Determination Number: CA 89/06
File Number: CEA 354/05

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE

BETWEEN	Paul Moynihan (Applicant)
AND	New Zealand Aluminium Smelters Limited (Respondent)
REPRESENTATIVES	Christine French, Counsel for Applicant Pheroze Jagose, Counsel for Respondent
MEMBER OF AUTHORITY	James Crichton
INVESTIGATION MEETING	22 March 2006 23 March 2006
DATE OF DETERMINATION	19 June 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Moynihan) alleges that he was unjustifiably dismissed on a summary basis by the respondent (NZAS) on 21 April 2005.

[2] NZAS resists Mr Moynihan's claim saying that any fair and reasonable employer could have summarily dismissed in the particular circumstances in which NZAS acted.

[3] The parties attended mediation provided by the Mediation Service of the Department of Labour but were unsuccessful in resolving the employment relationship problem between them.

[4] Mr Moynihan was a crane driver employed by NZAS at its Tiwai Point Aluminium Smelter. Mr Moynihan had been employed by NZAS for 20 years as a crane operator and at the time of his dismissal, he was working in the carbon baking furnace part of the Smelter.

[5] Mr Moynihan was dismissed for a single incident which took place on 17 March 2005.

[6] On that day, Mr Moynihan was working in the carbon baking furnace and as part of his crane driving operation, he was required to move refractory pit working platforms.

[7] This operation required Mr Moynihan to move his crane, which operates on a gantry system running the length of the carbon baking furnace, so as to be in a position to hook up to the refractory pit working platforms and move them as required within the carbon baking furnace.

[8] NZAS contends that the way in which the crane is to be operated in these particular circumstances is spelt out in its "Current Best Practice" (CBP). The essence of the instruction in CBP is that the crane driver should act on the orders of the dogman in moving the refractory pit working platforms.

[9] The dogman is a designated employee being one of a team of refractory bricklayers. The task of dogman rotates from one employee to another, but the principles of the role remain the same; the dogman controls the crane operator by hand signals or radio signals.

[10] On 17 March 2005, the radio was not working and so the only basis on which Mr Moynihan could have been directed by the dogman was by hand signals.

[11] A flashing light was supposed to give a warning that a platform was still engaged, that is that there was still a bricklayer actually working from the platform.

[12] Mr Moynihan acknowledges now that the light may well have been flashing, but he has no recollection of having seen it at the relevant time. It is clear and undisputed that there were no hand signals from the dogman (who was in fact the bricklayer still working below in the cage). Mr Moynihan says that all of the other indicators available to him, including in particular the body language of the two bricklayers he could see, suggested to him that he could move his crane into position over the platform, hook the crane up to the platform and "take the slack out of the chain".

[13] Mr Moynihan proceeded on this basis and having got this far in the manoeuvre was confronted by waving and shouting from the two bricklayers that he could see (the two above ground) and he then realised that the cage that he had hooked up to still had someone in it.

[14] Mr Moynihan then immediately lowered the chain, removed the hook from the cage and took no further steps until the bricklayers were ready for him again, which seems to have been a few minutes later.

[15] NZAS contacted Mr Moynihan the following day through its superintendent of the carbon bake furnace, Mr Dave Carrick, to indicate that NZAS wished to speak with Mr Moynihan in relation to the incident the previous day.

[16] There is dispute about the initial telephone discussion between Mr Carrick and Mr Moynihan and in particular whether Mr Carrick made it clear that the matter was seen by NZAS as potentially serious.

[17] The meeting to which Mr Moynihan was summoned on 18 March was to give Mr Moynihan an opportunity to advance his view point on the 17 March incident, and after he did that, Mr Carrick indicated that given the potential seriousness of the incident, Mr Moynihan would be suspended on full pay to enable NZAS to conduct a thorough inquiry.

[18] There was a further meeting between Mr Moynihan and representatives of NZAS on 20 March 2005 at which Mr Moynihan was provided with statements taken from other parties to the incident. Mr Moynihan was requested to provide an urgent response.

