

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 12
5519628

BETWEEN KINGI DELAMERE
 Applicant

AND ASALEO CARE NEW
 ZEALAND LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tim Oldfield for Applicant
 David France for Respondent

Investigation Meeting: 26 & 27 November 2014

Submissions Received: 2, 3 & 4 December 2014

Determination: 16 January 2015

DETERMINATION OF THE AUTHORITY

- A. Mr Delamere was unjustifiably dismissed from his employment.**
- B. Mr Delamere is to be reinstated to his position as a Senior Chemical Assistant on Monday, 26 January 2015.**
- C. Asaleo Care New Zealand Limited is ordered to pay to Mr Delamere an amount equivalent to three months lost wages less 50% for contribution. The payment is to be calculated and paid within 28 days of the date of this determination.**
- D. Asaleo Care New Zealand Limited is ordered to pay to Mr Delamere the sum of \$2,500 without deduction being compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000 within 28 days of the date of this determination.**

E. Asaleo Care New Zealand Limited is ordered to pay to Mr Delamere an amount equivalent to the travel, laundry and transport allowances he would have received if he had continued in his employment for a period of three months calculated from 19 September 2014. Mr Delamere is to be paid an amount equivalent to the half time rate for the hours he would have worked had he worked on Labour Day. All amounts are to be reduced by 50% for contribution. The payment is to be calculated and paid within 28 days of the date of this determination.

F. Costs are reserved.

Employment relationship problem

[1] Mr Kingi Delamere claims he has been unjustifiably dismissed from his position of Senior Chemical Assistant (SCA) by Asaleo Care New Zealand Limited (Asaleo Care). Mr Delamere claims he was given an instruction which was unlawful as there was a dispute about the interpretation of clauses 4 and 19(a) of the collective agreement (CA) at the time the instruction was given and that this renders his dismissal unjustifiable.

[2] Asaleo Care denies Mr Delamere's dismissal was unjustified, there was no dispute at the time the decision to dismiss was made and it has complied with the terms of the collective agreement.

Background

[3] At the time of his dismissal Mr Delamere was employed at Asaleo Care's pulp and paper plant in Kawerau. Mr Delamere had been employed at the plant since 1975.

[4] Mr Delamere was a member of the Pulp and Paper Industry Council of the Manufacturing and Construction Workers' Union Inc (PPWU). The terms of his employment were set out in a CA dated 6 January 2013 to 6 January 2015 between the PPWU and Asaleo Care.

[5] In his evidence Mr Roy Ormiston, the Operations Manager for the Beaters and Paper Machines set out very succinctly Mr Delamere's role and the issues being managed by the respondent and which led to Mr Delamere's dismissal. The following explanations are from Mr Ormiston's written evidence.

[6] Mr Delamere works in the Beater Area, as part of a two man Beater Crew. The other member of the Beater Crew is the Lead Hand. The Beater Area covers the pulp warehouse, mixing area and the outside yard. Mr Delamere operates a clamp truck in both areas.

[7] The pulp warehouse is used to store high quality bales that are then placed by conveyors into repulpers (mixers) that break-down and mix the bales into pulp. The pulp is then used for the production of paper.

[8] Broke bales or reclaim bales, are stored in the yard. These bales are made up of off-cut paper from the converting process and are also selected and collected by SCA's to transport onto the conveyer to be used in the reclaim mixer.

[9] The Yard Area serves a number of different purposes. There are two different groups of workers that share this workspace:

- a. The Yard Worker, who loads and unloads the bales that arrive from trucks into the yard or into the pulp warehouse. They also retrieve the broke bales that are ejected into the yard from the converting process using the same type of clamp truck as the SCA's; and
- b. The SCA who collects bales from the yard on their clamp trucks and moves them onto conveyers that feed the mixers.

[10] Yard Crew workers work seven days of the week from 8.00am to 4.00pm. Beater Crew workers operate over a three shift system 24 hours a day, seven days a week.

