

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 170
5433595

BETWEEN BRENT PETERS
 Applicant

AND GENERAL CABLE NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Greg Lloyd, Counsel for Applicant
 Peter Zwart, Advocate for Respondent

Submissions Received: 3 October 2014 from Applicant
 26 September 2014 from Respondent

Date of Determination: 31 October 2014

DETERMINATION OF THE AUTHORITY

[1] The recommendation of the Authority issued to the parties on 21 October 2014 under s 173A of the Employment Relations Act 2000 is final and is now the determination of the Authority.

Employment relationship problem

[2] Brent Peters was employed by General Cable New Zealand Limited (General Cable) as a cable maker/machine operator for just over five years before he was dismissed on 19 June 2013 for conduct or behaviour that could result in an injury and a failure to follow standard operating procedures. Mr Peters lodged a Statement of Problem with the Authority in which he said that he was unjustifiably dismissed from his employment and further that he was disadvantaged because of an unjustified action of General Cable in suspending him. He sought compensation for lost wages,



compensation for humiliation, loss of dignity and injury to feelings, compensation for loss of any other benefit and costs.

[3] General Cable, in its Statement in Reply, says that Mr Peters was justifiably dismissed for breaching the standard operating procedures and engaging in conduct causing injury. Reliance was also placed on the nature of Mr Peters' response at the disciplinary meeting that he had done similar things before and been neither hurt nor caught.

Investigation process

[4] The Authority had been provided with statements of evidence on behalf of witnesses for the applicant and respondent and all relevant documents. Shortly before the investigation meeting was to commence, Mr Lloyd and Mr Zwart conferred in writing on the Authority the power to make a written recommendation in respect of two employment relationship problems rather than proceeding with the scheduled investigation meeting. Counsel then agreed to provide written submissions in accordance with a timetable following which the Authority would provide its recommendation.

[5] By agreement the recommendation will become final 10 days from the date of the issue of the recommendation unless the parties do not accept the recommendation. I explained to Mr Lloyd and Mr Zwart the effect of s.173A (4) and (5) of the Employment Relations Act 2000 (the Act) and knowing the effect of those subsections, the parties affirmed their agreement.

[6] As this is a recommendation and the Authority has not had the ability to test the evidence, the full material will not be set out or referred to in this recommendation. I have, however, carefully considered all the written material together with the submissions. The test to be applied for justification of the actions of General Cable is that in s.103A of the Act.

The conduct leading to suspension and dismissal

[7] The dismissal followed an incident where Mr Peters was operating a machine which winds cable onto a wooden drum. It was nearing the end of the run and Mr Peters was shortly going to be using his cutters to cut the cable when it reached the required length. He dropped the cutters to the floor and bent down to pick them up.

As he began to stand up, the front of his overalls, which were loose on him, caught on a protruding screw and the machine began to pull him in. He could not reach the emergency stop button and other employees could not hear him over the factory noise. After a few minutes he was observed to be in difficulty and another employee stopped the machine. Mr Peters reported the incident and events preceding it at that point to a supervisor. After completing his shift, Mr Peters attended a doctor who told him it was likely he had fractured a rib.

Recommendation for serious misconduct dismissal

[8] My recommendation is that Mr Peters has a personal grievance of unjustified dismissal.

Reasons for recommendation

[9] The process at General Cable for reporting incidents is to prepare a preliminary report and then a root cause analysis and human factors analysis and classification systems within a 24 hour period with the input of all parties including the employee. Mr Peters had been involved in the preparation of an initial incident report but that report was not given to him at the time of the disciplinary meeting. Only the preliminary report in a largely but not entirely completed state was provided at the time of the disciplinary meeting on 19 June 2013 at the conclusion of which Mr Peters was dismissed. Mr Peters did not see and did not have an opportunity to comment on the other reports about the incident. These reports were provided after dismissal to management by the Health and Safety Advisor at General Cable. In disciplinary matters involving health and safety the reports form an integral part of the relevant information for decision making. They were relevant to the continuation of Mr Peters' employment. Failure to provide and consider them as part of the disciplinary process is not a minor procedural defect that would not cause unfairness.

[10] A single act of carelessness/negligence may depending on the circumstances justify a dismissal. Mr Peters action was unsafe because he placed himself in the way of moving machinery and therefore in harm's way. He should have stopped the machine before retrieving the cutters. There was a serious consequence because he was injured. The action leading to the accident was spontaneous and inadvertent to retrieve cutters to continue work and was not a wilful or deliberate breach of procedures and policies.

[11] Although a breach of the standard operating procedures was one of the allegations there was no specific instruction about such an action in the standard operating procedures for the machine. The disciplinary meeting notes show a general message delivered at toolbox meetings around safety and that an employee should not put themselves in danger was relied on. The allegations and explanations and all the circumstances needed to be considered against the disciplinary code. Failure to follow standard operating procedures is listed as an example of misconduct and not serious misconduct. There were other disciplinary outcomes in the disciplinary code to consider that fall short of dismissal such as a final written warning and consideration could and should have been given to these. The disciplinary notes did not support reflection about Mr Peters on earlier occasion's retrieved items with his foot while the machine was running and whether that indicated any gap in General Cable's training. That earlier conduct was part of the reason that it concluded it could no longer have the required trust and confidence in Mr Peters. One of the circumstances was that there was nothing at the time of the action to alert Mr Peters to potential danger as he bent to retrieve the cutters such as a painted hazard zone. That can be contrasted with other health and safety cases where there were visual cues. Painting a zone was an action to be taken on the initial incident report.

[12] Although discussed at the disciplinary meeting there was no reference in the dismissal letter to reliance being placed on an earlier warning for unrelated conduct in reaching the disciplinary outcome. Taking into account the procedural unfairness in undertaking a disciplinary process and delivering an outcome without the full health and safety internal reports being available, the failure to consider the allegation / action of Mr Peters and his explanation against the disciplinary code and other available disciplinary outcomes, I do not agree that a fair and reasonable employer could have justifiably dismissed Mr Peters in all the circumstances at the time.

Recommendation for suspension

[13] My recommendation is that Mr Peters has a personal grievance of unjustifiable action causing disadvantage in respect of the suspension.

Reason for recommendation

[14] Mr Peters was not consulted with directly about the decision to suspend and the timeframe for such suspension. The communication took place through the on-



site union representative and Mr Peters remained outside the meeting at which suspension was discussed. It would have been possible to consult directly with him. Although there was some questioning about the understanding of the suspension outcome directly to Mr Peters I do not agree that the process was that contemplated by the employment agreement or the usual standard of fairness. Whilst procedurally unfair the suspension was substantively justified in all the circumstances.

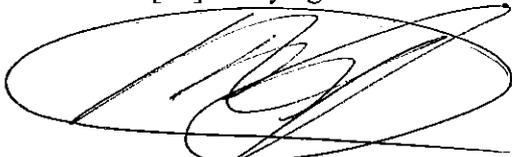
Remedies

[15] In light of my recommendations Mr Peters is entitled to three months lost wages in the sum of \$4,100 net and \$10,000 compensation in respect of the unjustifiable action and dismissal.

[16] Balancing both the actions of Mr Peters and the procedural unfairness which impacted on substantive justification I recommend the above amounts be reduced by 33% contribution.

Costs

[17] By agreement costs are to lie where they fall.



Helen Doyle
Member of the Employment Relations Authority

