

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 77/10
5276372

BETWEEN

WILLIAM TIOPIRA
Applicant

A N D

BYRNECUT MINING (NEW
ZEALAND) PTY LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Antony Hamel and Nicholas Eketone-Te Kanawa, Counsel
for Applicant
Kerry Smith, Counsel for Respondent

Investigation Meeting: 11 February 2010 at Dunedin

Determination: 29 March 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Tiopira) alleges that he was unjustifiably summarily dismissed from his position as mine foreman at the respondent's (ByrneCut) Macrae's Flat mine in East Otago on 6 August 2009.

[2] ByrneCut resists the claim on the footing that Mr Tiopira's dismissal on the grounds of serious misconduct was substantively justified and that the procedure used was fair and reasonable in all the circumstances.

[3] ByrneCut is a specialist underground mine operator and has a contract to manage the Macrae's Flat mine. Mr Tiopira was the project foreman for the operation and as such reported directly to the project manager. Issues of health and safety were paramount responsibilities of Mr Tiopira in his capacity as project foreman. ByrneCut told me (and I accept) that it took safety matters very seriously indeed and, to that

end, adopted a rigorous programme to maintain the high standards of the operation. One particular aspect of this was the requirement to take all practicable steps to avoid collapses of unsupported ground which had the potential to cause serious injury or death to personnel working alone.

[4] Mr Tiopira had been employed at the mine as project foreman for several years before Mick Hill came to the mine as project manager. Mr Hill commenced his duties in that capacity on 13 July 2009. Immediately on his appointment, Mr Hill was concerned to discover that Mr Tiopira had breached Byrnecut's safety standards the previous weekend. In pursuit of a better understanding between the two men, Mr Hill summoned Mr Tiopira to a meeting on 3 August 2009 at which the former emphasised the non-negotiable aspects of the safety culture of Byrnecut and to effectively *draw a line in the sand* so as to start the relationship between the two senior men in the mine on a fresh, greenfields basis. Mr Hill made it clear what his expectations were in that meeting.

[5] At around 1pm on 6 August 2009 (that is, three days after the *line in the sand* meeting), Mr Hill was undertaking an underground inspection of the mine workings and at an area of the mine known as 2C4 he discovered there was no bund wall in place to protect personnel from falling rock. Mr Hill effectively sealed the site and required Mr Tiopira to meet him at 2C4. Mr Hill's evidence is that he was deeply troubled by the apparent casual attitude to safety, particularly as the mine had a history of spontaneous collapses of unsupported ground. As the senior mine person short of himself, he wanted to explore with Mr Tiopira his disquiet about what he had discovered. The meeting at 2C4 did not relieve Mr Hill's anxiety as Mr Tiopira simply confirmed that he had previously inspected the bund and that the bund reflected the accepted standard in New Zealand.

[6] Mr Hill sought to have a further discussion with Mr Tiopira and directed there be a meeting above ground to discuss the matter further. In that subsequent meeting, Mr Hill said that Mr Tiopira reaffirmed on more than one occasion that the bund was in the same state as previously inspected by him, that he considered the bund to be safe in its current state, that he knew the ground conditions in that area of the mine well and that he did not accept that he was endorsing or encouraging unsafe work practices.

[7] Mr Hill told me that he had, by this stage of the conversation, lost trust and confidence in Mr Tiopira and that the latter had, in effect, become a danger to himself and to other mine personnel. Mr Hill was satisfied that Mr Tiopira was not following the company's own practices nor was he using proper professional skill and judgment in respect of safety matters. Mr Hill thought it particularly significant that he should discover this only three days after the *line in the sand* meeting. Given that Mr Tiopira was Mr Hill's most senior subordinate and was effectively in charge of the whole operation when Mr Hill was absent for any reason, Mr Hill decided that Mr Tiopira was *an unacceptable risk to personnel safety, to his own accountability as manager and to Byrnecut's commercial and reputation interests*.

[8] Mr Hill accordingly dismissed Mr Tiopira summarily on the grounds of his endorsement of unsafe work practices which were in breach of the policies and procedures of Byrnecut and Mr Tiopira's refusal to accept that those practices were in fact unsafe.

[9] The matter proceeded to the Authority in the usual way after mediation was unable to resolve the employment relationship problem between these parties.

Issues

[10] The only issue for determination in the instant case is whether Mr Tiopira was unjustifiably dismissed from his employment.

Was Mr Tiopira unjustifiably dismissed?