[11] Within the yard area, there are two landings that carry reclaim bales out from the Converting Plant and into the yard. Mr Ormiston explains the process as follows:

- a. The reclaim bales are fed directly out of the converting plant and onto the two bale landings in the yard.
- b. As the reclaim bales continue to be fed out of the converting plant and onto the bale landings in the yard the reclaim bales drag along a solid concrete platform and/or a tar seal surface (as they are pushed along from the baling unit which forms the bales). This causes the reclaim bales to become damaged as paper grinds off the bales and onto the concrete landing. This also loosens the wires which hold the bales together allowing more fibre to fall from the bale. The longer the bales drag across the ground the poorer the condition of the bale.
- c. If the bales become too damaged it means that they either need to be reworked or they are thrown away. There is also the possibility of dirt contamination to the papermaking process which can lead to lost production time on the paper machines.
- d. The fibre contained in the bales is worth approximately \$800 a tonne. If there is downtime on the paper machines the respondent is exposed to a lost variable cost recovery of approximately \$1,000 per hour (this is the labour and energy component).
- e. As the bales drag across the concrete and disintegrate it also results in large amounts of paper fibre being left on the concrete landing which then blows around the yard requiring extra cleaning work for the yard personnel.
- f. During the hours of 4.00pm and 8.00am the bales build up creating damaged and poor quality bales.

[12] In 2012 there was only one baler producing the reclaim bales. In 2013 Asaleo Care acquired an additional new baler. As a result of the installation of the new baler and increased production levels more bales were being produced and pushed into the yard. While the yard manages this well during the day there was growing concern about the quality of the bales outside of hours. For this reason it was decided that SCA's could push the bales to one side as the tail became too long during the hours of 4.00pm and 8.00am.

[13] On 27 August 2014 Mr Roy Ormiston, the Operations Manager for the Beaters and Paper Machines, issued an electronic Noticeboard Instruction which stated:

BALE CLEARANCE: the bale quality out of the balers as you know has not been very good of late, for a number of reasons. The converting folk are working through a number of issues on this so that we get bale of consistent quality going forward. One of the things which causes poor quality bales is when the back-log of bales is too long – this puts back pressure on the baler which impacts the ramming/compacting part of the process. With this in mind, please, after-hours, keep an eye on the bale backlog and keep it clear of a huge tail. This will help the situation hugely.

[14] The Shift Operation Leaders (SOL's) were requested to discuss this requirement with each of the Beater Crews as the Notice does not go to each of the members of the crews, only to the SOL.

[15] On the evening of 27 August 2014, Mr Stephen Jones SOL for the 4pm to midnight shift, advised Mr Delamere and Mr Toma Dimitro, Lead Hand, that they were required to monitor the number of waste bales coming out into the yard and if there was a backlog they were to push the bales out of the way so the length of the bale tail would not become too long.

[16] On 29 August 2014 Mr Ormiston followed up his instruction with an internal bulletin to all Beaters, reiterating the requirement that all Beater crews were to clear any backlog.

[17] This was followed by a meeting between Mr Delamere and Mr John Binzegger, the SOL on his shift, during which Mr Binzegger says he showed Mr Delamere photographs of the unacceptable backlog and requested him to keep an eye on the Baler and clear it after hours. Mr Delamere's response was that it was not his job and he refused to comply.

[18] On 1 September 2014 Mr Ormiston sent an email to the SOL's requesting them to monitor whether the Beater Crews were clearing bales after hours. If the bales were not being cleared SOL's were to ask Beater Crews to clear the bales and if they deliberately did not clear the bales then the SOL's were to confront the issue directly.

[19] On 5 September 2014 Mr Ormiston, who was acting SOL on the 4pm – midnight shift, noticed a back log of bales and asked Mr Delamere to clear them. Mr Delamere questioned whose job it was to clear the bales. He was advised of the

reasons why the bales needed to be cleared and that it was his job to clear them if they built up after hours. Mr Delamere was told that once there were 3-4 bales building up they should be moved.

[20] Mr Delamere maintained his position that it was not his job to clear the tail and that Mr Ormiston should speak to his Lead Hand. It was common ground that this interaction became heated. Mr Ormiston told Mr Delamere to clear the bales while he went to speak to his Lead Hand.

[21] Mr Ormiston then spoke to Mr Dimitro, who confirmed he would ensure Mr Delamere cleared the bales, while reminding Mr Ormiston that the machines were the Beater Crews' priority work.

