Employment Court of New Zealand

Villegas v Visypak (NZ) Ltd [2010] NZEmpC 154 (23 November 2010)

Last Updated: 20 April 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2010] NZEMPC 154

ARC 49/10

IN THE MATTER OF a de novo challenge to a determination of the Employment Relations Authority

BETWEEN JONITO VILLEGAS Plaintiff

AND VISYPAK (NZ) LTD Defendant

Hearing: 28 October 2010 (Heard at Auckland)

Appearances: Greg Lloyd, counsel for the plaintiff

Garry Pollak, counsel for the defendant

Judgment: 23 November 2010

JUDGMENT OF JUDGE B S TRAVIS

[1] The plaintiff, Jonito Villegas, has challenged a determination of the Employment Relations Authority which found that he was justifiably dismissed from his employment by the defendant (Visypak).

Factual Findings

[2] Mr Villegas was employed by Visypak and its predecessor for more than 12 years as a level 3 production operator. At the time of his dismissal he was working full time as a fork hoist operator in the injection moulding department. He had originally been employed for half his time in quality control and the balance as a fork hoist operator. He is a registered engineer with a BSc in mechanical

engineering, which he says was assessed by the New Zealand Immigration Service

as being the equivalent of an Australian engineering degree. He had been employed by a Saudi Arabian oil company for 17.5 years as a mechanical engineer. Health and safety was a very serious issue with that company as the oil industry is a very dangerous place in which to work. In his oil company role he had a significant amount of responsibility including planning, maintenance, production and control of budgets allocated to various projects.

[3] Mr Villegas came to New Zealand for lifestyle reasons. After years of working for corporate companies he wanted to spend his last years before retiring in a job that had less responsibility so that he could enjoy his family. He was, at the relevant times, a member of the Amalgamated Engineering, Printing and Manufacturing Union Inc (EPMU or the Union) and, prior to his dismissal, was also a union delegate. His terms and conditions were contained in the Visypak (NZ) Ltd Collective Employment Agreement 2008-2011 (the CA).

[4] On 5 September 2008 he received a written warning for an incident on his fork hoist that Visypak claimed should have been reported as a near miss. It found that he had driven across a wet floor in such a manner that he had lost control of the fork hoist, slid sideways and nearly struck a mobile floor scrubber that was being driven by a floor cleaning contractor's staff member, Darryn Jackson. Mr Villegas had not reported the matter.

[5] Mr Jackson made a complaint to Philip Lloyd, the Maintenance Manager and Injection Moulding Manager, to whom Mr Villegas reported. The complaint was made on Monday 4 August 2008 and claimed that Mr Villegas had driven his fork hoist dangerously on the previous Saturday. It was Mr Jackson's evidence that he had told Mr Villegas, and one other employee working in that part of the factory, that they needed to take extreme care as the cleaning operations involved a considerable amount of water on the floors and the water and accumulated dirt would constitute a significant potential safety hazard to his vehicle. Mr Jackson's evidence was that the work he was doing was clearly visible and Mr Villegas should not have been in his vicinity. Mr Villegas had skidded towards him. Mr Jackson said he had put his hands up in the air and screamed at Mr Villegas to stop. Mr Jackson considered that it was lucky that neither Mr Villegas nor himself were

injured. Mr Jackson said that Mr Villegas then proceeded to move the rear of the fork hoist directly in front of him and he had to avoid another collision by quickly reversing his vehicle. This left additional water on the floor and Mr Villegas continued to endeavour to lift his intended load off the floor which was in a wet and dangerous state. Mr Jackson complained that if he had not taken evasive action and braked when he did, he was certain that a serious accident would have occurred.

[6] When Mr Lloyd and Ms Tania Cotton, Human Resource Manager, met with Mr Villegas and his support person on 11 August 2008, Mr Villegas initially denied that the incident had taken place and then was emphatic that he had not been told by anyone that the floor scrubbing was going to occur that day.

[7] Mr Jackson was called to an investigation meeting by Mr Lloyd and Ms Cotton, to confirm his account and, in particular, that he had spoken to Mr Villegas about his intention to do the scrubbing prior to Mr Villegas entering that area.