[19] Mr Moynihan and NZAS representatives met again on 1 April and on this occasion Mr Moynihan was represented by his counsel, Ms French. At this meeting, Mr Moynihan submitted a written statement and Ms French provided written submissions. At the previous meeting, Mr Moynihan had simply made an oral statement.

[20] There was a further meeting between NZAS and Mr Moynihan on 8 April 2005 at which NZAS representatives indicated that their provisional conclusion was that Mr Moynihan be summarily dismissed for serious misconduct. Responses were sought.

[21] Another meeting between NZAS and Mr Moynihan on 19 April 2005 resulted in NZAS advising it intended to dismiss Mr Moynihan subject to any further observations that he might want to make.

[22] There was a further and final meeting on 21 April 2005 at which Mr Moynihan was summarily dismissed from his employment. In essence, NZAS say that they had reached the conclusion that they lacked the necessary trust and confidence in Mr Moynihan's ability to work safely.

Issues

[23] The central issues are whether NZAS's investigation was a fair and proper one, and whether the dismissal which followed was a justifiable response.

[24] It is helpful to analyse the matter under the following headings:

a) The relevant law;

b) The investigation;

c) The decision on penalty;

The relevant law

[25] Section 103A of the Employment Relations Act 2000 sets out the test for justification. The test is an objective one and I must consider whether NZAS's actions were what a fair and reasonable employer would have done in all the circumstances at the time of Mr Moynihan's dismissal.

[26] The meaning of the new test for justification inserted in the statute by the Employment Relations Amendment Act (No.2) 2004 has been the subject of much debate.

[27] For present purposes, I accept Ms French's submission that the intention of the Parliament in providing this statutory test of justification was to vary the approach so clearly enunciated by the Court of Appeal in *W & H Newspapers Ltd v. Oram* [2001] 3 NZLR 29.

[28] Ms French asserts in effect that the intention of the Parliament was to move the law on this particular point in the direction of favouring employees by reducing the discretion afforded employers in *Oram*. I agree with that analysis.

[29] Ms French also asserts, while acknowledging that in this regard her submission is more contentious, that a judicial approach which contemplates *a range of reasonable responses* is no longer good law. Again, I agree with that analysis for the reason that it seems to me to be consistent with the language in the statutory enactment.

[30] Since preparing this determination in draft form, I have had the benefit of reading Judge Shaw's decision in Air New Zealand Ltd v Hudson AC 30/06 30 May 2006, the first decision of the Employment Court on the new statutory test for justification.

[31] In a careful analysis, Her Honour determines that the test to apply is as follows:

> *A particular employer, having followed a proper process of investigation is justified in dismissing an employee for misconduct if the Court or the Authority finds that a fair and reasonable employer would have dismissed in those circumstances*

[32] That then is the test I must apply in the present case.

The investigation

[33] There was criticism of the process used by NZAS to investigate the incident of 17 March 2005. The important criticisms of the process need to be considered in turn here.

[34] On the day after the incident, there was a telephone discussion between Mr Carrick of NZAS and Mr Moynihan. Mr Carrick says that he rang Mr Moynihan at home and that he referred to the incident as *potentially serious*. Mr Moynihan's evidence on this point is that Mr Carrick did not tell him the matter was *potentially serious misconduct*, but Mr Carrick stood by his evidence that he has used the words *potentially serious*.

[35] Mr Carrick admitted that he could not recall referring to dismissal as a possible outcome in that early exchange and he also acknowledged that Mr Moynihan did not get the seriousness of the position. Mr Carrick's evidence was in effect that Mr Moynihan sought to make light of the matter and indeed initially refused to acknowledge that there had been *any incident* on the previous day.

[36] What both Mr Carrick and Mr Moynihan agree about in relation to this first conversation is that Mr Carrick did not suggest to Mr Moynihan that he should bring a representative with him to that first meeting. Mr Carrick tries to deal with this possible deficiency by saying that all that he was doing in this initial meeting was fact finding and he simply wanted to get Mr Moynihan's recollection of what had actually happened.

