

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 15/09
5123634

BETWEEN NICHOLAS McCLOY
 Applicant

AND SMITH CRANE &
 CONSTRUCTION LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Sally McRae, Advocate for Applicant
 No appearance for Respondent

Investigation Meeting: 4 December 2008 at Christchurch

Further information as to 27 January 2009
wages earned:

Determination: 13 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Nicholas McCloy was employed by Smith Crane & Construction Limited (Smith Crane) as a workshop labourer from 9 July 2007 until he was dismissed on 28 March 2008. Smith Crane is involved in the business of crane hire, precast manufacture, heavy haulage and civil engineering.

[2] Mr McCloy says that his dismissal on 28 March 2008 was unjustified and that he suffered disadvantage as a result of various unjustified actions by Smith Crane. Mr McCloy also seeks a penalty for breaches of his individual employment agreement.

[3] Smith Crane, in its statement in reply, says that Mr McCloy was caught stealing both time and supplies and he admitted doing so and was justifiably dismissed.

The Authority investigation process

[4] Mr McCloy's statement of problem set out concerns that Smith Crane had failed to attend mediation on two dates which had been set for that purpose and on one occasion the advice was received that the mediation would be cancelled when Mr McCloy, Ms McRae and a support person were present to attend mediation. Mr McCloy asked for a direction from the Authority that the parties attend mediation.

[5] Smith Crane advised, in the statement in reply, that its director, Tim Smith, was sick in bed on the date of the first mediation and then unexpectedly called to Auckland on business on the date of the second mediation.

[6] The Authority duly held a telephone conference with the parties on 27 August 2008. Ms McRae attended the telephone conference on behalf of Mr McCloy and Peter O'Sullivan the financial controller of Smith Crane, attended on its behalf.

[7] Mr O'Sullivan advised that Smith Crane was keen to participate in mediation and that the other two mediations were cancelled because of unavoidable circumstances.

[8] The parties were directed to mediation during the telephone conference and it was explained to them that a date would be set for the investigation meeting in the event that the matter did not resolve at mediation.

[9] A date for an investigation meeting was discussed and agreed to during the telephone conference of 4 December 2008. The Authority timetabled the lodging and serving of statements of evidence and specifically set out in a notice of direction that if there were any questions about the investigation process then either party could talk to a support officer.

[10] The employment relationship problem was not resolved at mediation and Ms McRae duly lodged and served statements of evidence in accordance with the timetable. There was no compliance with the timetable by Smith Crane and there was no request for an extension of time.

[11] I am satisfied that on 28 August 2008 Smith Crane was served with a notice of direction and notice of investigation meeting as confirmed by the Courier Post track and trace.

[12] There was no appearance on behalf of Smith Crane at the investigation meeting on 4 December 2008. I delayed the start time for the investigation meeting for approximately 20 minutes.

[13] In the circumstances, where there was no good reason shown as to why Smith Crane had failed to attend at the investigation meeting, I proceeded under clause 12 of Schedule 2 of the Employment Relations Act 2000 to investigate the matter. I heard evidence from Mr McCloy and from his mother Raewyn McCloy.

The issues

[14] The issues for the Authority to determine in this matter, applying the test of justification set out in s.103A of the Employment Relations Act 2000 which requires an objective assessment of the employer's action and how they acted, are:

- Was the investigation undertaken by Smith Crane into the actions of Mr McCloy what a fair and reasonable employer would have done in all the circumstances;
- Did Mr McCloy's actions that were relied on by Smith Crane for the dismissal amount to serious misconduct;
- Was the decision to dismiss Mr McCloy justifiable in all the circumstances;
- If the actions of Smith Crane or the dismissal were not justifiable, then what remedies is Mr McCloy entitled to, are there issues of mitigation or contribution and should a penalty be awarded?

Was the investigation undertaken by Smith Crane into the actions of Mr McCloy what a fair and reasonable employer would have done in all the circumstances?

[15] Mr McCloy described his actions on Friday, 28 March 2008 to the Authority. He explained that he was about 10 minutes late to work that day and that his usual hours of work were from 7am to 5.30pm but that he worked through his smoko break

to make up for the ten minutes. When Mr McCloy was first employed by Smith Crane, he had explained to them that his father was terminally ill with cancer and that he helped his mother look after him. Mr McCloy would sometimes be late to work. Often this was because he was helping his mother care for his father, particularly when his father's health deteriorated.

