

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 444/09
5133961

BETWEEN	DEAN CRANE Applicant
AND	CENTURY DRILLING & ENERGY SERVICES (NZ) LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Jills Burney for Applicant
Candice Murphy for Respondent

Investigation Meeting: 10 August and 23 September 2009

Submissions Received: 5 and 19 October 2009 from Applicant
14 October 2009 from Respondent

Determination: 10 December 2009

DETERMINATION OF THE AUTHORITY

[1] Mr Dean Crane claims he was unjustifiably dismissed from his employment as a Rig Worker at Century Drilling & Energy Services (NZ) Limited (“Century Drilling”) on 22 July 2008.

[2] Century Drilling is a world specialist in geothermal drilling and services and has been involved in the development of the geothermal industry in New Zealand for the last 50 years.

[3] Mr Crane is a member of the NZ Engineering, Printing and Manufacturing Union (“the EPMU”) and was covered by the Onshore/Offshore Oil and Gas Exploration Industry MECA agreement (“the CEA”).

[4] Safety is a major issue for Century Drilling and organisations operating in the industry. This can be seen by the number of times of the CEA mentions the

obligations on employees to adhere to all safety policies and instructions of the company. This theme is also carried through the code of conduct.

[5] Clause 16.5 of the CEA requires all employees to wear all protective clothing and equipment supplied to them as and when directed by the employer. Failure or refusal to comply with this requirement constitutes a breach of the agreement making the employee liable to disciplinary action.

[6] Clause 19 also sets out obligations for employees with respect to health and safety and breaches of these requirements also may result in disciplinary action up to and including dismissal.

[7] The CEA makes it a requirement that employees are familiar with the details of all policies and any changes to company policies and requires adherence to the employer's safety policies and instructions.

[8] On Sunday 20 July 2008 Mr Crane was asked to unload a couple of containers off a truck. He was told all the gear needed to move the rig would be available at the site. However, on arrival Mr Crane discovered that not all the equipment he required was available.

[9] The first container was unloaded without incident. Mr Crane says the second container had to be lifted from the top because it had an electrical unit on the outside of the container and he did not wish to damage it. The standing instruction in place for Century Drilling employees is that containers are lifted from the bottom using special lifting strops. The first container was moved from the bottom in accordance with this instruction.

[10] Mr Crane decided to use a cherry picker to access the roof of the container but there was no lanyard or strap in the basket. These items are used to secure the worker's harness to a suitable anchor point to arrest any possible falls. It was common ground that Century Drilling requires all employees to be harnessed in the cherry picker basket when operating the cherry picker over 2.4m high.

[11] Mr Crane says he discussed the problems with other workers (who were not Century Drilling employees) on site including a discussion about the risk of proceeding without using the full safety gear. Mr Crane decided to proceed to the top of the container to hook it up for removal. He was not harnessed to any anchor point or secured in any other way. This was contrary to Century Drilling's health and safety policies.

[12] Mr Guy Holmes, the Drilling Manager for Century Drilling, observed Mr Crane's actions and approached him, remonstrating with him for his actions and threatening him with instant dismissal. Mr Crane says Mr Holmes was very angry and did not ask for an explanation and refused to listen when he offered his view of the situation.

[13] Later that day Mr Crane was invited to attend a disciplinary meeting to address allegations that he had failed to comply with the code of conduct and industry safety procedures, and had driven a loader at excessive speed in a limited speed zone.

[14] The second allegation was withdrawn when it was proven that someone else had been driving the loader, however, Mr Crane was dismissed for the serious misconduct in relation to his breach of Century Drilling's health and safety policies.

Unjustified dismissal

[15] There is no dispute that Mr Crane was dismissed. The key issues for this determination are whether Mr Crane's dismissal is justified and if it is not, then what, if any, remedies will be awarded.

[16] Pursuant to section 103A the Authority must scrutinise Century Drilling's actions and ascertain whether it carried out a full and fair investigation that disclosed conduct which a fair and reasonable employer would regard as serious enough to warrant dismissal. The statutory test obliges the Authority to then separate out the employer's actions for evaluation against the objective standard of what a fair and reasonable employer would have done in the circumstances.

[17] Section 103A requires the Authority to have regard to all the circumstances at the time of the dismissal, including the contractual obligations between the parties and the resources available to the employer¹.

[18] Although the Authority does not have unbridled licence to substitute its decision for that of the employer² it may reach a different conclusion from that of the employer. Provided that conclusion is reached objectively, and with regard to all the circumstances at the time the dismissal occurred, such a conclusion may be a proper outcome³.

[19] Mr Crane was dismissed for serious misconduct. The law relating to serious misconduct is well settled. The definition of the kind of conduct that would justify summary dismissal is not possible, for it is always a matter of degree. What is usually needed is conduct that deeply impairs or is destructive of the basic confidence or trust that is an essential element of the employment relationship⁴.

