, Cardinal's Human Resources Manager, attending by way of Skype.

[22] Mr Jury outlined Cardinal's concerns. He said that, after viewing the camera footage, Cardinal was concerned that Mr Mason had not reported the incident immediately. He was also concerned that he had:

performed this action that caused the incident after the toolbox meeting the day before covering this action.

[23] Mr Jury also said that Cardinal was concerned that Mr Mason had repeated the unsafe action, being driving the forklift forwards when his vision was obscured by a stack of pallets, even after the collision had occurred. Mr Jury stated that the meeting was held in order to hear Mr Mason's view of things.

[24] Mr Mason's explanation was that as he approached the area where the trailer was, the front stack of pallets bottomed out on the tarmac gradient, which caused him to lose control of the front stack.

[25] He said he took action to recover those pallets but ended up heading towards the trailer and hitting the trailer. Mr Mason said that his view was not obstructed throughout the entire movement. He agrees that he completed two more trips with the same load to the same destination after the incident had occurred.

[26] When Mr Jury asked Mr Mason why he did not report the incident straight away, Mr Mason said he did not realise that he had hit the trailer that hard. He said he completed all of the trips he had to do and then reported the incident to Mr Tapara.

[27] Mr Aquino asked Mr Mason why he was pushing stacks of Chep 20 pallets high after the toolbox session that had been held the day before. Mr Mason answered that his view was not obstructed and he thought that the toolbox meeting was about double-stacked toilet paper and not about stacks of empty Chep pallets.

[28] The meeting ended with Mr Jury telling Mr Mason that they would reconvene the following day after Cardinal had the chance to review the camera footage again, with his explanation in mind.

Cardinal's further investigation

[29] After the meeting, Mr Jury reviewed the camera footage again. He also inspected the ground. He said that it did not appear to him that the vehicle had been affected by the tarmac gradient. Instead, it appeared to him that Mr Mason's forklift was traveling smoothly but he simply could not see the trailer parked in front of him.

[30] Mr Jury decided to check out Mr Mason's explanation that he could see where he was going at all times. Mr Jury sat in a stationary forklift loaded with two

stacks of Chep 20 pallets. He says he could not see ahead and concluded Mr Mason had not been able to see ahead either.

Cardinal's decision to dismiss

[31] Mr Jury came to the conclusion that Mr Mason's view was obstructed and that he was not being honest when he said he could see adequately through the Chep pallets. He concluded that Mr Mason was in breach of the clear instruction issued the day prior to the incident that he must not use a forklift when his view was obstructed. Mr Jury said that he found Mr Mason's comments about the toolbox instruction only being about loaded stacked toilet/paper rolls to be "disingenuous" because he had been at the meeting and said the clear message was an operator had to ensure their view was unobstructed, whatever the load.

[32] Mr Jury met with Mr Mason on 12 May and verbally informed him of his decision that Mr Mason had committed serious misconduct. Mr Jury summarily dismissed Mr Mason.

Cardinal's letter of reasons for the dismissal

[33] On 10 June 2016, Mr Aquino wrote a letter that gave Cardinal's reasons for Mr Mason's dismissal. He wrote:

A review of the company's footage didn't show any forks hitting the ground, no sudden change of direction, and that Mr Mason was just headed directly to the trailer. From the video footage of the whole day, there was also no one else in the warehouse moving pallets with an obstructed view. The company also did not accept Mr Mason's contention that carrying two 20-pallet high stacks did not interfere with his vision. During the training session on 5th May, it was reiterated that operators should have an unobstructed view, and that they should de-stack pallets to make sure they drive with a clear view in front of them...

The company concluded that Mr Mason deliberately disregarded instructions and Health and Safety procedures that were given just the previous day. The company also concluded that the fact that Mr Mason continued to do this after hitting a trailer, showed a disregard to any damage to property or injury to others that his actions may cause. The company also considered the fact that Mr Mason was already given a previous warning for unsafe work practice.

Issues

[34] In deciding whether or not Mr Mason was unjustifiably dismissed I need to consider the following issues:

- a. Did Cardinal act as a fair and reasonable employer could have acted in all circumstances at the time? That involves asking if the dismissal was substantively justified and procedurally fair.
- b. If not, is Mr Mason entitled to lost wages and/or compensation for humiliation, loss of dignity and injury to his feelings?
- c. Did Mr Mason contribute to the situation leading to his personal grievance in a way that was so blameworthy that any remedies should be reduced?

