

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Bill Palmer (Applicant)
AND Bluescope New Zealand Steel Ltd (Respondent)
REPRESENTATIVES Anne-Marie McNally, for Applicant
Philip Skelton/Katherine Burson, for Respondent
MEMBER OF AUTHORITY Ken Raureti
INVESTIGATION MEETING 1 December 2004
2 December 2004
DATE OF DETERMINATION 15 February 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem.

[1] Mr Palmer was employed by NZ Steel as a rigger. On 11 May 2004 he was dismissed for an unsafe act/breach of safety rules. He says the dismissal is unjustifiable and he is seeking reinstatement to his former position, reimbursement of lost earnings and compensation for the adverse emotional affects of the unjustifiable dismissal.

[2] NZ Steel denies that Mr Palmer was unjustifiably dismissed. The company says it dismissed Mr Palmer for a breach of the site health and safety rules after it conducted a full and fair investigation into the matter. It says that the breaches amounted to serious misconduct and therefore it was open to it as a fair and reasonable employer to dismiss him.

Background.

[3] Mr Palmer worked at NZ Steel as a rigger from 30 October 1995 until he was dismissed on 11 May 2004. His employment history was punctuated with a number of incidents some of which resulted in cautions, informal, formal and written warnings. The incidents ranged from failing to wear safety glasses and breaches of the company's safety rules, to refusing to comply with a lawful instruction, intimidation/threatening behaviours, to dishonesty and absenteeism.

[4] **Tuesday 4 May.** During the first week in May 2004, NZ Steel shut down its 4HI mill for maintenance. On Tuesday 4 May, Mr Alan Lucas (Plant Maintenance Engineer) saw Mr Palmer performing work at such a height that in his view Mr Palmer should have been wearing a fall restraint harness. Mr Lucas approached Mr Palmer and spoke to him about the need to wear a safety harness. Mr Palmer told him that he was only required to wear a harness if he was exposed to a fall of 3 meters or more, and in the particular job he was working on, the fall hazard was not greater than 3 meters. They had a very robust debate about when a harness should be worn, and Mr

Palmer came back through the danger tape and proceeded to the ground level where he began building a scaffold.

[5] **Wednesday 5 May.** At about 1.00pm on 5 May, three health and safety auditors commenced a routine inspection of the 4HI plant. During that audit they observed Mr Palmer and another rigger (Mr Ritchie) working in an area where in their view, Mr Palmer and Mr Ritchie were exposed to an approximate fall hazard of some 5 meters and they were not wearing a safety harness. Mr Lucas was one of the audit team members. Mr Lucas called at the riggers and asked them to step back from the hazard. Mr Ritchie stepped back, however Mr Palmer (who had a broom in his hand was down on his hands and knees leaning over the edge of the fall hazard reaching outwards and downwards trying to unhook a crane hook) did not. He argued with Mr Lucas about the need to wear a restraint, and accused Mr Lucas of not knowing the rules. After he had unhooked the crane with the broom handle, he then moved away from the hazard and continued to argue with Mr Lucas. After a very intense argument, Mr Palmer continued working on the shut through until about 8.00pm that evening.

[6] **Thursday 6 May.** Mr Palmer started work at 7.45am and worked through until approximately 9.30 am, when he was suspended by Mr Dwyer (Rigging Supervisor). He was suspended on pay without any consultation with Mr Palmer or Mr Elsley, the Chairperson of the Combined Unions Site Committee, and the Senior EPMU delegate. Mr Dwyer then commenced initial investigations into the previous day's incident.

[7] **Friday 7 May.** During the morning of the 7th, Mr Dwyer and Mr Ross (Maintenance Services Manager assisting in the process) continued their investigations into Mr Palmer's conduct. As part of their initial investigations they met with an interviewed Mr Palmer and Mr Elsley. After they had completed their initial enquiries, Mr Dwyer and Mr Ross consulted with Mr Reimink (Engineering & Maintenance Services Manager) and they decided to progress the matter to a disciplinary meeting. They reconvened a meeting with Mr Palmer and Mr Elsley at 3.0'clock that afternoon and advised them that the matter had now proceeded to a disciplinary level.

[8] **Monday 10 May.** Mr Dwyer and Mr Ross made further enquiries, revisited the plant and reconvened the disciplinary meeting with Mr Palmer and Mr Elsley at around 1.0'clock. They outlined the results of their investigations and sought further information from Mr Palmer. Mr Palmer was advised that the matter was very serious and that his employment was in jeopardy. Mr Palmer raised a number of issues which required further investigation, so the meeting was adjourned at about 2.45pm. At about 3.45pm they reconvened and advised Mr Palmer that the matter was progressing to the next level (Mr Reimink) to consider Mr Palmer's future employment at NZ Steel. Mr Reimink was the ultimate decision maker.