[20] Mr Crane was summarily dismissed for failing to comply with Century Drilling's code of conduct when he disregarded the company's health and safety policies and procedures. Specifically Century Drilling says Mr Crane did not adhere to the Company's Safe Systems of Work procedures and policies when he was working at a height well in excess of the 1.8m limit permitted without being 100% tied off.

[1] The Health and Safety in Employment Act 1993 specifically requires employees to take all practicable steps to ensure their own safety at work⁵.

[21] Century Drilling's Working at Heights Policy provides inter alia that:

No person shall work without an approved method of fall protection wherever there is the risk of falling. Suitable methods of fall protection, in order of preference, are erection of physical barriers, use of an approved fall protection device and/or measures to catch a person after falling.

[22] Century Drilling's Right to Work Safely Policy provides inter alia:

¹ *Toll New Zealand Consolidated Ltd v Rowe*, unreported, 19 December 2007, Auckland Employment Court, Shaw, J, AC39A/07.

² *X v Auckland District Health Board* [2007] 1 ERNZ 66.

³ *Air New Zealand v Hudson* [2006] 1 ERNZ 415.

⁴ *Northern Distribution Union v BP Oil NZ Ltd* [1990] 3 ERNZ 483.

⁵ Section 19.

If an employee believes that their or others safety and/or the environment is being compromised, then they have the right and an obligation to refuse to complete the activity with fear or reprisal.

[23] The policy requires an employee who believes their safety may be compromised to immediately report the unsafe task to the supervisor, who will promptly investigate the task to satisfactorily resolve the issue with the employee.

[24] Finally, the code of conduct sets out employee's obligations with respect to the wearing and use of safety clothing and equipment. The items listed under serious misconduct for which dismissal is a possibility include:

- Deliberate acts that effect quality and safety;
- Failure to wear provided personal protective equipment;
- Disregard of health and safety policies and procedures.

[25] In 2006 all employees were issued with a memo outlining the care and maintenance expectations of harnesses and lanyards. The memo records that when using a cherry picker employees must always wear a harness with a short lanyard attached to the cage anchor point while in the cherry picker. The words "No exceptions" have been underlined.

[26] Mr Crane does not dispute that he was working outside the safety rules at the time of the incident. He was aware of the working at heights policy at the time of the incident and he was in breach of that policy.

[27] At the investigation meeting and in submissions Mr Crane drew to my attention that his "working at heights" training had lapsed by four days. He relies on the fact that the policy requires refresher training to be undertaken every 12 months.

[28] Mr Crane had last received "working at heights" training on 16 July 2007 and when he was dismissed on 22 July 2008 he had not undertaken his refresher training. That may be so, however, I am satisfied Mr Crane knew he was not allowed to be in the cherry picker without a lanyard and he knew he was not allowed to walk on top of a container that was approximately 4 metres above the ground without being 100% tied off.

[29] I am supported in this conclusion by the evidence from Century Drilling which showed that at the usual safety meeting on 6 May 2008 Mr Crane was present when the importance of not exiting a cherry picker without a lanyard and the correct use of the lanyard was stressed. Again on 28 June the importance of harness use at heights was highlighted.

[30] There were a number of other safety compliant options available to Mr Crane:

- Stopping work until the necessary safety equipment was available (this had been reiterated at a meeting on and on 20 July when employees including Mr Crane had been told that they should not be afraid to stop the job if health and safety was an issue);
- Taking the brief trip to Rig 16 to obtain a lanyard (this would have taken approximately 5 minutes);
- Lifting the container from its base strops (in accordance with the standing instruction); or
- Staying in the cherry picker and swinging the hooks onto the container.

[31] There can be no doubt that Century Drilling took its obligations to protect its employees from harm in the workplace seriously and that Mr Crane was aware that compliance with health and safety obligations was paramount.

[32] I am satisfied Mr Crane was provided with a full opportunity to explain his conduct from the position of having union representation and an understanding that his job was in jeopardy. Mr Crane was also provided with a full opportunity to make submissions as to the penalty. In coming to its decision to dismiss Mr Crane, Century Drilling took into account Mr Crane's admission that he had acted wrongly, that he had no prior warnings on his file and that he had attempted a risk analysis before proceeding.

[33] Mr Crane has criticised Century Drilling for not undertaking a full investigation and not interviewing others at the scene. I find Century Drilling were entitled to rely on the information it had received from Mr Holmes, who had witnessed the event, and from Mr Crane himself, who accepted that he had breached the working at heights policy.

[34] I find Century Drilling have acted in a way that a fair and reasonable employer would have acted in all the circumstances at the time Mr Crane was dismissed. I can be of no further assistance to Mr Crane.

Costs

[35] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Century Drilling & Energy Services (NZ) Limited may file and serve a memorandum as to costs within 28 days of the date of this determination with reply submissions with 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell
Member of Employment Relations Authority