[22] A further bulletin was issued to the Beaters on 8 September 2014 reiterating the requirement that the Beater Crews were to clear any backlog of bales after hours.

[23] At a meeting held on 9 September 2014 concerns about the manner and tone of Mr Delamere's response to Mr Ormiston on 5 September 2014 were raised with Mr Delamere. This was not a disciplinary meeting. Mr Dimitro attended the meeting with Mr Delamere together with two Union delegates.

[24] At this meeting Mr Ormiston again reiterated the instruction that Mr Delamere was required to monitor the bales after hours and if the bales built up he was to ensure the bales were moved. As there had previously been some concerns that the Yard Crew would not want the Beater Crews doing this work, Mr Ormiston assured Mr Delamere that the Yard Crew had been spoken to and they had no issue with the bales being moved by the Beater Crews during the night shifts. It was common ground at the investigation meeting that other SCA's in other Beater Crews were moving the bales.

[25] After the meeting with Mr Delamere had concluded the Union stayed back. Both Union delegates present at the meeting say they continued to discuss with Mr Ormiston the process for ensuring the SCA's moved the bales and that it was agreed that the SOL would monitor the bales and let the Lead Hand know if the bales needed to be moved. The SCA would then move the bales if he was not too busy. This was then communicated to Mr Delamere and Mr Dimitro.

[26] Later on the 9 September 2014 when Mr Delamere was working, he was requested by Mr Dimitro to move the bales and he did so.

[27] On 10 and 11 September 2014 Mr Delamere did not move the backlog of waste bales, instead they built up and were moved by the beater crew on the shift immediately following Mr Delamere's shift. As a result of his failure to move the waste bales Mr Delamere was dismissed on 19 September 2014 for failing to follow a lawful and reasonable instruction.

[28] After Mr Delamere's dismissal, on 14 November 2014 Asaleo Care embarked on a restructuring in the Yard. The proposal, if introduced in its current form, will remove the need to have a Yard Crew working on Saturday and Sunday. This means that Yard Crew workers will only work Monday to Friday inclusive. There was no indication in the information provided to the Authority about who would be responsible for moving the bales during 8.00am and 4.00pm on Saturday and Sunday if the proposal goes ahead.

Issues

[29] The issues for determination are:

- (a) Whether the instruction that Mr Delamere move bales was a lawful and reasonable instruction;
- (b) Whether Mr Delamere's dismissal is justified;
- (c) If the dismissal is unjustified what, if any remedies, should be awarded.

Was the instruction that Mr Delamere move the bales lawful and reasonable?

[30] Mr Delamere claims the instruction to him to clear the bales in the yard between 4.00pm and 8.00am was unlawful as it was given in breach of the CA. Mr Delamere says the task was outside the normal duties of an SCA.

[31] When the Union became involved on 8 September 2014 the Union raised a dispute about whether the instruction was within the terms of the CA.

[32] The dispute has two limbs. The first relates to clause 4 of the CA and the second to clause 19(a). Clause 4 states:

The parties acknowledge the rights and obligations each has with respect to the terms and conditions of the Collective Agreement.

Within the terms of the Collective Agreement, the parties will work together on the reduction of labour costs. The parties will seek to reach agreement on the outcomes or solutions that are acceptable to both parties. This may include, but not be limited to, finding ways to reduce overtime costs and improving labour practice flexibility.

[33] Clause 19(a) - Assigning Work, states:

All employees within the Tissue Mill will be available for redeployment across all areas. This may be to work as an “extra” to assist with work, to train or to perform work in the bottom position of any area for which they are signed off as competent, or if working under supervision.

All employees shall use their best endeavours to support the efficient operation of the production units and service areas in a safe manner. This will include carrying out any job deemed to be safe, efficient, logical and legal as directed, or working under supervision.

The decision for redeployment will be made by the Lead Hand and the Supervisor. If agreement cannot be reached, the Lead Hand’s decision will apply.

Lead Hands and employees agree to assist their supervisor with arranging cover.

When a cleaner is absent, then a spare on day shift may be assigned to cover the cleaning on that day.

[34] Mr Delamere says Asaleo Care did not consult or reach agreement prior to issuing the instruction, in breach of clause 4, as the instruction was an attempt to improve labour practice flexibility and reduce labour costs within the meaning of clause 4.