[11] I am satisfied on the evidence before me that Mr Tiopira was not unjustifiably dismissed from his employment and that a fair and reasonable employer, after a proper inquiry at the relevant time, would have determined to dismiss: s.103A Employment Relations Act 2000 (the Act) applied.

[12] It is clear law (see for instance *Air New Zealand Ltd v. Hudson* [2006] ERNZ 415) that the Authority is not to establish itself in the position of being, as it were, an alternative employer, and thus to substitute its decision for that of the actual employer.

[13] This is a dismissal carried out in the context of significant health and safety considerations. There are a number of aspects to this complex set of issues. The first is that there is a contractual obligation on Mr Tiopira in respect of the safety of

workers under his direction. That obligation is, I conclude, both express and implied. It is express because of the express provisions in the letter of appointment dated 1 September 2006 which place significant emphasis on the safety of mine personnel. For instance, under the heading *Duties* in the letter of appointment is the following overarching statement:

You will be responsible for all mining activities and the safety of personnel and plant for the site.

[14] Then, as subsets of that basic obligation are the following specific obligations:

- *The highest standards of safety and quality are (to be) maintained at all times*

and

4. *Maintain a safe workplace environment and ensure that all works are carried out in accordance with Byrnegut Mining, safety and maintenance procedures ...*

[15] Also the obligations on Mr Tiopira are implied by force of law. In that regard, I accept the submission of Byrnegut to the effect that safety has a special place in employment agreements by way of an implied term. In *Air New Zealand Ltd v. Samu* [1994] 1 ERNZ 93, Judge Finnigan held at p.95 para.[4]:

... where safety is genuinely involved in the operations of an employer it is not just another ingredient in the mix, another factor to be taken into account. Safety issues have a status of their own.

[16] Similarly, in *Fuiava v. Air New Zealand Ltd* [2006] ERNZ 806, Judge Travis held that safety was *the overriding consideration* for the employer in that case and that the employer needed to have confidence that its employee would not breach the trust placed in him by the employer in that regard. In particular, at para.[68], His Honour says:

Issues of safety may therefore be critical, as they are in this case, in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances.

[17] I conclude from the foregoing decisions that it is appropriate for an employer such as Byrnegut to apply safety considerations to a question of whether a dismissal is fair and just and indeed to give those safety issues *a status of their own*, thus placing matters of safety in a position of *primacy* to use counsel for Byrnegut's word.

[18] Furthermore, Mr Tiopira also has obligations pursuant to the Health and Safety in Employment Act 1992 (the HSE Act). Those obligations are cast on him as part of the statutory framework requiring all participants in the employment relationship to actively engage in reducing harm in the workplace. This duty, as it applies to employees, is especially contained in s.19 of the HSE Act. That section divides into two distinct provisions, one requiring the cooperation of the employee to assist in his or her own protection from harm by, for instance, the wearing of protective gear, and the other a more general duty forbidding action or inaction which might cause harm to any other person. It is, of course, the second leg of s.19 that is relevant in the present case. Mr Tiopira's behaviour (or the want of it) could potentially impact on other employees for whom, in his role as effectively the second in charge of the mine's works, he had more than an ordinary duty.

[19] But if it is true that the employee has obligations under the HSE Act, the obligations of the employer are infinitely more onerous. The HSE Act fundamentally changed the law in respect of the prevention of harm in workplaces. Under the old statutory framework, a succession of particular statutes dealt with safety matters more or less on an industry-by-industry basis and prescribed actions required by an employer in order to gain compliance with the statutory regime. Under the new Act (the HSE Act), the obligation of the employer is effectively to take *all practicable steps* to avoid the possibility of harm. In addition, there are specific statutory duties requiring an employer, for example, to ensure that plant provided for employees to use is safe to work, and so on.

[20] I accept without reservation that the obligations on Byrnegut (pursuant to the HSE Act) are onerous indeed. The fundamental reason for this is the dangerous nature of the industry in which Byrnegut operates. Just as in the civil aviation cases I referred to earlier in this determination, so in the mining industry, safety is a paramount issue. In civil aviation, of course, the obligation of the employer is not just to protect staff from harm but also to protect fare paying passengers whose safety is primarily in the hands of the employees. In the mining industry, of course, there is no analogous third party to the fare paying passengers found in the civil aviation context, but nonetheless the obligations on the employer to protect employees from harm is still significant because of the high risks associated with the very nature of the industry.