[16] In or about early February 2008, Mr McCloy was called to a meeting with the plant manager, Mike Dickson, to talk about his attendance at work and that he was late. Mr McCloy recalled the meeting and could remember that there was a discussion about his attendance and the contractual requirement to be on time for work. Mr McCloy said that whilst he was told to *buck his ideas up* at the end of the meeting he was not given the formal warning letter that Smith Crane provided as part of his file when it was requested by Ms McRae. I accept his evidence on that point.

[17] Mr McCloy had been to Ashburton the weekend before he had been dismissed to collect an engine that he had bought. He had asked Mr Smith if he could borrow a company truck for that purpose and Mr Smith had given Mr McCloy permission to do so. Mr McCloy intended to work on the engine the following weekend but needed a couple of hooks for his hoist at home to do so.

[18] Mr McCloy said that during his lunch break on 28 March he saw two pieces of steel on the scrap pile that he thought would work as hooks for the hoist. He took them and scraped all the weld and other pieces off them and drilled holes in them. Mr McCloy said that he had almost finished them by the end of his lunch break and that he often did that sort of thing when he was learning to use his tools, taking steel off the scrap pile and throwing it back when he had finished.

[19] Toward the end of the day on 28 March, Mr McCloy said that he looked at the time on the clock and there were about three minutes to go before finish time at 5.30pm. Mr McCloy said that he tidied up and decided to go and get the steel and finish the hooks off. Mr Dickson then came over and asked Mr McCloy if he was making the tools for the company or himself. Mr McCloy explained that what he was doing was for himself and I conclude that Mr Dickson's displeasure must have been obvious because Mr McCloy said he took the bits of steel and replaced them on the scrap metal pile.

[20] The time was now after 5.30pm and Mr Dickson returned in what Mr McCloy described as a bad mood and told him to go immediately to Mr Smith's office. Mr McCloy went to see Mr Smith as he was directed to do. He said he had only just got into Mr Smith's office when Mr Smith told him he was fired for theft. Mr McCloy could not recall having an opportunity to sit down and could not recall being asked or invited to say anything. Mr McCloy understood that the reason he was being dismissed was for theft and he was told to leave the work premises immediately. Mr McCloy said the exchange at the office was at the most two minutes, which he described as Mr Smith blowing him up and then firing him.

[21] Mr McCloy said that he was devastated by the dismissal and he did not understand that he was doing anything wrong. He said that he had never removed the pieces of steel from the premises and, if given the chance to explain, he would have told Mr Smith that he intended to bring them back the next working day after the weekend.

[22] Mr McCloy went home and talked to his mother about what had occurred. Mrs McCloy telephoned Mr Smith on 28 March and told him that he had not followed the correct procedure. Mrs McCloy said that the telephone call went badly after she suggested to Mr Smith that he could not fire her son. She recalled Mr Smith saying he would do whatever he wanted and the call ended with Mr Smith hanging up on her.

[23] In its statement in reply, Smith Crane says that Mr McCloy was caught stealing at 5.10pm and that he admitted doing so. Mr McCloy did not accept that. Mr McCloy was never shown any video footage that it is suggested shows this and the Authority has never been provided with the footage.

[24] A letter dated 31 March 2008 was written to Mr McCloy by Mr Smith headed *allegations of serious misconduct*. It referred to the incident on 28 March 2008 and said that there was a meeting to discuss theft of steel from the workshop and using company equipment in work time for personal reasons and that at the end of the investigation there was a conclusion that Mr McCloy was guilty of serious misconduct. Mr McCloy did not accept that there was any such discussion with Mr Smith. The letter provided that Mr McCloy's actions were considered a fundamental breach of his employment agreement.

[25] A letter was also provided to Ms McRae dated 14 April 2008 which was written by Mr Dickson. The letter stated that Mr McCloy was caught at 5.25pm during work time, doing non-allocated work and when confronted he said he was doing a home job making brackets. The other matter raised in Mr Dickson's letter was that the material used by Mr McCloy was not just lying about but was special rail hooks which are kept in a specified area. Mr McCloy said in evidence that he simply picked up the pieces he had used from the metal scrap pile. There is then a further letter following Ms McRae's request for reasons for dismissal from Mr O'Sullivan dated 14 April 2009. The reason in that letter or ground that I find was relied on by Smith Crane for dismissal was theft and performing other than work duties in work time.

[26] Theft is classified in Mr McCloy's employment agreement as very serious misconduct. Smith Crane must be able to show that it carried out a fair and full investigation which disclosed conduct which a fair and reasonable employer would regard as serious misconduct. Whilst the usual civil standard of proof, the balance of probabilities apply, because of the grave nature of an allegation of theft, there has to be convincing evidence.