[37] This fact finding process was, by common consent, proceeded with on the footing that Mr Carrick asked Mr Moynihan questions, when they did meet, and Mr Moynihan responded.

[38] NZAS says that there is no evidence before the Authority that Mr Moynihan was prejudiced by the absence of a representative at this first meeting. Mr Moynihan says that he felt *ambushed* when he met with Mr Carrick and that, having gone along to the meeting to, as it were, provide information, *I found myself in the middle of a disciplinary meeting having questions put to me and then being suspended*.

[39] It is difficult to square NZAS's claim that there was no deficit to Mr Moynihan in attending this first meeting without a representative with Mr Moynihan's evidence of what actually happened. It may be, as NZAS contends, that Mr Moynihan did not say anything he might not have said had he had a representative present.

[40] The fact is that the normal rules about procedure in employment matters are predicated on the footing that the employee knows roughly what to expect from each part of the process by having that information provided to him or her by the employer's representative. This was a situation where Mr Moynihan believed that he was providing information about an incident he had been involved with the previous day which plainly he thought was less significant than the view that NZAS took. Instead of providing the employer with information and carrying on with his normal

work and life routines, his evidence was that he was surprised by the vehemence of NZAS's performance at that first meeting, had not appreciated in advance that he was potentially at risk from a disciplinary perspective, and certainly he had not expected to be suspended by the end of the meeting.

[41] I accept Mr Moynihan's evidence on this matter as being truthful. In my opinion, based on the evidence in this particular case, NZAS failed absolutely to satisfy the requirement that they adequately communicate to Mr Moynihan the nature and extent of the meeting that he was being asked to attend.

[42] The very fact that Mr Carrick admitted that he thought that Mr Moynihan was minimising the incident, ought to have put Mr Carrick on notice that a representative should have been insisted upon. As it was, no representative was even suggested, and in my opinion that makes the result of this first meeting potentially unsafe.

[43] A further issue which I need to examine is the question of the alleged difference between the material provided to NZAS by Mr Moynihan at this first meeting (by way of information solicited from Mr Moynihan by questioning by Mr Carrick) and the written statement with Mr Moynihan made at a subsequent meeting on 1 April 2005.

[44] The meeting on 1 April was attended by Mr Moynihan and his counsel and was convened to enable Mr Moynihan to respond to statements which had earlier been given to Mr Moynihan by NZAS at a meeting on 20 March 2005.

[45] Mr Moynihan says that there were two fundamental differences between the material he had provided in the original question and answer session on 18 March and his written statement on 1 April. Those fundamental differences are said to be the emphasis in the 1 April statement on Mr Moynihan's intention, and Mr Moynihan's referral in the 1 April statement to similar behaviour by work colleagues.

[46] NZAS contended that the initial verbal statement and the 1 April written statement *did not differ materially*. Mr Moynihan resists that proposition for the reasons just outlined.

[47] Whatever NZAS's characterisation of the nature of the two statements, the fact is that in respect to Mr Moynihan's contention that other crane drivers did what he had done and did not suffer disciplinary consequences, NZAS, having been appraised of this contention in Mr Moynihan's statement of 1 April, proceeded to make further inquiries to test Mr Moynihan's contention.

[48] The evidence tendered by NZAS's witnesses, and supported by their documentary evidence of the investigation that they conducted, was that while there were some occasional examples of crane drivers hooking up without prior authorisation, there was no evidence of those crane drivers then lifting the platform after hooking up. Given that Mr Moynihan had, by his own admission, done both, NZAS argued that his position was different.

[49] However, at the investigation meeting, evidence was given from two crane drivers as to their practice. These crane drivers said that they had, from time to time, hooked up without a signal and one also said that it was *perfectly feasible* for Mr Moynihan to say, as he did, that he was just taking the slack out of the chain and that in doing that, he slightly over tightened the chain with the result that the platform moved fractionally.