[9] **Tuesday 11 May.** Messer's Reimink, Dwyer and Ross met and discussed the matter. Mr Reimink decided that he wanted to see the site as it was on the 5th, so arrangements were made to shut that part of the mill down, and riggers re-constructed the site so that Mr Reimink could view it first hand. Mr Palmer's representative, Mr Elsley attended the re-construction visit. After the visit, at 1.30pm, Mr Reimink convened a meeting with Mr Palmer and Mr Elsley to give him an opportunity to speak directly to him before he made a decision. After this opportunity, Mr Reimink adjourned the meeting and he considered all of the information available to him. He then decided to dismiss Mr Palmer and conveyed his decision to him.

[10] Mr Reimink said that Mr Palmer's poor employment record, particularly as far as safety is concerned, and the fact that Mr Lucas had told Mr Palmer the day before that he must wear a safety harness was of concern to him. He said it was also a concern to him that rather than step away from the hazard when approached by the auditors, he chose to continue and finish the job and to argue

the point. Mr Reimink told Mr Palmer that this incident combined with previous occasions irrevocably damaged his relationship with NZ Steel and he had shown that he was unable to work within the NZ Steel safety culture.

Suspension.

[11] One of the considerations in this the matter are the circumstances surrounding Mr Palmer's suspension. The general principle applying to the action of suspension carried out by an employer will usually require an employer acting fairly to consult with an employee about a proposed suspension before deciding whether and when to take that step. Suspension without a prior opportunity for the employee to comment on the appropriateness of the suspension can constitute an unjustified action. *Tawhiwhirangi v Attorney-General* [1993] 2 ERNZ 546.

[12] Mr Elsley gave evidence (which was not disputed) that there is an agreed understanding between the Combined Site Unions and NZ Steel surrounding the circumstances/process in which an employee can be suspended without consultation with the union, or employee. Such circumstances would generally arise during the Back Shift, and would relate to serious safety issues such as a breach of isolation, or where an employee is posing an immediate safety risk of harm to either himself, or a colleague/s or both, and where there is no one else on site to consult.

[13] None of these circumstances existed in Mr Palmer's case, the incident in question occurred during the early afternoon of an ordinary weekday. NZ Steel did not take prompt action to address or consider suspension, and Mr Palmer carried on working throughout the rest of the day up to about 8.00pm that evening. He returned and continued with his work the next day, without any apparent immediate danger to himself or his workmates. Neither Mr Palmer nor Mr Elsley was consulted on the question of whether he should be suspended or not. The only people that discussed Mr Palmer's suspension were Mr Lucas, Mr Dwyer, and Mr Graham Platts.

[14] Mr Palmer was not afforded any opportunity to be heard on his suspension. His suspension was, in the circumstances unjustified.

Dismissal.

[15] The legal principles to be applied to claims of unjustified dismissal have been clearly set out in a number of Court decisions. When an employer takes disciplinary action against an employee it must ensure that what it does is just and fair in all the circumstances. The main focus of the Authority is not whether there was misconduct but is whether the employer had reasonable grounds for believing that there was misconduct. In *Drummond v Coca – Cola Bottlers NZ* (1995) 2 ERNZ 229 at 234 the Employment Court stated;

The initial question ...is solely this: On the basis of the enquiry that the employer carried out, was the decision to dismiss one that was open to a fair and reasonable employer? This involves a value judgment about the quality of the enquiry and the quality of the decision based upon it.

[16] The reference to what is open to a fair and reasonable employer comes from the well known *BP Oil* case, [1992] 3 ERNZ 483 and 487, in which the Court of Appeal provided the following guidance.

For a discussion of a kind of conduct that will justify summary dismissal it is unnecessary to look further than this Court's judgment in BP Oil NZ Ltd v Northern Distribution Workers Union [1989] 3 NZLR 580. Definition is not possible, for it is

always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance claim... questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances...

[17] Most recently in *W & H Newspapers v Oram* [2000] 2 ERNZ 448, 457, the Court of Appeal at paragraphs [31] and [32] said that

The Court has to be satisfied that the decision to dismiss was one that a fair and reasonable employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to use this in terms of “could” rather than “would” used in the formulation used in the second BP Oil case [1992] ERNZ 483 (CA) at 487.

“The burden on the employer is not that of proving to the Court the employee’s serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct”.