[27] The minimum requirements for procedural fairness are well known – *NZ Food Processing Union v. Unilever NZ Ltd* [1991] NZILR 35 at p.45-46. An employee should have notice of the specific allegations of misconduct that they are required to answer and the consequences if such an allegation is established. There should be a real opportunity to refute, explain or mitigate the conduct in an unbiased consideration of that explanation. Smith Crane simply concluded Mr McCloy had admitted theft and that was in essence the extent of the investigation. I have considered objectively from the position of a neutral observer whether that was what a fair and reasonable employer would have done in the circumstances.

[28] Mr McCloy told Mr Dickson when asked that he was doing a home job. He was using Smith Crane metal that he said he obtained from the scrap metal pile. It was obvious that the task was being undertaken a few minutes before Mr McCloy's finish time. Mr McCloy believed he was allowed to take metal from the scrap pile. He said that he had done so in the past, as had other employees, to assist him in gaining experience with his tools. He said that he would always throw the metal back into the scrap pile. Mr McCloy said that he did not intend to keep the steel but

intended to bring it back after the weekend. After the discussion with Mr Dickson Mr McCloy threw the steel back and it was not removed from the premises. Mr McCloy accepted that he had undertaken the task in work time but that he had not begun the work until a few minutes before his usual finish time.

[29] A fair and reasonable employer would have wanted an explanation from Mr McCloy in the circumstances and would not have concluded that Mr McCloy admitted stealing from his employer. It is a fundamental requirement of natural justice that an employee has an opportunity to give an explanation for conduct. Mr McCloy did not have an opportunity to give any explanation at all to Mr Smith before he was summarily dismissed for theft.

[30] In conclusion I do not find, objectively assessed, that the investigation undertaken by Smith Crane into the actions of Mr McCloy was what a fair and reasonable employer would have done in all the circumstances.

Did the actions of Mr McCloy relied on by Smith Crane amount to serious misconduct?

[31] Without a fair and full investigation Mr Smith could not properly consider and weigh an explanation that the steel had been retrieved from the scrap metal pile from which Mr McCloy thought that steel could be taken or, that Mr McCloy intended to return the steel. Importantly Mr Smith could not weigh and consider that Mr McCloy had replaced the steel on the pile so had not in fact taken anything. Mr Smith could not properly consider and weigh an explanation that Mr McCloy had only commenced work on the steel for the hoist hooks a few minutes before his finish time.

[32] I do not find that, in those circumstances, a fair and reasonable employer would have concluded that Mr McCloy's actions amounted to serious misconduct.

Was the decision to dismiss Mr McCloy justifiable in all the circumstances?

[33] The decision to dismiss Mr McCloy for theft was not a decision that was properly reached because the investigation into the allegation was not one that a fair and reasonable employer would have carried out.

[34] The resulting decision to dismiss, therefore, is not justified because it was not what a fair and reasonable employer would have done in all the circumstances.

[35] Mr McCloy has a personal grievance that he was unjustifiably dismissed and he is entitled to remedies. I conclude that whilst the process was such that it was unjustified and disadvantaged Mr McCloy, no separate remedies will be awarded in terms of a grievance of unjustified action causing disadvantage.

Remedies

Contribution

[36] The Authority must consider, under s.124 of the Employment Relations Act 2000, the extent to which the actions of Mr McCloy contributed to the personal grievance. If the Authority considers the actions of Mr McCloy did contribute, then the remedies otherwise awarded must be reduced.

[37] On the balance of probabilities I find that Mr McCloy obtained the metal he was working on from the scrap metal pile and I find it was more likely than not that he genuinely believed that he was entitled to use that metal.

[38] Nevertheless, this was a different situation to those Mr McCloy described in his evidence when he had used the scrap metal to gain experience with tools and then put it back on the pile. Mr McCloy was using the steel for a home job although was then intending to bring it back to work. Mr McCloy should have asked permission of either Mr Dickson or Mr Smith in those circumstances.

[39] Clause 19 of Mr McCloy's employment agreement is clear that no private work is to be carried out without the express agreement of Mr Smith or management and that, even with agreement, the work must be completed in the employee's own time. Mr McCloy did carry out, albeit in the last few minutes before his finish time, personal work without agreement of either Mr Smith or Mr Dickson. He should have obtained permission to do so.

[40] I find that by failing to obtain authorisation in both of these circumstances, Mr McCloy did contribute to his personal grievance and a fair and reasonable employer would have warned Mr McCloy about these matters.

