

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 140
5419128

BETWEEN

CAMERON NELLEY
Applicant

A N D

TOP ENERGY LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: A N McNally, Counsel for Applicant
P A Caisley/J Greenleaf, Counsel for Respondent

Investigation Meeting: 10 and 11 February 2014 at Whangarei

Submissions Received: 7 and 18 February 2014 from Applicant
7 and 18 February 2014 from Respondent

Date of Determination: 11 April 2014

DETERMINATION OF THE AUTHORITY

- A. Cameron Nelley was not unjustifiably dismissed.**
- B. The application for personal grievance is dismissed.**
- C. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.**

Employment relationship problem.

[1] Cameron Nelley was employed as a line mechanic by Top Energy Limited. He was dismissed following an incident where he was electrocuted.

Facts leading to dismissal

[2] On 1 April 2013 Mr Nelley arrived late to the work site in Opononi. He had been required to collect another employee and equipment. As a consequence, he

missed the morning hazard identification meeting run by his supervising foreman, Murray Corr.

[3] The hazard identification meeting was designed to meet the safety standards set out in the Safety Manual – Electricity Industry (SM-EI).¹ The meeting identified potential hazards, work to be done and the work area.

[4] Mr Corr was the recipient of the access permit 892. He was responsible for ensuring employees signed the access permit prior to the start and at the finish of the work set out therein. Signing at the start of work confirmed signatories had knowledge of the equipment, permit area, hazards, safety measures and “Recipient Applied Safety Measures” i.e. the sets of earths located at each end of the permit area creating a safe work zone.² Signing at the end of work acknowledged they could no longer work on the equipment covered by the permit because it was no longer safe and must stand clear.³ No employee signed access permit 892 at the end of the work covered by the permit.

[5] At the end of the hazard identification meeting employees signed the access permit and a tailgate sheet. This sheet confirmed “... *each staff member ... understands the job to be undertaken and helps to identify and control hazards on site.*”⁴ It set out the hazards at the worksite and how they were to be controlled.

[6] Mr Nelley signed the tailgate sheet and access permit 892 prior to starting work in the morning.

[7] During the morning shutdown another supervisor, Richard Hodge, arrived on site. He did not sign the access permit 892 prior to starting work. He did sign the tailgate sheet. He also spoke to Mr Corr about the job. There was no clarity as to who was the supervisor in charge from that point onwards.

[8] There were two shut downs scheduled in the morning and afternoon. The afternoon shutdown started at 1 pm in a different location. Although the afternoon

¹ Common Bundle of Documents (CBD) Document 2, p56

² Oral evidence R Watt 11/02/14

³ CBD Document 18 p223

⁴ CBD Document 19, p225

shut down was scheduled to start later, Mr Nelley believed it was scheduled for 12.30 pm. The afternoon shutdown work was to occur between poles 38 to 42.⁵

[9] By 12.15 pm the crew had finished their morning work and the lines had been re-livened. During lunch there was a brief discussion about the afternoon work. The group then dispersed to their poles ready to start work at 12.40 pm.⁶

[10] No hazard identification meeting was held. No tailgate sheet was signed. No access permit was produced for signature.

[11] Mr Nelley went to start his afternoon work at poles 39 and 40. He saw a set of earths from the morning shutdown at pole 46. These should have been removed. He assumed (incorrectly) they had been applied for the afternoon shutdown. He did not see the set of earths at the other end of the work area.

[12] He saw another employee, Grant Young, working in the same area he was. He assumed from his knowledge of the shutdown time, the set of earths and Mr Young's presence that the afternoon shutdown had occurred and the line was no longer live or de-energised.

[13] He set his ladder on pole 40. Prior to starting, he flagged down Richard Hodge and asked about equipment. Mr Hodge then left the site. Mr Nelley climbed to his work position. As he attached his safety harness he came in contact with the live 11kV power line. The resulting electric shock threw him off the ladder and he fell approximately 6 metres landing on a hedge at the bottom of the pole.

[14] Mr Nelley sustained minor burns to both hands and was flown by helicopter to Whangarei hospital that afternoon. He was held for two nights and discharged on the afternoon of Thursday 11 April 2013.