[8] The other employee who had been spoken to by Mr Jackson and warned of the work, was also called to the meeting and confirmed that Mr Villegas knew that the work was going to take place.

[9] Mr Villegas then stated he remembered being advised to be careful but claimed that he was not driving too fast and dismissed the incident as not serious and said that he had not come within two metres of the scrubbing machine. Video footage of the incident was obtained and shown to Mr Villegas and later to the Court. I accept Mr Lloyd's evidence that it shows that Mr Villegas skidded in a sideways drift on the wet floor and that if Mr Jackson's vehicle had not stopped there would have been a collision. It also supports Mr Jackson's account and I prefer his evidence to that of Mr Villegas where there was a conflict.

[10] After further meetings with Mr Villegas, Mr Lloyd issued the 5 September written warning which concluded that Mr Villegas had been specifically warned about the wet floor but had lost control of the fork hoist in proximity to another person, had not reported the incident and had played it down on many occasions until he was shown the video footage. The letter stated that his behaviour and

actions were unacceptable for a person of his tenure and responsibility and that this amounted to a near miss and raised concerns about Mr Villegas's future adherence to safety and his willingness to carry out instructions. It concluded:

I will expect that you will

• Drive your fork hoist safely

• Report all incidents

- Listen carefully to all instructions and, if at all unsure, clarify what is required of you

• Work as a co-operative team member in the department

[11] An organiser for the EPMU, Ms Mackintosh, wrote to Visypak on 26

September claiming that a written warning in the circumstances was too harsh and unjustified. This was because Mr Villegas had not been properly warned about the potential hazard, his account differed from that of the contractor, the video footage was inconclusive and there were no physical barriers or signs to alert workers to the fact that the floor was wet. It also claimed that a verbal warning of three months duration would have been more appropriate and more consistent with the CA which contemplated the following warning procedure:

a) Verbal warning

b) First written warning (6 months standing)

c) Final written warning (12 months standing)

[12] Visypak, in response, relied on another clause in the CA dealing with the disciplinary procedure which states:

20.3 In cases of misconduct which fall short of serious misconduct, but which the Employer still considers to be sufficiently serious, the Employer may give a final written warning in the first instance.

[13] Mr Lloyd maintained, for the reasons given above that a written warning was appropriate, but did agree to expressly state that its duration would be six months.

[14] On the basis of the evidence of Mr Jackson, the video recording and the accounts of Mr Lloyd, I find that Mr Villegas initially denied the incident had ever taken place and claimed that he had not been warned of the unsafe state of the floor as a result of the cleaning operation. The incident also constituted a "near miss", which was defined as "any unplanned incident that occurred at the workplace which although not resulting in any injury, disease or property damage has the potential to do so" in the Visypak policy documents relating to the reporting of incidents. I find this policy had been expressly brought to Mr Villegas's attention in what was described as a "toolbox talk" in which health and safety issues were addressed and the policy document distributed.

[15] I also find that, in terms of the CA, this incident was sufficiently serious to have justified a final written warning rather than simply a first written warning.

[16] On 16 February 2009 Mr Villegas received a final written warning for "poor performance". This was based on three separate incidents on 11 February 2009 which were reported to Mr Lloyd by other staff. One was for loading a full LPG cylinder unrestrained onto the forks of his fork hoist and driving it at speed to another fork hoist that had run out of gas. The second was for damaging a water pipe, leaving it spilling water onto electrics and the floor. The third was for tipping over a full bin of plastic preforms, from which bottles were made, and which, as a consequence, had to be scrapped.

[17] Mr Lloyd approached Mr Villegas on 12 February about these matters and explained that disciplinary action might be a possibility arising from the investigation and that Mr Villegas was welcome to bring a support person. I accept Mr Lloyd's evidence that, as a result of telling him about these matters, Mr Villegas later handed him an incident form relating to the water pipe issue which, in Mr Lloyd's view, understated the issue but confirmed that Mr Villegas was the driver who had caused the incident.