[41] I do not take into account the time sheets that Mr McCloy completed on Monday, 31 March. Mr McCloy, having been summarily dismissed on the Friday without fair process, gave evidence he simply wanted to fill in his time sheet as

quickly as possible and did not give the matter much thought. I accept his evidence on that matter.

[42] I assess contribution, in all the circumstances, at 20%.

Lost wages

[43] Mr McCloy started a new job on 19 May 2008. I am satisfied that he attempted to mitigate his loss prior to that date and is entitled to lost wages from the date of his dismissal until 19 May 2008 less the contribution assessed.

[44] Using the schedule of earnings provided by Smith Crane, I have calculated the wages that have been lost. This shows that Mr McCloy's average weekly earnings for 40 weeks at Smith Crane is \$483.14 gross. I have taken that figure and multiplied it by the seven weeks when Mr McCloy was without work to arrive at a figure for lost wages of \$3,381.98.

[45] Applying the assessment for contribution, I order Smith Crane & Construction Limited to pay to Nicholas McCloy the sum of \$2,705.58 gross being reimbursement of wages under s123 (1)(b) of the Employment Relations Act 2000.

Compensation

[46] I accept that Mr McCloy was quite devastated to be told that he was being dismissed for theft without having an opportunity to be heard on that matter in his defence. He gave evidence that he felt it was quite unjust and unreasonable. Mr McCloy said that he had been brought up not to lie or steal and that it was particularly difficult for him to have such an allegation made.

[47] Mr McCloy suffered from severe depression in the months following the dismissal. I have read the medical certificate attached to Mr McCloy's statement of evidence dated 28 October 2008. It is difficult for me to conclude with any degree of accuracy what part the dismissal had in terms of the depression because that was attributed in the medical certificate in the main to Mr McCloy's father's death in June 2008. Mr McCloy said that he attributed his depression largely to his dismissal. I do accept his evidence that the dismissal impacted on his emotional wellbeing, although I am not satisfied that this was the sole factor that contributed to his depression.

[48] There was an opportunity for Mr Smith, when he was telephoned by Mr McCloy's mother on the evening of the dismissal to take some steps to reduce the hurt and humiliation that the summary dismissal had caused. Sometimes employers do things in the heat of the moment and subsequent attempts to reduce the impact can be taken into account. Mr Smith, however, did not take any steps when telephoned by Mrs McCloy.

[49] Mr McCloy also gave evidence of the difficulties caused for him and his family in terms of the mediations that did not proceed. Whilst I consider that there were some quite unsatisfactory matters with respect to those mediations when inadequate advice of non-attendance was given, I do not consider it appropriate to take those matters into account in the compensatory claim.

[50] I do accept that the reason for Mr McCloy's dismissal and the way it was carried out was particularly devastating for him. Mr McCloy was a young employee with no support at the time of the dismissal. He gave evidence that he could not understand what had happened, what he had done and he was very humiliated. I accept that he considered the matter to be unfair and it caused him to be very resentful. In turn, I accept that this impacted on his self-esteem.

[51] In all the circumstances I consider that a compensatory sum of \$10,000 is a fair and reasonable award.

[52] Taking contribution into account, I order Smith Crane & Construction Limited to pay to Nicholas McCloy the sum of \$8,000 being compensation for humiliation, loss of dignity and injury to feelings without deduction under s.123(1)(c)(i) of the Employment Relations Act 2000.

Penalty

[53] I make no order for a penalty.

Costs

[54] Mr McCloy is entitled to a contribution towards his legal costs. Ms McRae wanted costs to reflect the difficulties in terms of the two mediations which did not proceed. Mr Smith did attend mediation after being directed to do so by the Authority. I intend to deal with the matter in this way.

[55] Because of the previous failure by a representative of the respondent to attend at mediation or advise in advance of any difficulty in doing so, Ms McRae was required to lodge a statement of problem and ask the Authority for a direction to mediation. I accept that this contributed to Mr McCloy's costs and I shall make an allowance in terms of that.

[56] The matter was not unduly complex. Two statements of evidence were required. In all the circumstances, and taking into account the fact that the applicant, Mr McCloy, was required to obtain a direction for mediation, I make an award of costs in favour of Mr McCloy in the sum of \$2,000 together with a filing fee of \$70.

[57] I order Smith Crane & Construction Ltd to pay to Nicholas McCloy the sum of \$2,070 being costs.

Helen Doyle
Member of the Employment Relations Authority