Did Cardinal unjustifiably dismiss Mr Mason?

Substantive justification

[35] Mr Jury's evidence was that he decided Mr Mason's actions were serious misconduct and that the three allegations were made out. I need to objectively assess whether the allegations were of the kind that could lead a fair and reasonable employer to dismiss Mr Mason.

Allegation One: Repeated engaging in an unsafe act

[36] Mr Jury said that this allegation by Cardinal meant that Mr Mason's action of shifting loads of Chep pallets stacked 20 high was an unsafe act because his vision was totally obstructed. Once the collision happened, Cardinal expected Mr Mason to recognise that what he had done was an "unsafe act" and not repeat the same manoeuvre in the same way. However, he did not and carried another two loads.

[37] In all the circumstances, including the CCTV footage that showed Mr Mason heading directly for the trailer without braking, even when he apparently started to lose the front stack of pallets, Cardinal could have fairly and reasonably reached the conclusion that Mr Mason engaged in an unsafe act both before and after the collision. A fair and reasonable employer could have concluded that the footage shows that Mr Mason could not adequately see the trailer's location because his view was not clear.

Allegation Two: Not reporting a health and safety incident

[38] Cardinal's view was that Mr Mason only reported the collision to Mr Tapara because he needed to unlock his forklift. In the meeting on 11 May 2016, Mr Jury clarified that the allegation was Mr Mason did not report the incident immediately.

[39] In the Authority's investigation meeting, Cardinal clarified that its concern about Mr Mason continuing to use his forklift after the severe impact was that the forklift could have been damaged in the collision and may have been unsafe to operate. Cardinal said that Mr Mason knew that he had to report any collision or other health and safety incident immediately, but did not do so.

[40] This allegation is bound up with allegation 1: that Mr Mason repeated an unsafe act after the collision.

[41] Mr Mason carrying loads with his vision at least partially obscured had potential to cause a serious incident. Mr Mason said that he did not consider it had been a very hard collision. However, the video evidence showed the collision caused the trailer to move relatively significantly. The Fleet Focus system recorded the impact as a severe one. The incident that led to the toolbox meeting the day before arose from a similar cause; the operator's obscured vision.

[42] Mr Jury said that the delay in reporting the collision was part of the overall picture he took into account in deciding that Mr Mason was wrongly downplaying the seriousness of what he had done.

[43] When viewed objectively, Cardinal could have reached the view that Mr Mason should have reported the collision immediately.

Allegation Three: Refusal to accept or follow lawful and reasonable instructions

[44] Both parties agree that the toolbox meeting of 5 May 2016 did not specifically discuss the transport of Chep pallets. However, one of the hazards identified in the 4 May 2016 incident that led to the toolbox meeting was "operator unable to see if the travel pathway was clear".²

² There were three other unrelated hazards identified.

[45] A corrective action arising out of the toolbox meeting was that “pallets are to be carried only 1 pallet high” when driving forward, and “two pallets maximum can be carried with the Kooi forks extended”.

[46] There were no express corrective actions outlined in the toolbox meeting that applied to empty Chep pallets. However, at the investigation meeting, Mr Jury told me that because of the message conveyed to the operators in the toolbox meeting, he expected empty Chep pallets would be stacked only 10 high when an operator was driving forward because that would allow clear and unobstructed vision. He agreed that he did not explicitly state that at the toolbox meeting.

[47] Mr Jury’s evidence was that in the afternoon, after the toolbox meeting, he instructed the truck drivers to take empty Chep pallets off as stacks of 10. However, he acknowledged that Chep pallets were often stacked 20 high on the ground because of a lack of space.

[48] Mr Mason’s explanation for carrying the pallets 20 high is that was how high they were stacked when he picked them up and that was how high he was expected to leave them stacked when he had moved them.

[49] Mr Jury was entitled to decide that Mr Mason had downplayed the seriousness of his actions and failed to admit that his vision had been obstructed. Mr Jury had been present at the toolbox meeting and was:

confident that the clear message was it was the operator’s obligation to ensure that vision was unobstructed, regardless of the nature of the load.

[50] Mr Mason said that the message he had taken from the toolbox meeting was that if he could not see he should de-stack.

[51] Cardinal did not give Mr Mason a specific “lawful and reasonable instruction” not to carry stacks of Chep pallets more than 10 high when driving forward. However, Mr Jury was entitled to conclude that Mr Mason understood that the message of the toolbox meeting had been that it was his responsibility to ensure his view was clear and unobstructed.