[35] Mr Delamere says instructing beater crews to move the bales from the baler in the converting factory was not the type of work assignment contemplated under clause 19 of the collective agreement, or, if it was, the instruction should have come from the Lead Hand, not the Supervisor.

[36] Mr Delamere says the instruction was not legal within the meaning of clause 19 because no agreement was reached with the Union and the Lead Hand did not issue the instruction.

[37] Relevant to this issue is clause 17 of the CA which sets out the wages for classified positions including Mr Delamere’s position of SCA. The role of SCA includes as part of its normal and expected duties, the moving and manoeuvring of bales.

[38] It was common ground that a substantial part of Mr Delamere's role is to collect bales from the yard. The yard is a common work area shared by Yard Crew and Beater Crew workers. The bales Mr Delamere was asked to move to avoid a backlog of bales, were located in the yard. He was asked to push them out of the way so the bales did not cause a backlog and get damaged.

Clause 4

[39] Clause 4 of the CA deals with how the parties to the CA will address a reduction in labour costs and/or attaining labour flexibility. The question for the Authority is whether Asaleo Care was seeking to achieve a reduction in labour costs including a reduction of overtime costs and/or labour flexibility when it required Mr Delamere to push the reclaim bales to one side during his shifts.

[40] Mr Delamere says the costs Asaleo Care was seeking to reduce were costs associated with overtime. It was submitted that having the bales moved by SCA's after the Yard Crew had finished work allowed Asaleo Care to reduce its labour costs as it did not need to pay overtime to Yard Crews to come into work after their normal working hours to move the bales and neither did Asaleo Care have to employ additional resources to move the bales.

[41] Asaleo Care submitted that Yard Crews did not work overtime so Asaleo Care was not "reducing its labour costs" as no costs for the work being requested of the SCA's was being incurred by Asaleo Care.

[42] Mr Delamere says the requirement to move the bales fits within the meaning of "*labour practice flexibility*". The applicant and his witnesses gave evidence at the investigation meeting about the strict demarcation of work duties between positions and areas. The moving of bales had never been work performed by the Beater Crew. The bales were only moved by the Yard Crew during their working hours. The importance of the demarcation lines between positions was evident when concerns about whether the Yard Crews had agreed with SCA's moving the bales were raised by the Union and Mr Delamere and were addressed by Asaleo Care. The Yard Crews confirmed they had no issue with the bales being cleared after hours by the SCA's. This information was communicated to Mr Delamere on 9 September 2014.

[43] The tail needed to be moved once or twice during a shift which would take approximately 5-10 minutes on each occasion. The SCA's were to push the bales out

of the way so that the Yard Crews could stack them up when they attended work the following morning.

[44] As an SCA, Mr Delamere was using the equipment needed to do the work. He was working in the yard area and it was a straight forward process for him to see the tail building up and to push the bales out of the way. No other employees were employed after 4.00pm to do this work. He was not being asked to do the work of any other employee employed at the time he was working.

[45] I am satisfied the moving of the bales was a task Mr Delamere could be expected to undertake when he was working in the yard and that the manoeuvring of the bales in the way requested of him falls within his job requirements. However, I also agree with the submissions made on Mr Delamere's behalf that in seeking the assistance of the Beater Crews during the after hours shifts to move the tail of the reclaim bales, Asaleo Care was seeking labour flexibility. During the hours of 8.00am to 4.00pm this job fell to the Yard Crews and was not a task normally expected of the Beater Crews.

[46] I find that asking the SCA's to keep an eye on the bales and to push the tail to one side did involve a reduction in costs for Asaleo Care and flexibility in the labour practice of its employees. To bring in Yard Crew workers at overtime rates after hours to complete the task of moving the bales would have been uneconomical. Further, the cost to the company of dealing with the damaged reclaim bales or the stopping of the paper machines as a result of the reclaim bales not being pushed out of the way would be costly.

[47] However, I find that the request to move the bales on 9 September 2014 was not a breach of clause 4 of the CA. Clause 4 requires the parties to seek to reach agreement on outcomes or solutions acceptable to them both. The Union and the Company were involved in the meeting held on 9 September 2014 to discuss with Mr Delamere the way he had spoken to an SOL on 5 September 2014. After Mr Delamere and Mr Dimitro had left the meeting the Union confirmed to the company representatives that they had spoken to the crews (including the Yard Crews) and there was an agreement that the Beater Crews could move the tail of the bales as necessary.