[50] Further, one of the crane drivers who gave evidence at the investigation meeting said he would hook up and raise the platform without instruction but I accept that the evidence does not disclose that that admission was made to NZAS during its investigation.

[51] Mr Moynihan says that there were deficiencies in the way in which NZAS documented their investigation, including the failure to disclose some information to him and a failure to accurately apprise Mr Moynihan's solicitor on the work practice of other crane drivers. No doubt the investigation was not perfect. However, these deficiencies are in my opinion no more than blemishes on the overall process.

[52] I am more troubled by Mr Moynihan's next objection which is to the failure of NZAS to encourage his participation in the reconstruction of the events complained of. The reconstruction was important to NZAS in its final disposition of the matter.

[53] NZAS characterise this exercise as a re-enactment rather than a reconstruction and they say this re-enactment was part of a much wider investigation and only one of the factors which the decision-maker took into account. The appropriate descriptor for the process is neither here nor there. The fact remains that NZAS used the process by their own admission, as one of the *factors* that the decision-maker took into account in coming to the decision to dismiss.

[54] The law on natural justice as it applies to the investigation of an employer is well known. In *New Zealand (with exceptions) Food Processing IUOW v Unilever* [1990] 1 NZILR 35, the Labour Court held that an employee is entitled to have the allegation squarely put to him, have a genuine opportunity to refute, explain or mitigate his conduct and then have the employer consider his explanation in a fair and unbiased way.

[55] In my view, NZAS's failure to have Mr Moynihan participate in the re-enactment does not give Mr Moynihan the opportunity he is entitled to, to explain or mitigate his conduct and his absence from the re-enactment means the NZAS decision maker is robbed of a potentially valuable building block in giving the required unfettered consideration to Mr Moynihan's explanation.

[56] Indeed, it does seem that NZAS have rather downgraded the importance of the reconstruction or re-enactment in the face of the argument from Mr Moynihan that he ought to have been involved. The evidence suggests that the simulation exercise was, at the time it was done and at the time that the decision was taken to dismiss, if not *pivotal* as Mr Moynihan suggests, at least important in the final decision.

[57] The next objection raised by Mr Moynihan is also, in my opinion, an important area of concern. The central difference between Mr Moynihan's conduct, and the conduct of some fellow crane drivers, relates to Mr Moynihan's decision to take the slack out of the chain and lift the platform fractionally. There was evidence before the Authority that one other crane driver did that, although as I have already conceded, that evidence does not appear to have been available to NZAS during its investigation. Given the importance of the lifting of the hook to take the slack out of the chain, it follows that how high the chain was lifted is a highly relevant factor.

[58] Mr Moynihan's complaint essentially is that NZAS's investigation of the matter was completely unscientific in that the investigating officer invited witnesses to indicate the distance the platform moved by moving their hands.

[59] Mr Moynihan says this is significant because it enabled witnesses to give a variety of more or less unspecific impressions about how far the platform had actually been moved by Mr Moynihan's actions. Further, it is significant because, as I have already made clear, the single difference between Mr Moynihan's non-compliance with NZAS's Customary Best Practice (CBP) is in relation to his lifting the hook so as to *take the slack out of the chain*. In those circumstances, I think Mr Moynihan is right to criticise NZAS's investigation and I agree with him that on the face of it, the issue of the distance that Mr Moynihan was supposed to have raised the cage was not accurately established by the employer's investigation.

[60] Furthermore, this lack of specificity in the establishing of the distance the platform was moved, seems to me to tie back to Mr Moynihan's view that this intention in moving the platform is relevant. NZAS contend that Mr Moynihan accepts that he lifted the platform. While that is true as far as it goes, that bald statement over simplifies Mr Moynihan's position. Mr Moynihan says he lifted the platform fractionally by 25 – 50 mm with the intention of taking the slack out of the chain, and for no other purpose.

[61] Given NZAS's inability to satisfactorily establish, in its investigation, any consensus on the distance the platform was moved, I would have thought a fair and reasonable employer would then have turned to consider Mr Moynihan's intention as a means of establishing what happened and what level of culpability should attach to those events.