[18] The first investigation meeting on these matters was held on 13 February. Mr

Villegas said this was the third time that he had carried an LPG cylinder on the forks

of his fork hoist but he denied travelling at a reckless speed, the fork hoist being set at a maximum of 10 kilometres an hour.

[19] In evidence Mr Villegas said this was the first and last mistake he ever made. He agreed in cross-examination that he knew he should not have been transporting an unrestrained LPG cylinder on a forklift and that it was a particularly foolish thing for a competent and trained forklift driver like himself to have done. He then claimed that as he had proceeded at a very slow speed, it was safe. His explanation was that others had also done this. The staff member who had reported this particular incident had noted on the incident report that he had heard of this happening before.

[20] I accept Mr Lloyd's evidence that at the time he investigated this incident and issued the final written warning, he was unaware of whether any other fork hoist driver had carried LPG cylinders in this manner. I also accept his view that the consequences could be a fatality or a permanent injury and that this was not an acceptable practice.

[21] As to the damaging of the water pipe, I find that Mr Villegas had accepted he knew he had done some damage, but that he had failed to report it to an appropriate person as soon as practicable after the incident because he claimed he was too busy, did not check the damage, and had not thought to fill out an incident form. Mr Lloyd found that explanation to be unacceptable. I agree. Mr Lloyd was entitled to conclude that this was an incident which required to be reported to avoid damage and safety risks and that there was a requirement in cl 23.6 of the CA which states:

All work related injuries and any damage to plant or equipment must be reported to the appropriate supervisor/manager immediately and recorded in the appropriate Register.

[22] Mr Villegas had helped negotiate the CA and I have no doubt he was aware of this provision. He claimed that at the time he had not realised he had been involved in an incident until later and that he had filled out an incident report form the following day after the discussion with Mr Lloyd.

[23] As to the two boxes that were knocked over, Mr Villegas claimed he had not put the forks of the forklift in fully and that when he started to back out, the boxes fell off. He told Mr Lloyd: "It was an accident I have nothing to say".

[24] Mr Villegas claimed in evidence that he had reported this incident to his team leader who, because of the risk of contamination, had arranged for the items to be quarantined and then scrapped and that he therefore did not need to fill out an incident report.

[25] Mr Lloyd, in the final written warning, issued on 16 February 2009, stated that he had come to the conclusion that it was difficult to comprehend how a fork hoist driver as experienced as Mr Villegas could tip over a bin of preforms and concluded that he had been negligent in securing the load properly before moving off with it. He found that Mr Villegas's performance in that regard was unsafe and unacceptable.

[26] The final written warning stated that all such incidents had to be reported to an appropriate person as soon as practicable after the incident and that Mr Villegas's comments that he was "too busy" and did not even check the damage or fill out an incident form were entirely unacceptable. The letter observed that Mr Villegas had been employed for almost 12 years and remunerated at a senior level. In wording very similar to the first written warning, Mr Villegas was again directed to drive his fork hoist safely in accordance with plant rules, report all incidents including, but not limited to, all near misses and any damage to company property, to listen carefully to all instructions and to work as a cooperative member of the staff. The final written warning was said to remain in place until 11 February 2010.

[27] The union wrote again on Mr Villegas's behalf on 18 February, recording its views that the final written warning was too severe, as was the previous written warning. It denied that there was excessive speed and stated that other persons had also carried a full LPG cylinder on a fork hoist and that rather than singling Mr Villegas out for disciplinary action it would have been better to have communicated the unacceptability of the practice to all hoist drivers. It raised an issue as to the possibility that the incidents in question could have occurred because of a problem

with Mr Villegas's eyesight and that this should be checked instead of finding that he had failed to report an incident. It also suggested that, as in the past, Mr Villegas had spent approximately half his time driving the fork hoist and half his time in quality control, the rotation of his duties to avoid excessive fork hoist driving would provide him a more varied role. It claimed that Mr Villegas had long tenure and a high level of skill.