[18] Of importance to a consideration of any personal grievance claim are the minimum requirements for a fair procedure to be followed by an employer in cases of dismissal. These have been concisely stated by the Labour Court in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35, to be the following;

1. *Notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;*
2. *An opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate his or her conduct;*
3. *An unbiased consideration of the worker’s explanation in the sense that that consideration must be free from pre-determination and uninfluenced by irrelevant considerations.*

[19] After Mr Palmer was suspended, he obtained and was well represented by an experienced senior union delegate Mr Elsley. Mr Palmer, both personally and through his representative was afforded a number of opportunities to put his circumstances and explanations to the investigating team during five separate meetings and stages through the disciplinary process. **I am satisfied that the investigations conducted by NZ Steel, the process it adopted, and its decision to dismiss Mr Palmer was one that was open to it as a fair and reasonable employer.**

Disparity.

[20] Mr Palmer has raised an issue that he was dismissed, whereas Mr Ritchie, his fellow rigger workmate was not. Mr Ritchie was cautioned and given a verbal warning for his involvement in the 5 May incident. Generally speaking, when taking disciplinary action against employees, employers must treat employees in a similar manner where there are similar offences or circumstances. The law relating to disparity of treatment was canvassed recently by Judge Colgan in the Employment Court in *Riddell v Commissioner of Police* (AC 40/03 20 June 2003) where the Court said:

“[50] There is no dispute between the parties about the law of disparity of treatment of employees as it relates to justification for dismissal. The law is long and authoritatively established including in judgments of the Court of Appeal and this Court and only needs to be restated shortly in this judgment.

[51] As was written in the Rapana v Northland Co-op Dairy Co Ltd [1998] 2 ERNZ 528, 537:

Where, in the course of an inquiry which may lead to dismissal of an employee (or indeed to other disadvantage in employment) a question of parity of treatment of employees is in issue, the reasonable and fair treatment of the employee may involve consideration by the employer of relevant prior incidents and the consequences of them for other employees. A fair and reasonable employer will treat employees in a fair and reasonable manner. Reasonable consistency is one facet of fairness. To arbitrarily impose consequences for materially similar breaches and/or in respect of employees whose circumstances are materially similar, may not be fair and reasonable treatment. Where, in the Tribunal, an employee bringing a personal grievance raises the issue of the disparity of treatment and the Tribunal considers that there is substance to the issue (a prima facie case of disparity), it will be incumbent upon the employer, who or which has the onus of persuading the Tribunal of the justification of the dismissal, to address the parity/disparity issue and to satisfy the Tribunal that its decision to dismiss was, in this regard, fair and reasonable.

[52] On appeal in Northland Co-op Dairy Company Limited v Rapana [1999] 1 ERNZ 361, the Court of Appeal noted that there was no challenge to the way in which this Court had recorded the applicable legal principles on the question of parity of treatment.

[53] Other principles applicable include that if there is an adequate explanation for apparent disparity, that the disparity will not be a factor supporting a conclusion of unjustified dismissal. An employer is not required to be bound by a mistaken or overgenerous treatment of a particular employee on a particular occasion. These principles are taken from the judgment of the Court of Appeal in Samu v Air New Zealand Limited [1995] 1 ERNZ 636.

[21] Mr Ritchie’s part, his behaviour, and reactions towards the audit team, were quite different to Mr Palmer’s reactions, and responses. While both riggers were exposed to a fall of more than 3 meters, and neither of them were wearing a safety harness I am satisfied with NZ Steel’s explanation of the reasons for the different conclusion it reached in respect of Mr Ritchie. I am satisfied that NZ Steel has provided an adequate explanation for the disparate treatment between Mr Palmer and Mr Ritchie. I accept its decision to caution Mr Ritchie, and in my view the different treatment between Mr Palmer and Mr Ritchie does not give rise in this matter to a conclusion of unjustified dismissal for disparate treatment.

Determination.

[22] After reviewing and considering all of the information available to me, and applying the legal principles, I am satisfied that **Mr Reimink’s decision to dismiss Mr Palmer was one that was fairly and reasonably available to him. To that extent, Mr Palmer does not have a personal grievance for unjustified dismissal.**

[23] **Mr Palmer does however have a personal grievance in relation to how he was suspended.** Mr Palmer lost no wages as a result of the suspension; therefore the remedies must be confined to compensation for injury to feeling and loss of dignity arising from the suspension. The circumstances are such that I find the presence of contribution on the part of Mr Palmer to the

situation that gave rise to his particular personal grievance; his blameworthy conduct, for which I have found he was justifiably dismissed, was causally linked to the decision to suspend him. Taking account of all factors, NZ Steel is required to pay Mr Palmer the sum of \$1500.00 pursuant to s.123 (c) (i) of the Employment Relations Act 2000.

Costs.

[24] Costs are reserved.

Ken Raureti
Member of Employment Relations Authority