[62] Mr Moynihan then raises a series of complaints about the inquiries that NZAS made or ought to have made about the events complained of, particularly in relation to the observations of the incident by the two employees who were most closely proximate to the crane at the time the incident happened. It is true that these two witnesses changed their story materially during the course of the investigation. It is also true that although these two co-workers were arguably *the best* witnesses of the event complained of, they still only saw the incident of concern to NZAS for a very short period of time.

[63] Given the reliance on these two employees by the investigation, the fact they changed their story especially in relation to Mr Moynihan's reliance on their "body language" ought to have raised doubts in NZAS's mind.

[64] Further, I am troubled by NZAS's miscounting of the number of previous safety issues Mr Moynihan had been involved in. One such incident, counted in the Statement in Reply as a safety issue which Mr Moynihan had been the architect of, was actually a matter where he had only been a witness.

The decision on penalty

[65] NZAS has a strong safety culture. Its operation is essentially a dangerous one, both in terms of the size and complexity of the production process and in terms of the inherent risks attached to the various operations at the smelter plant.

[66] NZAS developed its "Customary Best Practice" inter alia to promote agreed and appropriate common standards of work across the workplace. It is clear that safety is a major focus of CBP.

[67] In relation to the particular operation being performed on 17 March 2005, the CBP specifies that the crane operator is to be under the control of the dogman whose instructions, either by hand signal or by radio telephone, are to be followed by the crane driver.

[68] It is common ground that Mr Moynihan acted before the dogman had given any instruction to him. It is also common ground that Mr Moynihan knew what NZAS's "Customary Best Practice" provided in respect of the relevant operation.

[69] Mr Moynihan's terms and conditions of employment with NZAS included a provision that he be bound by NZAS's Code of Conduct. Under the subheading *dismissal offences* is the following entry:

- *Non-compliance with the health, safety, environmental and operating standards of the Company where this is deliberate or the result of gross negligence*

[70] As I indicated earlier, in the Authority's view, the clear difference between Mr Moynihan's conduct and the conduct of other crane drivers who gave evidence at the investigation meeting, was that Mr Moynihan not only moved the crane in and hooked up but also lifted the hook to *take the slack out of the chain*. That latter action distinguishes Mr Moynihan's conduct from the conduct of other crane drivers.

[71] Mr Moynihan never denied that he lifted the hook so as to move the platform below by an incremental amount, although the amount of that increment is in dispute. What Mr Moynihan says in his defence is that his intention in doing what he did is relevant.

[72] Mr Moynihan accepted in his oral evidence that an injury might have resulted if he intended to lift the platform but he says that was not his intention.

[73] In his oral evidence, Mr Carrick, who is the superintendent of the carbon baking furnace at NZAS, confirmed that he had given consideration to whether the appropriate response to Mr Moynihan's error was some kind of warning. By implication anyway, Mr Moynihan may well have accepted some disciplinary response short of dismissal or at least that inference is capable of being drawn from the final paragraph of Mr Moynihan's submissions in reply.

[74] For NZAS though, the issue came down to an application of the clear words in its disciplinary procedure and, having found that Mr Moynihan's action did not comply with NZAS's safety standards (which Mr Moynihan acknowledged he knew of), the only issue was whether the actions complained of were either deliberate or the result of gross negligence.

[75] If the actions were neither deliberate nor the result of gross negligence, then the appropriate disciplinary response, in terms of the disciplinary procedure, was by way of warning.

[76] NZAS reached the conclusion that Mr Moynihan's actions were either deliberately non-compliant or grossly negligent in respect of the company's enunciated safety standards and accordingly the decision was taken to summarily dismiss him.

[77] Ms French, for Mr Moynihan, contends that NZAS's CBP does not unequivocally preclude the action that Mr Moynihan took and therefore it could not be said that Mr Moynihan either deliberately or grossly negligently breached NZAS's safety standards. The fact that NZAS clearly enunciated a revised policy after Mr Moynihan's dismissal may support Ms French's contention.