[21] Counsel for Byrnegut in his erudite submissions quite properly makes reference to the fact that harm is defined under the HSE Act so as to include risk of harm: s.2 HSE Act definition of *hazard*: ... *actual or potential cause or source of harm*. Mr Smith's submission on this point is to deal with the suggestion in Mr Tiopira's evidence that, because no one was hurt in the safety matters complained of, it is unfair of Byrnegut to rely upon it. I do not accept that view and agree with Mr Smith that Byrnegut quite plainly has an obligation to address potential risk and that it is entitled to look to its senior supervisors to contribute positively to that process.

[22] In addition to the statutory obligations in relation to health and safety, Byrnegut also imposes its own stringent safety requirements in its policies and procedures. Mr Hill's evidence (which I accept) is that Byrnegut has a safety record *second to none* in the underground mining industry and he describes in his evidence the nature of the processes used by Byrnegut in achieving the successful outcomes that it does. Amongst other things, there is a *comprehensive programme of documented procedures, training modules, continuous task observation, risk assessment and operational improvement ... which is regarded as industry best practice*. It is also important to note that the company's written policies and procedures on safety matters are specifically referred to and, as a matter of law, part of the obligations of the employee as a consequence of the execution of the employment agreement.

[23] The other fundamental basis for Mr Tiopira's objection to the dismissal is the contention that the process used by Byrnegut to dismiss Mr Tiopira was somehow deficient and/or that whatever the sins of omission or commission perpetrated by Mr Tiopira, they were not grave enough to justify a dismissal let alone a summary one. I do not accept these submissions. On the issue of process, it seems to me clear that Mr Hill saw the area of risk with his own eyes, immediately drew it to the attention of Mr Tiopira, sought Mr Tiopira's immediate response and then timetabled a meeting to discuss the matter. The subsequent meeting took place above ground in Mr Hill's office and Mr Tiopira can have been in no doubt about the nature of the discussion and the purpose of it. Mr Tiopira complains that he did not know that it might end in dismissal, that he was not encouraged to bring a representative and that the meeting was of short duration. Mr Tiopira also claims that he did not confirm that the bund was acceptably placed.

[24] Mr Hill's evidence is different. Mr Hill says that at the meeting underground he simply verified whether Mr Tiopira had inspected the bund and, during the course of his response, Mr Hill's evidence is that Mr Tiopira said that the bunding conformed to the accepted standard in New Zealand. Then, at the subsequent above ground meeting, Mr Hill's recollection is that Mr Tiopira again confirmed that he had inspected the subject bund and that he considered it safe. Mr Hill said that Mr Tiopira told him he knew the ground well and that the practice he (Mr Tiopira) was endorsing was not unsafe.

[25] I must say that, of the two principal protagonists who gave evidence of the disciplinary meeting, I prefer the evidence of Mr Hill. Even on Mr Tiopira's evidence, he agrees that he specifically stated that a co-worker *was not exposed to danger at any time* despite Mr Tiopira's own concession that he *agreed the bund was low and poorly positioned*

[26] Mr Hill had a witness to his interview with Mr Tiopira. That witness was Scott Glover, a relieving mine foreman who was visiting the Macrae's Flat mine on behalf of the employer. Mr Glover told me that he took notes of the discussion between Mr Tiopira and Mr Hill and his brief of evidence about the interview is based on those notes. The notes have the ring of truth about them. Mr Hill acknowledged in his evidence to me that Mr Glover's notes were more fulsome than his because he (Mr Hill) was talking. Mr Glover's notes, considered in their totality, are even more damning of Mr Tiopira's attitude to health and safety matters and it seems to me inevitable that an employer, committed to safe work practices and to harm minimisation in a highly dangerous industry, would have concluded from Mr Tiopira's attitude that it could not have trust and confidence in him based on his approach to this particular safety issue.

[27] Given the primacy the law properly requires to health and safety matters in general, and the particular challenges of managing a dangerous work environment such as an underground mine, it seems to me improbable in the extreme that another employer, looking at this matter with fresh eyes after seeing the evidence of the problem first hand and then talking about it with the person responsible, could reach any conclusion other than one that resulted in a summary dismissal.

Determination

[28] For the foregoing reasons, I am not persuaded that Mr Tiopira has made out his claim of having been unjustifiably dismissed and accordingly I dismiss his claim in its entirety.

Costs

[29] Costs are reserved.

James Crichton
Member of the Employment Relations Authority