[48] Consistent with the requirements of clause 4 of the CA the Union and company agreed that the tail of the reclaim bales could be moved by the Beater Crews which included the SCA's.

Clause 19

[49] This is the second limb of the dispute raised by Mr Delamere. The clause relates to "redeployment" across "all areas" and includes the possibility that an employee may be required to work as an extra, to train, or to perform work in the bottom position of any area.

[50] During the process leading up to Mr Delamere's dismissal both parties were discussing whether or not the assignment of the task of keeping a watching eye on the reclaim bales and to move them when the tail got too long fell under the ambit of clause 19 and therefore required the Lead Hand to make a decision on the redeployment.

[51] The clause refers to employees being available for redeployment, which connotes an assignment to a new place or task. It is strongly arguable that while Mr Delamere was not being asked to work in a new area, the requirement on Mr Delamere to keep an eye on the tail and to move the reclaim bales out of the way was a new task. On that basis the decision about whether Mr Delamere should do that task was for "...the Lead Hand and Supervisor". During Mr Delamere's shift while Mr Dimitro was his Lead Hand, his Supervisor was the SOL.

[52] In the case of a disagreement the clause allows for the Lead Hand, Mr Dimitro, to make a decision. In line with that requirement, on 5 September 2014 Mr Ormiston approached Mr Dimitro after Mr Delamere had refused to move the tail of the reclaim bales. During that conversation, which became heated, Mr Dimitro agreed that Mr Delamere would move the bales as soon as he had completed his jobs for Mr Dimitro. Mr Ormiston insisted Mr Delamere move the bales immediately. The conversation ended without resolution.

[53] Mr Ormiston, when he approached Mr Dimitro, was attempting to comply with the requirements of clause 19 of the CA. That is not the end of the matter though. Clause 19 put the obligation squarely on both Mr Dimitro and Mr Delamere to use their best endeavours to support the efficient operation of the production units and service areas. This includes carrying out any job deemed to be safe, efficient, logical and legal as directed.

[54] I find that after Mr Delamere refused to comply with the request from Mr Ormiston to move the bales on 5 September 2014, Mr Ormiston attempted to comply with the provisions of clause 19 by seeking the assistance of Mr Dimitro. Mr Dimitro agreed that Mr Delamere would move the bales on the condition that the jobs Mr Dimitro required Mr Delamere to complete had been done.

[55] Even if that had not been the case, during the meeting on 9 September 2014 where Mr Dimitro and the Union delegates were present, there was agreement that Mr Delamere would move the bales.

Conclusion

[56] I find the request of Mr Delamere that he move the tail of the reclaim bales out of the way in order to prevent a backlog fell within the scope of clauses 4 and 19 of the CA. Further, at the time of Mr Delamere's dismissal there was no breach by Asaleo Care of the CA. In accordance with clause 4 of the agreement, the Union delegates and company representatives had agreed that the bales would be cleared by the Beater Crews during the hours of 4.00pm and 8.00am.

[57] With respect to clause 19, Mr Ormiston had approached Mr Delamere's Lead Hand and Mr Dimitro had agreed that Mr Delamere would move the bales once Mr Dimitro's conditions had been met.

[58] For the reasons set out below, after 9 September 2014, any instruction to Mr Delamere to move the tale of the bale was a lawful and reasonable instruction with which he was required to comply.

Was Mr Delamere's dismissal justified?

[59] The Authority is required in determining the justification of Asaleo Care's actions, to do so objectively by applying the test in s103A of the Employment Relations Act 2000 (the Act). The test is whether Asaleo Care's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time the decision was made.

[60] Mr Delamere was dismissed on 19 September 2014 for failing to follow a lawful and reasonable instruction.

[61] The question for the Authority is not whether there was wilful disobedience but whether Mr Delamere's conduct justified dismissal.¹ The conduct complained of was the failure to move the tail of the reclaim bales on 10 and 11 September 2014.

