

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 65  
5326767

BETWEEN                      TONY COOPER  
   Applicant  
  
AND                                SOLID ENERGY NEW  
   ZEALAND LIMITED  
   Respondent

Member of Authority:        Dzintra King  
  
Representatives:              John Dewar, Counsel for Applicant  
   Andrew Shaw, Counsel for Respondent  
  
Investigation Meeting:        27 January 2011 at Hamilton  
  
Submissions Received:        2 February 2011 from Applicant  
   4 February 2011 from Respondent  
  
Determination:                18 February 2011

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Mr Tony Cooper, says that he has been unjustifiably dismissed and unjustifiably disadvantaged by the respondent, Solid Energy New Zealand Limited (“Solid Energy”). He also claims that the company has breached its good faith obligations by not supplying documents in a timely manner.

[2]     Mr Cooper was employed by Solid Energy as Site Manager, Underground Coal Gasification Project (“UCG”) at East Mine Road, Huntly. On 8 November 2010 Mr Cooper was summarily dismissed from his employment following an investigation and suspension from his employment. The grounds for dismissal were set out in a letter dated 8 November. They were that he had used a contractor’s vehicle without permission and without training and compromised health and safety; and that he had

sexually harassed a fellow employee. The company concluded that it had lost trust and confidence in Mr Cooper.

[3] Mr Cooper seeks reinstatement and compensation.

### **Background**

[4] On Friday 24 September 2010 Mr Cooper was due to finish work at 5pm but stayed on. He noticed that a nitrogen gas bottle was not properly secured on the far side of the site. He decided to fix the cylinder properly into its intended place. He loaded the bottle onto the rear of his company-provided ute and tied it down with a strop. He then drove over to the location of the well, which necessitated going off road and over a grassy area. Unfortunately, the ground was softer than it appeared and his vehicle became bogged down. He attempted to extricate his vehicle but was unable to do so.

[5] Mr Cooper then returned to the office and obtained the other company vehicle, a ute which had no warrant of fitness, and drove it to where his ute was stuck. However, he was unable to extricate his own ute with the other ute. He then went over to a large mechanical tractor known as a sheep's foot roller which was owned by Johnston Contracting. He also looked around the site for an alternative method to move his ute but could not find anything.

[6] Mr Cooper therefore decided to try and use the sheep's foot roller. However, this was also unsuccessful and the sheep's foot roller also became stuck. By this time it was dark.

[7] Mr Cooper then went to see a local farmer, Mr Steve Gray, and sought his assistance. Mr Gray drove his tractor to the scene of the stuck vehicles and with a steel rope both men removed the utes and the roller from their trapped positions.

[8] The next day was a Saturday and a non-work day for Mr Cooper. He went back to the site to clean up the vehicles, including his company ute. He washed them down and cleaned the cab of the roller and then went to where the ground had been cut up by the vehicles and attempted to smooth out the area as best he could, knowing that some large logs were due to arrive on site the next Monday morning.

[9] On Monday 27 September Mr Cooper arrived at work and walked around the site. During that time he spoke briefly with Mr Shane Johnston, the owner of the sheep's foot roller, but made no mention of the incident. Mr Cooper said that was due to acute embarrassment. He wanted to sort matters out with his immediate boss, Mr Rick Dobbs, before speaking with Mr Johnston. However, at about 8am, Mr Dobbs arrived and walked around the site before Mr Cooper had a chance to talk to him.

[10] About half an hour later, Mr Dobbs approached Mr Cooper and asked whether he knew anything about someone joy riding on Mr Johnston's sheep's foot roller. Mr Cooper explained the circumstances surrounding the incident. He then went to Mr Johnston and told him and apologised. He returned to his office and entered the details of the incident into the company impact report as he had been instructed to do by Mr Dobbs.

[11] Later that day, Mr Cooper was approached by the UCG manager, Mr Steve Pearce, who asked him when would be a good time to have a discussion. Mr Cooper said that it would be okay to talk at that time. Mr Pearce asked him about the vehicles that had become stuck. Mr Cooper explained what had happened.

[12] Three days later, on Thursday 30 September, Mr Cooper received an email from Mr Pearce asking him to check the record of notes he had made at the previous meeting. Mr Cooper accepted that the notes were correct.

[13] On Monday, 4 October Mr Cooper received an email from Mr Pearce which referred him to a covering letter and a copy of an incident investigation report. The letter asked him to attend a meeting on Wednesday, 6 October at 10am. It stated that the company had completed its investigation into the incidents that occurred on 24 September relating to vehicles and to the use of contractor property at the site. The purpose of the meeting was to advise him of the company's conclusions from the investigation and for him to offer any further information. Mr Cooper was told that he should be aware that the outcome of the meeting might result in disciplinary action which could lead to termination.

[14] The incident report set out a number of conclusions and observations. These included the company's view that Mr Cooper had gone to lengths to hide the incident from his work colleagues and the contractor, that he had covered up the vehicle marks as much as possible, that he had damaged Solid Energy's reputation with one of its

contractors, that he had undertaken tasks that he had not performed previously without asking for help, training or advice and had failed to call for help once he was stuck.