[52] A fair and reasonable employer could have decided that Mr Mason understood the message from the toolbox meeting to de-stack if he could not see, but that he had ignored that instruction in driving with a partially obstructed view ahead.

Procedural fairness

[53] Cardinal is required to prove that in dismissing Mr Mason it acted as a fair and reasonable employer could in all the circumstances at the time. Part of that involves a consideration of whether Cardinal used a fair process in deciding to dismiss Mr Mason.

[54] Factors I need to consider in deciding whether the process was fair include whether Cardinal:

- sufficiently investigated the allegations against Mr Mason, having regard to the resources available to it?
- raised its concerns with Mr Mason before deciding to dismiss him?
- gave Mr Mason a reasonable opportunity to respond to its concerns?
- genuinely considered Mr Mason's explanation before deciding to dismiss him?

[55] I can also consider any other relevant factors. However, I must not decide that Cardinal's action was unjustified if there were only minor defects in the process that did not result in Mr Mason being treated unfairly.

[56] Cardinal, through Mr Jury, carried out a sufficient investigation. However, Mr Mason was not made aware of the further investigation carried out between the first and the second meeting.

[57] Mr Jury's further investigated by loading a forklift with 20 empty Chep pallets and sitting on the driver's seat looking forward. He did not drive forward with the load. Mr Jury used what he discovered in that part of the investigation to assist him in his decision-making. It led him to conclude that Mr Mason was not telling the truth about his vision not being obstructed. However, he did not report to Mr Mason about that aspect of his investigation and the conclusion he reached.

[58] During the Authority's investigation meeting, Mr Mason agreed with Mr Jury that it is difficult to see clearly, when the forklift is stationary. However, he said that he had sufficient vision forwards when the forklift was moving. He also said that he moves his head to the side at times when he is driving.

[59] Mr Mason was not able to give that explanation to Cardinal before he was dismissed because Mr Jury did not tell him about his further investigation and how it led to the conclusion he reached.

[60] Mr Jury did not put his view to Mr Mason that his explanation of what he understood the message from the toolbox meeting to be was disingenuous.

[61] Therefore, although Mr Mason was given an opportunity to respond and give his explanation to Cardinal's concerns he was not given a complete opportunity to respond, as he had no opportunity to respond to Mr Jury's conclusion about his truthfulness and the evidence on which he based it.

[62] It follows that Mr Jury could not have taken Mr Mason's explanation into account when he decided that the appropriate sanction was summary dismissal.

[63] However, in all the circumstances, including the existence of the clear CCTV footage, I consider Mr Mason had a reasonable opportunity to give his explanation and that Mr Jury did the fair thing in investigating the gradient of the tarmac and what Mr Mason's general view would have been through the Chep pallets.

[64] I consider the procedural breach was minor and did not lead to Cardinal treating Mr Mason unfairly.

Choice of disciplinary outcome

[65] Cardinal's warning in April 2016 noted that any other failure to follow company policy or "any other type of offense" might lead to a final warning. However, Cardinal decided that on 6 May 2016 Mr Mason's behaviour had moved beyond a final warning. It decided that in driving as he did Mr Mason had not taken his health and safety obligations, to safeguard his own well-being and that of others, seriously. It reached that conclusion because of the collision, because he carried two further loads after the collision and did not immediately report the incident.

[66] The previous warning in April for unsafe forklift operation was one of the circumstances a fair and reasonable employer could have taken into account in deciding whether Mr Mason's actions on 6 May impacted its confidence and trust in him to drive safely in the future. I consider dismissal was one of a range of consequences a decision a fair and reasonable employer could have imposed in all the circumstances at the time.

[67] Cardinal did not unjustifiably dismiss Mr Mason. Mr Mason's claim is dismissed.

Costs

[68] Costs are reserved. The unsuccessful party can usually expect to pay a reasonable contribution towards the successful party's costs.

[69] The parties should seek to agree on costs. If I am asked to determine costs, I am likely to adopt the Authority's notional daily tariff-based approach. The daily tariff for the first day is \$4,500. This matter was heard within one day.

[70] If the parties cannot reach an agreement, the party seeking costs has 28 days from the date of this determination to file and serve its submissions on costs. The other party has 14 days from the date they receive those submissions to file submissions in reply.

[71] The parties should identify any factors they say should result in an adjustment to the notional daily tariff.

Christine Hickey
Member of the Employment Relations Authority