[62] Mr Delamere says that after the meeting on 9 September 2014 he understood that the SOL would advise him when the tail needed to be moved and that he was not required to monitor the backlog. In accordance with that understanding and on that same day, Mr Delamere was requested by the SOL to move, and he did move, the tail of the reclaim bales out of the way.

[63] Mr Delamere was not requested by an SOL or his Lead Hand to move the bales on any day following 9 September 2014.

[64] Mr Delamere attended a disciplinary meeting on 15 September 2014 having previously been advised of the meeting, the allegations to which an explanation was required, of his entitlement to representation and that disciplinary action up to and including dismissal was possible. The allegation was that he had failed to move the bales on 10 and 11 September 2014 and that this constituted a failure to follow a lawful and reasonable instruction.

[65] During the meeting questions were raised about Mr Delamere's confusion about whether moving the bales required a specific instruction from the SOL or Lead Hand each time. The Union were of the view that the agreement reached on 9 September 2014 was that the SCA's would not be required to monitor the tail, instead the SOL would advise the Lead Hand, who in turn would advise the SCA that the bales needed to be moved.

[66] Mr Ormiston's view differed to the extent that he believed the agreement was for the SCA's to monitor the tail and move the reclaim bales as necessary. In this respect I have preferred the evidence of Mr Delamere and his witnesses. I am supported in my view by the fact that Mr Delamere moved the bales on request on 9 September 2014.

¹Sky Network Television v Duncan [1998] 3 ERNZ 917.

[67] I find Mr Delamere was not requested on 10 and 11 September 2014 to move the bales and so did not move even though I find he had time during his shift to do so. In accordance with the Union's understanding of what was required after 9 September 2014 Mr Delamere had a reasonable belief that he was not required to move the tail unless specifically requested to.

[68] A second meeting was held the following day, on 16 September 2014. Mr Delamere was advised that Asaleo Care did not accept his explanations for not undertaking the duties of moving the waste bales. He was also advised that Asaleo Care did not accept that the instruction to move the waste bales involved a variation to the CA.

[69] Asaleo Care concluded that Mr Delamere's actions on 10 and 11 September 2014 in not moving the reclaim bales amounted to a refusal to obey a lawful and reasonable instruction. In reaching that conclusion Asaleo Care relied on the notices issued on 27 & 29 August and 8 September as well as the meeting on 9 September 2014 as constituting the instruction to monitor and move the tail.

[70] Asaleo Care was not in a position to place any reliance on the notices issued prior to 9 September 2014. On 8 September 2014 the Union raised a dispute with Mr Ormiston about the instruction to move the bales. The Union was concerned that the instruction amounted to a new task and needed to be consulted about.

[71] As set out earlier in this determination the Authority agrees with that assessment. However, the consultation process worked its way through during the next day or so when the Union confirmed to Mr Ormiston, after the meeting on 9 September 2014 with Mr Delamere had concluded, that the Yard Crew agreed that the Beater Crew could move the tail.

[72] Asaleo Care wrote to Mr Delamere after the meeting advising him that it was considering terminating his employment on the basis that it had reached a conclusion that he had failed to follow a lawful and reasonable instruction from a Supervisor.

[73] At a third meeting on 19 September 2014 Mr Delamere was provided with the opportunity to make submissions on the penalty. After considering his submissions Asaleo Care determined that dismissal was appropriate in all the circumstances.

[74] In making its decision Asaleo Care took into account a number of factors including:

- (a) All Beater Crews, including Mr Delamere, had been repeatedly advised that the respondent required them to clear the Baler Machines after hours.
- (b) Mr Delamere had the ability, capability, training and experience to comply with the instruction and it was within the scope of work required of a Senior Chemical Assistant.
- (c) Mr Delamere received seven separate communications, including three bulletin notices, three oral instructions from three different SOLs, and he was also instructed at a meeting with Mr Ormiston and the PPWU that he was required to clear waste bales, after hours.
- (d) Mr Delamere did not demonstrate any remorse or an appreciation of his conduct towards his managers during the investigation process.
- (e) Asaleo Care concluded it could not trust Mr Delamere to comply with instructions from his supervisor.
- (f) Mr Delamere had many years of service and should have been aware of his responsibilities and obligations with regards to compliance with lawful and reasonable instructions from his supervisor.
- (g) That in April 2013 Mr Delamere had been subject to disciplinary action for similar behaviour. A verbal warning was issued on the promise that Mr Delamere would not engage in such behaviour going forward.