### **Sexual harassment**

[15] In the interim, Mr Cooper was approached in his office by Mr Pearce and an HR adviser regarding an alleged sexual harassment complaint from a fellow employee, Ms X. The allegation related to a text message sent by Mr Cooper to Ms X in the early hours of 8 October during a social function. Mr Cooper was asked to explain his actions and responded that the text was neither sexual nor intended for Ms X, the apparent recipient. Mr Cooper was suspended.

[16] The background to this allegation was that a social gathering had been held at a house owned by Solid Energy which was used by visiting staff as accommodation. During the course of the evening people ate and drank alcohol and at some point in the evening it was suggested to Mr Cooper that he stay the night on the couch as he was probably over the limit. After 11pm only four people, including Mr Cooper and Ms X, remained in the house. In the early hours of the morning, Mr Cooper took a photograph of Ms X without her knowledge. A short time after Ms X retired, Mr Cooper sent her a text message saying *Night*. Ms X replied and there followed further text exchanges between the two. The final text message from Mr Cooper to Ms X finished with the words *Last one*. A little later, however, Mr Cooper sent another text stating *Kick my butt for asking but do you want some company in a mate kind of way*. He got no response.

[17] The following morning, he left the house before the others had woken. While en route to his work site, he received a phone call from Ms X asking about work-related issues and expressing hope that he did not have too much of a hangover. Later that morning, Mr Cooper went to text Ms X to arrange to meet as earlier agreed and at that point he says he realised he had inadvertently sent his last text to Ms X but it had actually been intended for a fishing mate. As soon as Mr Cooper saw Ms X he apologised for the text. Ms X said Mr Cooper said nothing about her not being the intended recipient. Ms X found the text offensive and upsetting and complained about it.

## **28 October Disciplinary Meeting**

[18] Mr Cooper was represented by Mr Dewar. Mr Pearce was present, the National HR Manager, Mr Bill McDonald, was present and their representative, Mr Andrew Shaw, and was present. The purpose of the meeting was to advise Mr Cooper of the conclusions of the investigation and for him to offer any further information and any explanations that he believed were pertinent.

[19] Mr Cooper provided two written statements by way of explanation. The meeting was recorded by the employer and I have a transcript of that. At the end of the meeting, Mr Cooper was told that his suspension would continue and that an interim decision would be made later that day.

[20] It is very unfortunate that Mr Dewar advised his client that he should not respond to any of the questions being asked by Solid Energy during the course of that meeting. That put the company into a difficult situation and it resulted in Mr Cooper not ever having addressed a number of the issues that the company had raised in its correspondence with him. Neither were those issues addressed in later letters sent by Mr Dewar on his client's behalf. Mr Cooper's decision not to reply to the company's questions resulted in the company being unable to ascertain Mr Cooper's responses to some of the allegations.

### **Serious misconduct**

[21] The test for serious misconduct is set out in *Northern Distribution Union v. BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 at p.487:

*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.*

[22] Serious misconduct may arise not just from the misconduct itself but where there are inconsistent and unsatisfactory explanations which undermine the employer's trust and confidence in the employee: *Garden v. Lovich Floor Décor Ltd* (AC86/00, 6 November 2000, Shaw J).

[23] Mr Cooper's position description makes it clear that he was to ensure that the site was compliant at all times with the company's health and safety management system. That constitutes 50% of Mr Cooper's role. The company says that Mr Cooper failed to observe Solid Energy's health and safety procedures, that he

harassed another employee and that he committed actions that brought Solid Energy into disrepute.

[24] Mr Cooper used a ute that did not have a warrant of fitness. He complained about the use by another employee of a vehicle without a warrant of fitness and said that was a serious breach of health and safety. When questioned about this at the investigation meeting, he refused to comment on his use of a non-warranted vehicle.

[25] The company was entitled to conclude that Mr Cooper had returned to work on the Saturday, a day on which he did not normally work, to try and cover up the scuff marks left by Mr Gray's tractor and that it was a deliberate act and that he had travelled for over two hours in order to try and achieve that. Mr Cooper did not address these matters in any of his written responses and did not reply verbally. The respondent says that Mr Cooper's inconsistent and unsatisfactory explanation exacerbated his conduct and that led to total loss of trust and confidence.

[26] As to the text, the company was entitled to conclude that in sending the text, the intention was to go into her room for sexually related purposes. That was certainly a reasonable interpretation of the content of the text and I accept that the text was upsetting and distressing as far as the recipient was concerned. At no time during the investigation held by the company or in the filing of his claim or in his brief of evidence, did Mr Cooper advise who the alleged fishing buddy was; nor whether that person was male or female or where that person lived. Finally at the investigation meeting he said that the person was female and lived in Huntly but that he had lost track of the person. It also appeared that he had been advised not to reveal the identity of that person to his employer. Mr Cooper said that he did not want to do so because he did not want the company interfering in his friend's business. That was an unfortunate approach because it meant that the company was denied the opportunity to verify the applicant's claim that that text had not been intended for his work colleague but for another person.