[15] The company conducted an accident and disciplinary investigation in connection with the incident. A copy of the company's accident investigation was provided to Mr Nelley.

[16] On 30 April 2013 he was invited to a disciplinary meeting to discuss concerns about his conduct on the day of the incident arising from the company's investigation. The concerns were that he may have breached safety procedures because:

⁵ CBD Document 17

⁶ CBD Document 26 p250

- (a) the new tailgate was not completed for the second shutdown on that day to identify hazards in the vicinity of the work area;
- (b) he did not sign on to the access permit;
- (c) he had not been given access clearance or confirmation that the line was de-energised before proceeding to work on it;
- (d) he did not carry out any testing to ensure the line was de-energised before proceeding to work on it;
- (e) he had not attached his safety harness before proceeding to work on the line.

[17] The invitation letter alleged breaches of clauses 2, 4 and 6 of the Code of Conduct. These breaches constituted serious misconduct of “*serious neglect in the performance of duty*”, “*failure to follow procedures resulting in a serious safety or damage situation*”; and “*failure to uphold the philosophy, policies, operating procedures and standards of Top Energy.*”⁷ It alleged he had breached several rules from the SM-EI.⁸ He was warned he may be dismissed from employment following investigation.⁹

[18] Four other employees were also part of the disciplinary investigation. These included Murray Corr and Richard Hodge, his two supervisors, and Grant Young and Rewiri French, two employees working around the live wires on the day of the incident.

[19] Mr Nelley’s disciplinary meeting was held on 2 May 2013. He attended with his Union representative and provided feedback.

[20] A further meeting was convened on 3 May 2013. Mr Nelley was informed of his proposed dismissal. He made further submissions. At the end of the meeting Mr Nelley was told he was dismissed effective immediately.

⁷ CBD Document 5 pp 172 to 173

⁸ Part 3 “*Rules for Work on Equipment*”, particularly section 3 “*Control of Work*”; section 4 “*Rules Common to all Access and Test Permits*”; section 5 “*Additional Rules for Access and Test Permits*”; section 6 “*Isolation and Earthing for Work on HV Electrical Equipment*”; and section 7 “*Work on or near Electrical Equipment*”.

⁹ CBD Document 27, p.257 ff

[21] On 6 May 2013 Mr Nelley received a letter confirming his summary dismissal effective Friday 3 May 2013 at 11.25am. The reasons for dismissal were breaches of the SM-EI, Code of Conduct and Disciplinary Policy. It then stated “... *after three months, you may apply for any vacant positions at Top Energy that do not involve SMEI regulations [and] that after six months you may apply for any vacant line mechanic positions at Top Energy, if there are any available*”.¹⁰

[22] Other employees received outcomes ranging from a final written warning (Messrs Core and Hodge) to no disciplinary action (Messrs Young and French).

Issues

[23] The issues for the Authority to determine are:

- (a) Could a fair and reasonable employer have concluded Mr Nelley’s conduct was misconduct justifying dismissal?
- (b) Was the process leading to dismissal of Mr Nelley what a fair and reasonable employer could have done in all the circumstances?
- (c) If the dismissal was unjustified, what remedies should be awarded?

Could a fair and reasonable employer have concluded Mr Nelley’s conduct was misconduct justifying dismissal?

[24] Mr Nelley accepts he was required to sign onto the access permit prior to undertaking or accessing the network or live wires and did not do so. However he submits the respondent did not routinely require compliance with SM-EI such as earthing at every work position. If it had, Mr Nelley’s accident would not have occurred because he would have known the line had not been de-energised. Work pressure, inadequate tailgate meetings, inconsistent practice signing access permits, sets of earths remaining when should have been removed, uncertain afternoon shutdown times and employee behaviour led him to believe the line was de-energised. When he had raised with the respondent the inconsistent compliance with SM-EI he was rebuffed.

[25] The fact Mr Nelley’s employment was terminated is accepted. The onus falls upon Top Energy Limited to justify whether its actions “*were what a fair and*

¹⁰ CBD document 34, pp.298-299

reasonable employer could have done in all the circumstances at the time the dismissal or action occurred” (s.103A(2)). In applying this test, the Authority must consider the matters set out in s.103A.