[75] I have preferred the evidence of the Union that on 9 September 2014 the Union and Asaleo Care had reached agreement for the first time, that the Beater Crews would move the tail of the reclaim bales when they had time during their shifts between 4.00pm and 8.00am. This agreement was in accordance with the requirements of the CA. I also accept the evidence of Mr Delamere and his witnesses that he was not required to move the bales unless he was requested to do so during his shift.

[76] Mr Delamere followed this agreement on 9 September 2014 without incident. On 10 and 11 September 2014 Mr Delamere was not given any instructions to move

the bales and therefore a finding that he had failed to follow a lawful and reasonable instruction was not a finding a fair and reasonable employer could have reached in all the circumstances of this case and Mr Delamere's dismissal was unjustified.

Remedies

[77] Having concluded that Mr Delamere was unjustifiably dismissed I must turn my mind to what, if any, remedies should be awarded. Mr Delamere seeks the remedies of reinstatement, reimbursement of lost wages, compensation for hurt and humiliation and for lost benefits, and costs.

Reinstatement

[78] Mr Delamere seeks reinstatement to his position in the Beater Crew. Reinstatement is opposed by Asaleo Care.

[79] Section 125 of the Act applies where the Authority determines an employee has a personal grievance. The Authority may provide for reinstatement if it is practicable and reasonable.

[80] Practicability is the capability of reinstatement being carried out. The Authority should be satisfied the re-imposition of the employment relationship is feasible or can be carried out successfully.² Reasonableness requires the Authority to enquire into the equities of the parties.³

[81] Mr Delamere has been employed at the mill for 39 years and lives in a small community where the majority of residents are also mill workers. I accept that in these circumstances Mr Delamere's social life and community are interwoven with the mill and his work life.

[82] Asaleo Care have not filled the position left vacant by Mr Delamere's dismissal and Mr Dimitro has indicated a willingness to work with him as his direct supervisor.

[83] Asaleo Care says Mr Delamere has demonstrated consistent behaviour in refusing to carry out new tasks when requested and evidence of examples of this was given to the Authority during its investigation.

²*Lewis v Howick College Board of Trustees* [2010] NZCA 320.

³*Angus v Ports of Auckland Limited* [2011] NZEmpC 160; *H v A Ltd* [2014] NZEmpC 189.

[84] The decision as to whether to reinstate Mr Delamere is a finely balanced one. On the one hand Mr Delamere has a long history of employment at the mill. He is not a young man and lives in an area of New Zealand that does not present a large number of employment opportunities. On the other hand, I accept Mr Delamere presents challenges to his supervisors and managers at Asaleo Care, however, in all of his time at the mill Mr Delamere has only been issued with one warning. That was a verbal warning and was issued nearly 18 months before his dismissal.

[85] The evidence shows that before the decision to dismiss Mr Delamere was made Mr Delamere made an offer to undergo counselling or EAP and proffered an apology to Mr Ormiston.

[86] Taking into account all of the evidence and the submissions of the parties I have concluded that Mr Delamere's reinstatement is both practicable and reasonable.

[87] Asaleo Care New Zealand Limited is ordered to reinstate Mr Delamere to his former position as an SCA. Reinstatement is to take effect from Monday, 26 January 2015.

Lost wages

[88] Mr Delamere seeks reimbursement of lost wages from 19 September 2014 to the date of reinstatement. An employee who has been dismissed must take steps to mitigate their losses. Mr Delamere gave evidence at the investigation meeting that he had worked for his family trust in a volunteer capacity (for no pay), had made enquiries about obtaining a truck licence but took no further steps in that regard, and approached one company seeking work. Even though Mr Delamere was seeking reinstatement, he had a duty to attempt to mitigate his losses. I am not satisfied that his efforts to mitigate warrant a departure from an award of three months lost wages.

[89] Subject to my findings on contribution and pursuant to section 123(1)(b) of the Act, Asaleo Care New Zealand Limited is ordered to pay to Mr Delamere an amount equivalent to three months lost wages.

[90] I expect the parties can resolve the actual amount. If there are any issues leave is granted for either party to seek directions from the Authority.