[28] An issue that had been raised with Ms Mackintosh at the investigation meeting was the provision of further training, although it was accepted that Mr Villegas had completed a fork hoist refresher course on 20 June 2008. Mr Villegas was strongly of the view that he was an experienced and competent fork hoist operator, a view he asserted in answers to cross-examination and that he did not require any further training.

[29] Mr Lloyd was apologetic that he did not reply to this letter from the union because he claimed subsequent events overcame it.

[30] Visypak paid for a subsequent eyesight test which showed that Mr Villegas did require glasses. Mr Villegas asked Mr Lloyd if Visypak would pay for the glasses. Mr Lloyd responded that a formal application would need to be made but it was unlikely that the company would meet those costs. No such application was made by Mr Villegas.

[31] On 20 April 2009 Mr Lloyd received an incident report describing what had happened while Mr Villegas was removing the top pallet of stacked, folded cardboard boxes, when two pallets of stacked folded boxes collapsed and fell forward. It was reported as a near miss. Mr Lloyd convened a disciplinary meeting which took place on 30 April.

[32] Mr Villegas explained that he was attempting to lift down a stack of collapsed cardboard boxes on a pallet that were stored on top of other similar pallets in a column about three metres high. It was difficult to insert the forks of his fork hoist into the top pallet because of the height and the way some of the cardboard had been stacked over the front of the pallet. Mr Villegas explained that the easiest way

to get the cardboard down was simply to topple over the pallets which would bring down the boxes. Mr Villegas then left the boxes on the floor and went to morning tea. I find that Mr Villegas stated that, because the cartons were poorly stacked, he believed tipping them over was the only way to access them.

[33] It is clear from the notes of the meeting that Mr Villegas did not consider this was a matter of any significance and not worthy of reporting as an incident. He claimed throughout the investigation that it was common practice, it was safe and that these things happened all the time. In evidence before the Court Mr Villegas said that he ensured there was no one in the vicinity, it was a very safe and controlled action and the only option open to him in the circumstances.

[34] Mr Lloyd's evidence was that he had never heard of this being done by anybody else and that if others had done it, it would not have altered the significance and seriousness of the incident. The top of the stack was approximately three metres high and Mr Lloyd put to Mr Villegas at the meeting that the correct option was to get another fork hoist which had longer forks which would have fitted into the pallets notwithstanding the poor stacking. Mr Lloyd also considered that the technique adopted by Mr Villegas on this occasion could have caused damage or injury to him if the boxes had fallen onto the forklift. In addition he considered there was a potential hazard for anyone in the vicinity from the fall of the boxes or from them remaining on the floor whilst Mr Villegas went to morning tea. The notes of the meeting record Mr Lloyd's unhappiness with Mr Villegas's dismissive attitude and Mr Lloyd's statement to him that the "culture I'm struggling with is arrogance not ignorance".

[35] The evidence of Ms Mackintosh was that while, on the face of it, this may not have been the best possible practice, she believed that Mr Villegas had no alternative but to do what he did. She raised at the meeting the issue of whether this was within the definition of an "incident" which required reporting, as it was a planned and deliberate action on the part of Mr Villegas and not an unplanned incident. It had not caused any damage or injury and therefore did not come within the definition in the CA.

[36] Mr Villegas was suspended on 30 April on full pay and the parties met again on 5 May. Ms Mackintosh maintained the explanation that Mr Villegas intended or planned to drop the pallets down and therefore did not have to report it. This explanation was not accepted by Mr Lloyd who took the claim that such a practice should never be planned. Mr Villegas claimed this happened all the time, he had done nothing wrong, he was carrying out his job, it was a safe area where he had left the boxes on the floor, no one would have been passing that area and that the cardboard was not damaged.

[37] Mr Lloyd advised the meeting that he had lost trust and confidence in Mr Villegas to operate his hoist safely. Ms Mackintosh responded that this was a systemic problem in the safe and tidy stacking of cartons but the incident did not amount to any misconduct on the part of Mr Villegas who had worked for the company for many years.

