

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 345/09  
5149398

BETWEEN	CHRIS COULSTON Applicant
AND	UNITED CIVIL CONSTRUCTION LIMITED Respondent

Member of Authority: Dzintra King

Representatives: Bryce Quarrie, Counsel for Applicant  
Sally Leftley, Counsel for Respondent

Investigation Meeting: 8 September 2009

Submissions Received 16 September 2009 from Applicant  
22 September 2009 from Respondent

Determination: 28 September 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Christopher Coulston says he has been unjustifiably dismissed by the respondent, United Civil Construction Limited (“the company”). The company says that Mr Coulston was justifiably dismissed for failure to obey a lawful and reasonable order.

[2] Mr Coulston was employed as a civil construction worker/operator by the respondent on 25 February 2008. Mr Coulston says that he was employed solely to operate as a digger driver. Mr Coulston’s individual employment agreement sets out the scope of duties at clause 3(b):

*The employee’s duties include any work required in connection with the employer’s business and any other duties reasonably required by the employer. The employee will be based at our Kerikeri depot, but may be required to work throughout New Zealand.*

[3] The offer of employment given to Mr Coulston on 25 February reads:

*I am pleased to offer you permanent employment with United Civil Construction Limited as a civil construction worker/operator at our Kerikeri branch commencing Monday 25 February 2008. This offer is subject to your written acceptance of the terms and conditions of employment that we discussed at your interview.*

[4] Mr Coulston said that he had been employed by another organisation, Allied Workforce, solely as a digger driver. However, Mr Coulston's employment was as a contractor on a temporary basis and that employment ceased when he was offered the contract with United Civil Construction Limited in February 2008.

[5] Mr Coulston was based at Kerikeri working on a contract at Cape Reinga. His day-to-day tasks were varied and involved driving a digger and other vehicles as well as the operation of machinery.

[6] Early in 2008, a new machine, the Pugmill, was introduced to the operation. This required the loading of raw material into two receptacles, an activity not dissimilar to activities that Mr Coulston had regularly undertaken. In July 2008, it was decided to establish a small crew of staff to operate and be relief operators of the Pugmill. Mr Coulston was informed by his supervisor, Mr Richard Frankland, that he would be trained as an operator. Mr Coulston did not want to be trained and his resistance was reported to Mr Andrew Garratt, Corporate Compliance Manager, who was based in Whangarei.

[7] Communication with the site where Mr Coulston was working was difficult, due not only to distance but due to the fact that there was no cellphone coverage and there was only one landline into the site. Mr Garratt visited the site on 29 August 2008 and talked to Mr Coulston about his refusal. Mr Garratt wanted to know why Mr Coulston objected to working on this particular machine. Mr Coulston mentioned some safety concerns but primarily just stated that he did not want to work on it.

[8] Mr Garratt met with Mr Coulston on Friday 29 August 2008. Mr Coulston told Mr Garratt that he did not want to work on the Pugmill and he only wanted to do digger driving. Mr Garratt told him no one could do just one task and that everyone needed to be flexible on a construction site. Mr Garratt asked Mr Coulston on a number of occasions why he did not want to work on the Pugmill. He stated that he just did not want to. The only explanation he gave was that he believed it was not

safe. Mr Garratt explained that the company could not and would not expose staff to any hazard; that a full hazard assessment of the machine had been conducted and this was covered in detail in the training he would receive. He also confirmed that the required PPE would also be provided.

[9] Mr Garratt said that he had the impression that Mr Coulston felt that once he was trained he would spend all his time on the machine. Mr Garratt told him that they were going to have a substantial pool of people trained to be sure that everyone was rotated evenly. Mr Coulston then stated he was not particularly happy about it but would work on the Pugmill.