Compensation for distress and humiliation

[91] Mr Delamere seeks compensation for hurt and humiliation but has not quantified this. Mr Delamere gave evidence in support of his claim, however, I do not find that evidence particularly compelling. My order that Mr Delamere be reinstated will go a long way to mitigate any humiliation, or distress caused by his dismissal.

[92] Subject to my findings on contribution I find that an adequate award for compensation pursuant to section 123(1)(c)(i) of the Act is \$5,000.00.

Compensation for other benefits

[93] Mr Delamere seeks compensation for loss of allowances for overtime, transport and laundry which he would have received if he had remained in employment. Mr Delamere also seeks compensation for the payment of time and a half that he would have received if he had been still in employment and working on Labour Day.

[94] Subject to my findings on contribution and pursuant to section 123(1)(c)(ii) of the Act, Asaleo Care New Zealand Limited is ordered to pay to Mr Delamere an amount equivalent to the travel, laundry and transport allowances he would have received if he had continued in his employment for a period of three months calculated from 19 September 2014. In addition, Mr Delamere is to be paid an amount equivalent to the half time rate for the hours he would have worked had he worked on Labour Day.

[95] I expect the parties can resolve the actual amount. If there are any issues leave is granted for either party to seek directions from the Authority.

Contribution

[96] When determining the extent and nature of remedies to be awarded, the Authority is required to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.⁴

⁴Employment Relations Act 2000, section 124.

[97] Mr Delamere disputed the instruction that he move the reclaim bales as it was not a task he would normally undertake and he was concerned about backlash from the Yard Crew workers. On 9 September 2014, the Union had clarified the position of the Yard Crew workers and I have found it had reached agreement with Mr Ormiston that Mr Delamere would be requested when the bales were to be moved. He moved them when requested on 9 September but was never requested to move them on 10 and 11 September 2014.

[98] While other SCA's were monitoring and moving the bales of their own accord, they were working outside the specific agreement reached with the Union on 9 September 2014. The evidence indicates that at least one SCA was moving the bales before 9 September 2014 even without the Yard Crew's confirmation that they did not have any issues about the Beater Crews doing this task. Mr Delamere is a long standing Union member and has behind him a history where demarcation issues are important. He was not prepared to step over the line unless he was fully satisfied there would be no backlash from the Yard Crews. This was his undoing.

[99] An SOL had visited the yard several times during Mr Delamere's shift on both 10 and 11 September, because he took photos of the tail and used these photos as proof that Mr Delamere had failed to follow the instruction to move the bales. At no time did the SOL request Mr Delamere to move the bales and neither did the SOL raise it with Mr Delamere's Lead Hand.

[100] I find Mr Delamere played a significant part in the actions giving rise to his dismissal. The evidence shows that Mr Delamere was not particularly busy with his work on either 10 or 11 September 2014. Mr Delamere was aware that other Beater Crews were monitoring and undertaking the task of moving the bales out of the way using their own discretion. Mr Delamere would be in the Yard as a normal part of carrying out his duties and it would not be difficult for him to monitor the tail and move the excess bales out of the way.

[101] Mr Delamere was quick to resort to the wording in the CA when he was disputing the right of Asaleo Care to instruct him to move the bales. In doing this Mr Delamere has overlooked his obligations under clause 19 which required him to use his best endeavours to support the efficient operation of the production units and service areas in a safe manner. This will include carrying out any job deemed to be safe, efficient, logical and legal as directed, or working under supervision.

[102] Even if he had not received a specific request from the SOL or his Lead Hand on 10 and 11 September 2014 I am not satisfied that he could simply ignore the tail of the reclaim bales. By ignoring the tail and not moving the bales out of the way he was not ensuring the efficient operation of the production units and service areas in a safe manner. This is contributing conduct by Mr Delamere.

[103] I find Mr Delamere's actions warrant a reduction in the monetary remedies and I assess his contribution to be 50%.

[104] All monetary remedies for lost wages, compensation for distress and humiliation and for other benefits are to be reduced by 50% and paid within 28 days of the date of this determination.

Costs

[105] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Delamere shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. Asaleo Care shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

Vicki Campbell
Member of the Employment Relations Authority