[38] Ms Mackintosh said that Mr Villegas was well regarded by his fellow workmates and had a good service record. Mr Lloyd responded by saying that this was not his understanding. The five people Mr Villegas was working closely with were not impressed with his work ethic and therefore Mr Lloyd said he was not able to take that matter into account to give Mr Villegas a last chance. Ms Mackintosh asked Mr Lloyd to provide the witness statements and Mr Lloyd agreed to do so.

[39] Mr Lloyd discussed his decision with Ms Cotton. He decided to dismiss Mr Villegas and they had that decision confirmed by Visypak's Managing Director. The letter confirming the termination of Mr Villegas's employment on 5 May states:

The reason for your dismissal is failure to follow specific instructions. You have been counselled, received warnings – with very specific instructions, and been told in tool box talks and team meetings about your obligations around health & safety at work.

As a result of your continued failure to carry out these tasks I have lost confidence in your ability to carry out the responsibilities of your role in an acceptable and safe manner.

As I said in our meeting Jonito I am sorry it has come to this, but I have given you plenty of time and training in respect of these obligations and still I have seen no change in your behaviour.

He was given two weeks pay in lieu of notice.

[40] Ms Mackintosh raised a personal grievance on 15 May on behalf of Mr Villegas, asked for the full reasons for the decision, the witness statements which had been previously requested and sought his reinstatement.

[41] Mr Lloyd asked the five members of Mr Villegas's team to write out their views about him. They did so and this was sent on to the Union. These statements were obtained after the dismissal and universally state that he was not a good fork hoist driver, never listened and was not a good team player. Some went even further, setting out other incidents and poor safety aspects and describing him as lazy, reckless and reluctant to report any incidents.

Submissions and discussions

[42] Counsel were agreed that this matter is to be dealt with under s 103A of the Employment Relations Act 2000. Mr Greg Lloyd, counsel for the plaintiff, submitted at the outset that the main difficulty with this matter was categorising exactly what the grounds of dismissal were. The dismissal letter states there was a failure to follow instructions but does not explain what those instructions actually were. He submitted one can only presume it related to the instructions given in the two previous warning letters as the four bullet points. As he pointed out, the difficulty with that interpretation is that the actual event that gave rise to the dismissal bore little resemblance to the four instructions. He submitted that as the boxes were poorly stacked and the plaintiff was required to retrieve some, Mr Villegas had assessed the situation and had tipped them over after ascertaining there was no potential danger to any people or property. He submitted that the plaintiff's assessment had proved correct in that no damage was done to property, person or even to the boxes.

[43] Mr Greg Lloyd submitted this was not a driving incident or a failure to listen to instructions or a failure to work cooperatively. He submitted the only possible instruction that the dismissal could relate to was the instruction to report all incidents. This latter submission is borne out by the evidence that some considerable

time was spent in the investigation meeting arguing whether this event amounted to an "incident", as defined, which the plaintiff was required to report.

[44] I accept Mr Lloyd's submission that the event cannot be brought under the phrase "any unplanned incident" that occurred at the workplace, which though not resulting in an injury, disease or property damage, has the potential to do so. As I have noted above this comes from a policy document relating to the reporting of incidents. This was not an unplanned incident on the part of the plaintiff but a considered and deliberate act.

[45] The Union, on the plaintiff's behalf, had raised an issue over the interpretation of this clause. A dismissal based on only the employer's interpretation of a disputed clause would not have been fair and reasonable. The situation was not unlike that dealt with by the Court of Appeal in *Sky Network Television Ltd v Duncan.*[1] There the respondent refused to work the rostered shifts he was ordered to on the basis of advice from the Union that the roster changes were unenforceable. The

Court of Appeal held that wilful disobedience of a lawful order may justify dismissal but, where the legal position is not clear cut and a person has a bona fide

belief concerning contractual rights, the conduct of the worker would not justify dismissal. In such a situation, the Court of Appeal considered that resort to the disputes procedure was the appropriate course and could have resolved the matter without the parties reaching a point at which mutual trust and confidence had been destroyed.

[46] That approach sits comfortably with the test in s 103A as to whether, in all the circumstances, at the time the dismissal occurred, the actions of the employer were fair and reasonable.