[78] However, I think Mr Moynihan's own evidence gives the lie to this submission. Mr Moynihan never denied doing what he was accused of doing; he simply did not attribute to his actions the negative connotations which NZAS chose to place on them.

[79] I reject Ms French's suggestion that NZAS's policy was somehow not clear. It is true that the original policy (the one that applied at the time Mr Moynihan was dismissed) may not have been as artfully worded as it could have been, but it seems to me the meaning was clear enough and I did not understand Mr Moynihan to ever contend that he did not understand what it meant.

Determination

[80] In order to reach a conclusion in this matter, I must balance the procedural irregularities that I have identified which potentially put the employer's process at risk against NZAS's determination to make its workplace as safe as is humanly possible by being *non-negotiable* on issues of workplace safety.

[81] I am satisfied that the strong health and safety culture developed by NZAS is a relevant factor in balancing those procedural deficits.

[82] However, I have reached the conclusion that NZAS's investigation is so flawed as to cast doubt on the decision to dismiss. I am especially troubled by the failures around the first meeting (especially NZAS's failure to insist on Mr Moynihan having a representative present), the failure to involve Mr Moynihan in the reconstruction and thus allow him to mitigate or explain himself, and the issues about the distance the platform was moved and the relationship between that and Mr Moynihan's intention.

[83] In my judgement, looking a the decision making chain, if these various deficiencies had not been apparent, NZAS may well have reached a conclusion that a disciplinary response short of dismissal was appropriate.

[84] It follows that I have reached the conclusion that Mr Moynihan has a personal grievance by reason of an unjustified dismissal because the NZAS investigation was not a fair and proper one and thus the conclusions reached by that investigation are open to question.

[85] I need to consider the matter of contribution. In my opinion Mr Moynihan has significantly contributed to his own misfortunes by not scrupulously following the "Customary Best Practice" of NZAS. By his own admission, he did not comply with the policy although he plainly understood it. A disciplinary response of some sort was inevitable. I think the appropriate way to reflect this contribution is in reducing the compensation that might otherwise be awarded.

[86] Mr Moynihan claims $50,000.00 by way of compensation. For reasons, I have just advanced, I do not think it is appropriate that I consider a large figure. I think a figure of $7500.00 represents an appropriate award.

[87] In addition to compensation Mr Moynihan seeks reimbursement of lost wages at the rate of $3000.00 gross per month and permanent reinstatement. In the particular circumstances of this case, I do not think it appropriate to reduce the wages figure to reflect any contribution from Mr Moynihan and accordingly I award him $36,000.00 gross.

[88] Reinstatement is the primary remedy in the statute. NZAS says they have lost trust and confidence in Mr Moynihan's ability to work safely. Mr Moynihan says he is capable of being reintroduced into the workplace and working safely.

[89] I have given earnest consideration to Mr Moynihan's desire to be reinstated. I accept Ms French's submission that, if the submissions of employer parties were to be uniformly successful, no employee would ever be reinstated.

[90] NZAS's passionate commitment to safety is entirely laudable. Mr Moynihan's desire to continue his career at NZAS is equally laudable. Mr Moynihan's absence from NZAS for twelve months will have given him an opportunity to reflect on his shortcomings.

[91] I direct that Mr Moynihan be reinstated to his former position or to a position no less advantages to him at NZAS. In doing that, I have reached the conclusion that in a large workplace such as the smelter, NZAS has opportunities to find a suitable role for Mr Moynihan and or to assist his reintegration into the workplace with appropriate training and development.

Summary

[90] I have determined that NZAS should:

a. Pay Mr Moynihan compensation under S123 (1)(c)(i) in the sum of $7500.00

b. Pay Mr Moynihan wages of $36,000.00 gross

c. Reinstate Mr Moynihan to his former position or to a position no less advantageous by Monday 26 June 2006

Costs

[92] Costs are reserved.

James Crichton
Member of Employment Relations Authority