[27] Mr Cooper advised through his representative that he would not answer any questions during the meeting on 28 October. He provided two written statements and subsequently two letters were received from Mr Dewar. Those four documents, along with the responses provided to Mr Pearce and the incident investigation report of 4 October 2010 and the replies given to Mr Dobbs and Ms Glenda Dowd at the

suspension meeting of 8 October constitute the entirety of his responses during the investigation.

[28] Mr Cooper was well aware of the allegations against him. They were set out in the investigation report and reiterated in the letters of 12 October and the letter of 18 October. He was clearly advised to have representation with him throughout the proceedings, which he did. He was provided with all relevant information prior to the investigation on 28 October and afterwards when further investigation was required. He had access to all information that was relied on by Solid Energy in coming to its decision on 8 November.

[29] Solid Energy provided some documents more than once because Mr Dewar claimed not to have received these. For example, the suspension note was provided to him on 11 October, 12 October and 18 October. The letter of 18 October provided a complete copy of all documentation to ensure that at least 10 days before the meeting on 28 October he had all the information at that time.

[30] As a result of the investigation meeting on 28 October, further information was provided by Solid Energy to Mr Cooper and an opportunity to respond was provided. He was provided with a tentative decision letter and the letters of 28 October and 2 November. He was provided with a number of opportunities to give his response, both verbally at the meeting on 28 October which he refused, and in written form which he did on 28 October and through his advocate on 29 October and 5 November 2010.

[31] Mr Cooper says that the company did not comply with its obligations under the harassment procedure which provides that the company is to ask how the employee wants the problem resolved. However, the company did speak to Ms X and asked her how she wanted the matter resolved.

[32] Mr Cooper was aware from 6 October that his job was on the line. Mr Pearce said he did consider alternatives to dismissal. However, given the very small nature of the site and the workforce, there were no other options. Redeployment to another Solid Energy site was not possible given that that was the only underground coal gasification site in the country.

[33] Mr Pearce said he considered all Mr Cooper's circumstances advised to him but found that there was no alternative to summary dismissal.

[34] Mr Cooper also raised the issue of disparity of treatment. However, having looked at the evidence provided during the course of the investigation, I am satisfied that the respondent considered the matters that were raised in that regard prior to making the decision to dismiss and furthermore that there was, in fact, no disparity of treatment.

[35] The company was entitled to conclude that Mr Cooper had committed serious misconduct. As Mr Pearce said, had the issue been solely the matter regarding Mr Cooper's getting the vehicle stuck and his attempts to extricate it, including using the sheep's foot roller, dismissal may not have been an outcome. The matter was exacerbated by the text message and by Mr Cooper's refusal to provide explanations.

[36] The dismissal was justified.

### **Suspension**

[37] The issue with regard to this was that Mr Cooper was not told that he could have representation. Mr Pearce acknowledged that Mr Cooper had not had the opportunity to obtain representation and said he had decided to override the policy in consideration of health and safety concerns, which were that there were a very small number of people working on that site and Ms X had indicated to him that she would not be at all comfortable continuing to work alone with Mr Cooper.

[38] Solid Energy had a contractual right to suspend in terms of the employment agreement, clause 17.1.2, and the disciplinary procedure, clause 2.5. Mr Cooper was given an opportunity to respond to the proposal to suspend him. Mr Dobbs asked if Mr Cooper wished to make any comment on the proposed suspension to which he made three responses.

[39] When I asked Mr Cooper about the suspension he did not say that he had been adversely affected by it or that he had suffered humiliation or distress as a result.

[40] The respondent breached the employment agreement but as Mr Cooper has not said he suffered any disadvantage I am unable to award any remedy.

### **Good Faith**

[41] The applicant's failure to participate fully in the investigation process seriously disadvantaged the respondent in completing its investigation process. I

agree with the respondent's submissions that these actions were a breach of the statutory duty of good faith to be active, responsive and communicative throughout the entirety of an employment relationship.

[42] It may be that if Mr Cooper had taken given the opportunity to respond to the questions that the company wanted to ask him that this matter may have had a different outcome. Unfortunately that was not the case. Given the information that was available to the employer at the time, I conclude that it could find that Mr Cooper had committed serious misconduct and that the company had lost trust and confidence in him.

[43] As to the claim that the company breached its good faith obligations by failing to provide information in a timely manner, I find there was no breach of good faith by the respondent.

### **Costs**

[44] Costs are reserved. If the parties are unable to agree the matter of costs, the applicant should file a memorandum within 28 days of the date of this determination. The respondent is to provide a memorandum in reply within 14 days of receipt of the respondent's memorandum.

### **Documents attached to respondent's submissions**

[45] Those documents are not to be provided to third parties by either the applicant or his representative.

Dzintra King  
Member of the Employment Relations Authority