[47] Mr Pollak submitted that, approaching the matter in a holistic way and taking into account the previous incidents, the plaintiff had revealed an attitude to his forklift driving and a refusal to report incidents which was totally unacceptable to the defendant. He submitted that it was difficult to imagine a more foolhardy practice

on the part of the plaintiff than deciding to collapse the pallets and it was this incident which finally led to his dismissal.

[48] The difficulty with Mr Pollak's submissions is that these reasons are not spelt out in the letter of dismissal. Even in the notes of the investigation meetings which led up to that dismissal, it is difficult to discern the matter clearly being put on the basis of either an attitudinal problem or a foolish and dangerous act on the plaintiff's part. If the investigation and the reasons for the dismissal had been clearly directed to these matters, Mr Pollak's submissions would have carried more weight. A fair and reasonable employer would, I find, have directed the enquiry to these very issues, but the defendant did not.

[49] Mr Greg Lloyd argued the issue of whether the warning hierarchy in the CA had been properly followed by the defendant. I have already held that the first incident and at least two of the second incidents could have justified final written warnings in themselves. If the defendant was pursuing the matter purely as a performance issue then three warnings would have been required before a dismissal. The reasons given for the dismissal, however, do not appear to rely on the hierarchy of warnings, except insofar as they are referred to as "occasions" which, along with other communications, would have made it clear to the plaintiff the correct conduct required of him.

[50] I am unable to find where Mr Lloyd provided to Ms Mackintosh the full reasons for the dismissal in response to her letter of 15 May. I consider that the written incident report which gave rise to the final investigation ought to have been provided to the plaintiff and his representative and this also may have focussed the discussion on the safety of the practice Mr Villegas had intentionally adopted. If Mr Villegas was being dismissed, in part, because of the attitude he had displayed to his work, and it is difficult to conclude that Mr Lloyd was not influenced by what he had been told by Mr Villegas's team, then those written statements ought to have been obtained before the dismissal and provided to the plaintiff to give him the opportunity to comment on them. These were failures on the defendant's part which went to the merits of the decision to dismiss Mr Villegas.

[51] In view of my conclusions that the key issues which the defendant took into account to dismiss the plaintiff were not clearly put to him during the investigation, or even formulated as the reasons for the dismissal, I find that the defendant has failed to discharge the burden of showing that the plaintiff's dismissal was justified. I therefore uphold the challenge and find that the plaintiff has a personal grievance.

Remedies

[52] Mr Pollak initially did not seek to make any submissions in relation to remedies but it is in this area where his holistic approach to matters such as the plaintiff's attitude and the safety of the actions Mr Villegas carried out, become relevant. They go to the remedy of reinstatement, which is the prime remedy sought by the plaintiff, and whether that is practicable in terms of s 125 of the Act. Further, the Court, when determining that an employee has a personal grievance, must, in accordance with s 124, in deciding the nature and extent of the remedies to be provided, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance. If they so require it must reduce the remedies that would otherwise have been awarded. That is a particularly relevant consideration when addressing the prime remedy of reinstatement. Previous authorities have established that the actions of an employee must be blameworthy conduct before they can constitute contributory conduct and affect the nature and extent of the remedies to be awarded.

[53] The plaintiff has had considerable difficulties in obtaining other employment since his dismissal. Mr Pollak did not seek to contest the plaintiff's evidence that he has tried very hard to find other jobs, had managed to find part time employment but has very recently been made redundant from that job. The plaintiff's financial situation has been exacerbated by his wife's recent redundancy. The remedy of reinstatement has therefore taken on extreme importance for the plaintiff.

[54] Mr Pollak submitted that Mr Lloyd was entitled to have reached the conclusion that he no longer had trust and confidence in the plaintiff and could not trust him to act safely and to comply with the proper procedures for handling a fork hoist. Mr Pollak therefore submitted that reinstatement was not appropriate.