[10] On 15 September 2008, Mr Garratt paid another visit to the site to observe the Pugmill training. He met the trainees, Mr Coulston included, at Waitiki Landing at about 9.30am. Mr Coulston pulled him aside and said he was not happy about doing the training and he was not going to do it. Mr Garratt said he told Mr Coulston that he was needed to work on the Pugmill and that the training was not optional. Mr Coulston then stated he was only employed as a digger driver. Mr Garratt told him he was not; he was a construction worker and that he had to perform any reasonable duties.

[11] Mr Garratt then asked if Mr Coulston realised how serious it was to disobey a reasonable instruction. Mr Coulston said he did not care and he could easily get another job elsewhere. Mr Coulston said he did not recall saying he could get another job elsewhere.

[12] Mr Garratt said to Mr Coulston that he had to do the training. At that point, the trainer arrived and everyone got into the mini-van and drove off to the site. Mr Garratt said there were no further discussions that day and he assumed that Mr Coulston was undertaking the training. Mr Coulston said he had only gone to the site where the training was taking place because he was driving other people there.

[13] On Tuesday, 23 September 2008, Mr Garratt was informed by Mr Frankland that Mr Coulston was still refusing to work the Pugmill despite a formal warning being issued. Mr Coulston was approached by Mr Frankland on 23 September. Mr Coulston refused to work on the Pugmill and was given a verbal warning for refusing to carry out a reasonable instruction and was also told that the consequences would be serious.

[14] On 24 September 2008, at approximately 10am, Mr Frankland again met with Mr Coulston to see if he would carry out the instruction to work on the Pugmill. He again refused. Mr Frankland then told him he would be receiving a written warning. Mr Frankland went to the site office to implement the company's paperwork which he then took to Mr Coulston for signing in the presence of his colleague, Mr Allan Ryder, who Mr Coulston had asked to be a witness for the process. Mr Coulston reiterated that he was only employed as a digger driver and refused to sign the paperwork. Mr Frankland said he needed a conclusion to the matter so he took Mr Coulston back to the site office and telephoned Mr Garratt for assistance.

[15] Mr Garratt asked to be put on the speaker phone and proceeded to talk to Mr Coulston. Mr Coulston kept stating that he was only employed as a digger driver and kept refusing to work the Pugmill. Mr Garratt told him that refusing a reasonable instruction could result in his dismissal and that he was not employed as a digger driver and the company could never give him 100% digger work. He was again asked if he still refused to work on the Pugmill. At that stage, Mr Coulston stormed out of the room.

[16] Mr Garratt advised Mr Frankland to give Mr Coulston some time to cool down. After a few hours, at approximately midday, Mr Frankland went out and found Mr Coulston at the top carpark. Mr Rob Wilson, the Kerikeri manager, had just arrived. Mr Frankland filled Mr Wilson in on what had happened and asked him to accompany him. They both approached Mr Coulston and asked him if he would follow the instruction. Mr Coulston refused. They tried to persuade him but he still refused. At that stage, they left Mr Coulston to seek advice from Mr Garratt. After a conversation with Mr Garratt, they went back to see Mr Coulston.

[17] Mr Coulston was informed that he would be dismissed if he continued to refuse and that he could either follow the instruction and everything would be fine or he could resign if he was still refusing. He said he would not work on the Pugmill. Mr Frankland then told him he was dismissed as they could not continue any more.

[18] Mr Garratt confirmed the dismissal in a letter to Mr Coulston dated 30 September 2008.

[19] It is clear from the evidence, the provisions of the individual employment agreement and the content of the offer of employment that Mr Coulston was not

employed solely as a digger driver. His contract clearly provided for him to perform other duties. What he was required to do constituted a lawful and reasonable instruction which Mr Coulston refused to obey. Mr Coulston was warned about the consequences of his actions on more than one occasion. He refused to obey. The dismissal was justified.

### **Costs**

[20] If the parties are unable to resolve the issue of costs the respondent should file a memorandum within 28 days of the date of this determination. The applicant is to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King  
Member of the Employment Relations Authority