[26] The Authority must not determine the dismissal unjustifiable if the procedure or defects were minor or did not result in the employee being treated unfairly (s.103A(5)). A failure to meet any of these s.103A(3) tests is likely to result in a dismissal being found to be unjustified¹¹.

[27] Serious misconduct “... will generally involve deliberate action inimitable to the employer’s interests ... [it] will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.”¹² It is conduct which “deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.”¹³

[28] Safety issues have a status of their own, and where safety is genuinely involved in the operations of an employer it is not just another ingredient in the mix. Consistency is highly desirable and should be looked for in safety matters, but is not in principle superior to safety.¹⁴ A “single act of negligence, when sufficiently serious, can impair trust and confidence.”¹⁵

[29] This relationship is governed by a collective agreement which included company policies as part of its terms and conditions.¹⁶ The primacy of safety was a feature of the collective agreement and policies.

[30] Prior to the incident, Mr Nelley had no employment history concerns. He had been a registered and licensed line mechanic for a number of years. As part of his training he was required to be familiar with the Safety Manual for the Electricity Industry (SM-EI) that sets out safety rules for employees in the electricity industry.¹⁷ All equipment was to be regarded as live until it was established the conductor “was

¹¹ *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 160 at [26]

¹² *Makatoa v Restaurant Brands (NZ) Ltd* [1999] 2 ERNZ 311 (EmpC) at 319

¹³ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483

¹⁴ *Air New Zealand Ltd v Samu* [1994] 1 ERNZ 93 (EmpC) at 95

¹⁵ *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29, [2000] 2 ERNZ 448 (CA)

¹⁶ CBD Document 1 Top Energy Limited Collective Agreement April 2011 – March 2013 EPMU (Coverage Clause)

¹⁷ CBD Documents 2 & 3

*safe to work on, irrespective of whether an access ... permit has been applied.”*¹⁸

The SM-EI required individual employees ensure safety in the workplace, by understanding and compliance with “*safety rules, standards, guides and procedures*” set out therein. A minimum approach distance from live conductors was required to be maintained “*unless carrying out live work in accordance with an approved industry procedure.*”¹⁹ He had had refresher courses/training on these rules including health and safety, tailgate and access permits.²⁰

[31] Mr Nelley accepted at hearing he would not normally start working on the network without signing the access permit first. The access permit confirmed it was safe to work in this area. No access permit had been produced for his signature. He had not attended any hazard identification meeting. He did not sight both sets of earths. He was required to maintain a minimum approach distance. The fact another worker was believed to be working did not relieve him of his personal safety responsibilities under the SM-EI.

[32] There was little evidence of work pressure other than a reference to the project falling behind time in the accident investigation report.²¹ Even if there was work pressure, there is little evidence this directly affected Mr Nelley’s decision making. Although he arrived late, it did not prevent him from following the appropriate procedures prior to starting morning work that day.

[33] Inadequate tailgate meetings, inconsistent practice signing access permits, one set of earths remaining when it should have been removed, uncertain afternoon shutdown times or other employee behaviour does not reasonably allow him to ignore or neglect to follow the safety procedures under the SM-EI. His training, knowledge and experience should have reinforced this.

[34] The nature of this industry was working around an extremely hazardous substance, namely electricity. The SM-EI rules were designed to ensure all employees safety. Non-compliance with safety procedures could be fatal.

[35] Given the hazardous nature of the industry, Top Energy needed to be confident he would not be guilty of such a lapse. It was reasonably entitled to form the view

¹⁸ CBD Document 2 p 60

¹⁹ See above p 59 Rule 1.501 (a) to (b).

²⁰ Oral evidence R Watt 11/02/14

²¹ CBD Document 26 p252

that non-compliance with its SM-EI could not be condoned. Mr Nelley's failure to maintain a minimum approach distance until proper safety procedures had been followed directly resulted in a serious safety situation, namely his own electrocution.

[36] In the circumstances, the Authority determines a fair and reasonable employer could have concluded Mr Nelley's conduct was misconduct justifying dismissal.

Was the process leading to dismissal of Mr Nelley what a fair and reasonable employer could have done in all the circumstances?