[55] Mr Greg Lloyd submitted there was nothing before the Court which should prevent it from ordering reinstatement in terms of s 125 and cited *NZ (with exceptions) Food Processing etc Factory Employees IUOW v Napier Tanning Co Ltd,*[2] where Chief Judge Horn stated that[3]:

Reinstatement to a former position in these days is far more valuable and far more important than it was days long ago when other employment could be readily obtained.

[56] I agree with Mr Greg Lloyd that this proposition is of particular relevance given the current economic climate. Mr Greg Lloyd referred to the plaintiff's evidence that he had applied for at least 80 jobs and managed only to secure part time work as a storeman. He also cited *Ashton v Shoreline Hotel*[4] and *Horton v Fonterra Co-operative Ltd,*[5] that to routinely award compensation instead of

reinstatement is to create a system for licensing unjustifiable dismissal. He referred to a passage in *Ashton* where Chief Judge Goddard held that the factors that point to the refusal to reinstate ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ someone who they should not have dismissed in the first place.

[57] Mr Greg Lloyd submitted that the principal reason given by the defendant why the plaintiff should not be reinstated was that he is an unsafe fork hoist operator. He submitted that the plaintiff was not dismissed for being unsafe but for failing to follow a specific instruction. Although there were safety elements to that particular instruction he submitted it was drawing a long bow to say that, based on that incident, and the other two incidents which occurred over a period of eight months the plaintiff was so unsafe that he could not be trusted.

[58] Mr Greg Lloyd also looked at the reasons Mr Philip Lloyd had advanced, namely that the plaintiff had a cavalier attitude and was not respected by the colleagues with whom he must work, if reinstated. Here again Mr Greg Lloyd submitted that little weight should be given to these reasons as they did not form part

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of the reasons for the dismissal. The plaintiff had not been previously warned in relation to his work with his colleagues and Mr Greg Lloyd contrasted this with the petition signed by 22 of the plaintiff's colleagues, albeit ones that did not work directly with him, to have him reinstated. Mr Greg Lloyd submitted that the plaintiff was a team player because he had been elected as a site delegate. He relied on the plaintiff's own evidence that he desperately wants to go back to work and was committed to doing anything the Court, or the defendant for that matter, considered necessary to achieve that.

[59] I have given careful consideration to these submissions. I find that the plaintiff was guilty of blameworthy contributory conduct in the first incident, and that he did lose control of his fork hoist and also in the incidents of breaking the water pipe and carrying the full LPG cylinder on his fork hoist. He also lost a load of preforms which demonstrated a degree of negligence on his part. The final act of pushing over a stack of boxes, when he could have used the long fork hoist, also demonstrated a lack of concern for safety. These issues all contributed to the circumstances that gave rise to his dismissal.

[60] I am satisfied from the evidence that these were not incidents which would have been avoided by the provision of further training for Mr Villegas. The plaintiff, on his own evidence, was well trained and highly experienced in operating fork hoists for the defendant. The incidents demonstrated a cavalier attitude to safety.

[61] There were also difficulties in the plaintiff's relationship with Mr Philip Lloyd. Mr Villegas described in his own evidence that Mr Lloyd had only been at Visypak for 18 months, while he had been there for 12 years. When Mr Pollak in cross-examination probed Mr Villegas's relationship with Mr Lloyd and put to him that Mr Lloyd, after the first warning, made a point of often talking to Mr Villegas and that, apart from those issues, he and Mr Villegas always got on, Mr Villegas responded:

I am sorry to say that the first time that I met Phil Lloyd I thought he was a good man and a straightforward man, but deep inside his heart is different. That is why all this happening happen. He is after me all the time. That is the truth.

[62] There was then the following exchange:

Q. Now Mr Villegas if you were reinstated back to your job do you think you would get on with Mr Lloyd.

A. As I told you I will do anything that the company wants me to do including Mr Lloyd, I'll do anything what they want me to do especially

forklift training and if necessary Mr Lloyd's specific instructions.