[37] Mr Nelley submits there were failures to put relevant matters such as sighting the earths, potential timing of a tailgate meeting and when an access permit could have been issued. It also raised contradictions in the respondent's evidence. These included the finding Mr Nelley accessed the network without signing the permit when Richard Hodge did the same and the failure to raise inconsistent practice around access permits when it was raised by the Union representative during the investigation meeting. He also raises disparity of outcome with Mr Hodge, a supervisor who also accessed the network without signing onto the access permit but was not dismissed.

[38] No issue has been taken with the investigation, raising of concerns and opportunity to be heard. The principle submission is about the genuine consideration of Mr Nelley's responses, including failures to put relevant matters, giving too much weight to contradictory evidence and disparity.

[39] The decision maker was Richard Watt, General Manager Contracting Services. He had the accident investigation report and Mr Nelley's transcribed interviews.

[40] The earths were discussed during the interviews. At hearing Mr Nelley confirmed he sighted one set of earths (which had been erroneously left from the morning) but did not see the second set of earths. This led to the necessity to test his individual pole prior to climbing. During the interview, Mr Nelley (through his Union representative) confirmed he should have tested his pole in these circumstances but "*it wasn't common practice.*"²² Mr Nelley relied upon the fact he saw Grant Young up the pole beside him as evidence the pole was no longer live.

[41] The holding of a tailgate or hazard identification meeting was discussed during the interviews.²³ Mr Nelley did not believe it was required because he thought he knew the hazards well enough when he did not.

[42] The issue of an access permit was also discussed during the interviews with Mr Nelley.²⁴ Mr Nelley accepted in hindsight he shouldn't have been doing what he was in absence of signing an access permit.

[43] The earths, hazard identification meeting and access permit were standard safety procedures Mr Nelley was aware of but neglected to follow. They were raised and discussed at the interviews. There was no unfairness to Mr Nelley about these issues.

[44] The issue of Mr Hodge accessing the line without signing the access permit does not appear to have been before Mr Watt when he made his decision to dismiss. Mr Hodge's written warning did not refer to him accessing the line without signing the permit.²⁵ It was referred to in the accident investigation report.²⁶

[45] Where there is alleged disparity of outcome with another employee, the Authority must consider:

- (a) Is there disparity of treatment?
- (b) If so, is there an adequate explanation for the disparity?
- (c) If no, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?²⁷

[46] If there is an adequate explanation for the disparity, it becomes irrelevant. Even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is "*certainly no requirement that an employer is forever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.*"²⁸

²³ CBD Document 32 pp 4 - 6

²⁴ CBD Document 32 p 9

²⁵ CBD Document 36

²⁶ CBD Document 26 p 250

²⁷ *Chief Executive of the Dept of Inland Revenue v Buchanan* [2005] ERNZ 767; (2006) 7 NZELC 98,153 (CA) at para 45

²⁸ *Samu v Air New Zealand Ltd* [1995] 1 ERNZ 636, 639 (CA)

[47] There is a prima facie case of disparity between Mr Hodge and Mr Nelley. Both accessed the network prior to signing the access permit.

[48] The explanation for disparity may have been the discussion between Mr Hodge and Mr Corr about the work.²⁹ Mr Hodge also signed the tailgate sheet and appeared aware of the location of both sets of earths.³⁰ In short Mr Hodge had followed other safety procedures which would have satisfied him the line was de-energised prior to starting work. Mr Nelley did not for the afternoon shutdown.

[49] Even if this explanation was inadequate, the failure of Mr Nelley to adhere to well-known policies and procedures was serious misconduct justifying dismissal. The respondent is not bound to treat him similarly to Mr Hodge.

[50] In the circumstances the Authority determines the process leading to dismissal of Mr Nelley was what a fair and reasonable employer could have done in all the circumstances.

[51] Cameron Nelley was not unjustifiably dismissed. The application for personal grievance is dismissed. The remaining issue of remedies is not required to be considered.

[52] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed and served 14 days from the date of this determination. The other party shall have 14 days to file and serve a reply.

T G Tetitaha
Member of the Employment Relations Authority

²⁹ CBD Document 23 p 237

³⁰ CBD Document 19 tailgate sheet; Document 29 notes an instruction to leave the temporary earths attached from the morning shutdown.