Q. And what about adherence to safety procedures.

A. As I told you I work safely and I adhere to it.

[63] These responses and Mr Villegas's demeanour when giving evidence led me to have considerable concerns about Mr

Villegas's willingness to accept instructions from Mr Lloyd. The plaintiff demonstrated that he considered himself superior to Mr Lloyd, his manager, and could not, at any stage, accept that he had not acted safely. The plaintiff showed his belief that he alone was entitled to decide whether or not he would report the various events that had taken place as incidents. In the notes of the meeting of 30 April Mr Lloyd put to Mr Villegas the proposition that as Mr Villegas was continuing to maintain that he was in the right and everyone else was in the wrong, what Mr Lloyd was struggling with was "arrogance not ignorance".

[64] The consistent attitude demonstrated by Mr Villegas during the hearing and at the investigation meetings which led to the two warnings and his dismissal, left me with severe reservations as to whether it would be practicable to reinstate him. Although he offered to accept training he continued to maintain that he was fully qualified and trained and had always acted safely.

[65] Mr Villegas's situation was not assisted by the statements from his five co- workers, which I have referred to above. Mr Villegas was at pains to point out that these people were not union members, as though that explained why they had reservations about his work attitude and safety standards.

[66] My findings as to contributory conduct also lead me to the conclusion that these too should impact on the nature and extent of the remedy of reinstatement. At the heart of this matter were safety issues and the Court should be slow in reaching a

different conclusion to that of the employer on safety issues: see *Air New Zealand*

Ltd v Samu.[6]

[67] For these reasons I decline to order the reinstatement of Mr Villegas.

[68] I consider that that is the full extent to which his contributory conduct should reduce the remedies that Mr Villegas has sought. I now turn to deal with his claims for reimbursement and compensation for distress, humiliation and injury to feelings.

[69] Mr Pollak did not contest the quantum of the losses sustained by Mr Villegas as a result of the dismissal. He accepted that Mr Villegas lost the superannuation benefit which was estimated at approximately $8,000. He also indicated that there was no challenge that Mr Villegas has suffered terribly as a result of the dismissal.

[70] In view of the defendant's concession I award Mr Villegas $8,000 to compensate him for lost remuneration under s 123(c)(ii) of the Act.

[71] Mr Villegas's evidence was that he earned approximately $50,000 as salary. He obtained a part time storeman position in September 2009 from which he was "saving around $260 every fortnight". The statement of claim sought reimbursement of all lost earnings from the day of dismissal plus interest. Credit must be given for anything earned in that period. I am prepared to award the proven amount of loss of remuneration but the material provided to me does not assist me to make the final calculations. I will award Mr Villegas reimbursement of all lost wages from the expiry of the two weeks pay in lieu of notice, down to the date of this judgment, less his earnings in the meantime.

[72] I am not prepared to award interest on this sum. I reserve leave to the parties, if they cannot agree on the amount, to refer the matter back to the Court for determination.

[73] The statement of claim sought compensation for humiliation, distress and injury to feelings in the sum of $20,000. The evidence in support was limited to a statement by Mr Villegas that being dismissed from his employment was extremely upsetting and that having been someone who had worked hard all his life it was very difficult to find decent employment given the economic recession and his age. He is

61. Such evidence does not support a claim of compensation for the amount sought. From the way Mr Villegas gave his evidence he appeared to be angered rather than distressed by the circumstances surrounding his dismissal because he could not see that he had done anything wrong. In these circumstances I an award of $5,000 under s 123(1)(c)(i) of the Act.

Costs

[74] The challenge having been successful, the plaintiff is entitled to costs. If the parties cannot agree on costs a memorandum should be filed and served within 30 days from the date of this judgment with a memorandum in response filed and served within a further 30 days.

B S Travis

Judge

Judgment signed at 9.15am on 23 November 2010

[1] [1998] NZCA 246; [1998] 3 ERNZ 917.

[2] [1986] ACJ 149.

[3] At 152.

[4] [1994] 1 ERNZ 421.

[5] [2010] NZEmpC 72

[6] [1994] 1 ERNZ 93 at 95. Not affected by appeal: *Samu v Air New Zealand Ltd* [1995] NZCA 504; [1995] 1 ERNZ 636 at 640.
