

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 429/10  
5276255

BETWEEN                      ANTONIO HEATHER,  
   MAARAARUA POKO, and  
   BILL MATTHEWS,  
   Applicants

AND                              CITY CARE LIMITED,  
   Respondent

Member of Authority:        Yvonne Oldfield

Representatives:              Simon Mitchell for applicants  
   Raewyn Gibson for respondent.

Investigation Meeting:        11 and 12 February 2010

Submissions received:        17 February 2010 from Applicant  
   22 February 2010 from Respondent

Further information            26 February 2010  
received

Determination:                01 October 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     The three applicants in this case were employed in City Care's water division and based at its Mt Maunganui depot. They were all dismissed as a result of an incident on 7 April 2009 in which they were alleged to have breached City Care's health and safety policies.

[2]     At six thirty that morning Mr Matthews had been called out to address a problem that affected the water supply to approximately one hundred households in Mount Maunganui. Mr Heather and Mr Poko joined him on the site at 9.30. The

team's task was to locate, excavate, and repair a broken water main. Mr Matthews was crew leader, Mr Heather the digger operator and Mr Poko's primary task was to "spear" the ground as the excavation proceeded in order to locate underground services before any risk of damage by the digger bucket.

[3] By lunchtime, with the pipe yet to be uncovered, the excavation had reached 1.5 metres, the depth beyond which the sides of a trench must be shored to prevent their collapse. Mr Matthews returned to the depot to obtain shoring materials. While he was away, a City Council representative visited the site. He found the trench to be closer to 2.0 metres deep, with Mr Poko inside and Mr Heather continuing to operate the digger. Although the risk of collapse was in his view minor, he nonetheless ordered work to cease and Mr Poko to get out of the trench for his own safety.

[4] Meanwhile, Mr Matthews had found that there were no shoring materials to be had at the depot. He sought assistance from his foreman, Greg Palmer, who authorised him to purchase what was needed. As the two men were talking they were joined by Mr Jackman (who as supervisor was senior to Mr Palmer.) Mr Jackman suggested the alternative course of "battering" the trench (sloping the sides to prevent collapse.)

[5] Mr Matthews returned directly to the site and proceeded with battering. At mid afternoon the Council representative returned and found that the battering had not been done correctly and that the trench was not safe for Mr Poko (who was back in it.) Once again, work was halted until the excavation was made safe. The repair was eventually completed before nightfall.

[6] Concerns about the health and safety implications of what had occurred then led to disciplinary proceedings in respect of each of the three applicants. Mr Matthews was dismissed on 30 April 2009. The reasons for the dismissal were confirmed in a letter of the same date as follows:

*"your employment was terminated ... for failing to observe safety procedures, working in an unsafe manner, and failing to make proper use of installed or supplied safety equipment at the Matapihi site on the 07/04/09. During the incident you also refused to carry out proper and lawful instruction delivered by a person acting with the authority of City Care..."*

*These are breaches of City Care house rules as set out under ‘what could get me dismissed’ on page 47 and 48 of the staff handbook. This is considered serious misconduct.”*

[7] Also taken into consideration was the fact that not long before these events, Mr Matthews had received a formal warning for failing to follow health and safety protocols.

[8] Mr Poko was also dismissed on 30 April 2009. A letter of the same date gave the following reason:

*“your employment with City Care was terminated... for failing to observe safety procedures and working in an unsafe manner at the Matapihi Road site on the 07/04/09.*

*This is a breach of City Care’s house rule as set out under ‘what could get me dismissed’ on page 48 of the staff handbook, and is considered serious misconduct.”*

[9] Mr Heather’s dismissal on 4 May 2009 was also confirmed in a letter of that date which stated:

*“your employment with City Care was terminated... for failing to observe safety procedures, working in an unsafe manner and allowing another employee to work in an unsafe manner at the Matapihi Road site on the 07/04/09.*

*This is a breach of City Care’s house rule as set out under ‘what could get me dismissed’ on page 48 of the staff handbook and is considered serious misconduct.”*

[10] Each of the three applicants now asserts that his dismissal was unjustified and is seeking reinstatement, reimbursement of lost earnings and compensation for hurt and humiliation. They say that at the relevant times Mr Poko was not at the bottom of

the trench, but rather standing safely at a shallower point at one end. Mr Matthews argues that he had simply followed Mr Jackman's instructions. He and Mr Heather also note that when Mr Webber visited the site at mid afternoon the battering was not yet complete.

[11] The respondent disputes that the dismissals were unjustified, claiming that each of the men acted in such a way that City Care could no longer have trust and confidence that they would perform their duties without endangering themselves or others.

### **Issues**

[12] The question whether a dismissal has been justified is determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time.

[13] The respondent's inquiry into what had happened on 7 April was led by Rob Newman (Contracts Manager, Underground Operations.) He began with some prior knowledge of the incident because he had personally spoken to the Council representative, Kelvin Webber, when Mr Webber expressed his concerns (at midday and again at mid-afternoon) about the site. On the second occasion Mr Newman had gone out to check the site personally and observed for himself that it was not correctly battered.

[14] Mr Newman was assisted in his inquiries by a member of the human resources team, Vicki Petrie, and by Bruce Hammond, (the respondent's Commercial Manager.) Interviews were conducted with Mr Matthews and with Mr Heather and Mr Poko (together.) Mr Jackman and Mr Palmer were questioned about the conversation at the depot. Mr Matthews was re-interviewed and then Ms Petrie drew up a "synopsis of events" summarising the respondent's conclusions about what had happened. This synopsis, along with notes of the interview with Mr Jackman and Mr Palmer, was then presented to each of the three men with the advice that the conduct set out there was considered to be in breach of health and safety requirements.

[15] Finally each was called to an individual meeting with the Tauranga Branch manager, Kees Swanink, and given an opportunity to respond to the information provided. The final decision to dismiss each of the men was made by Mr Swanink, taking into consideration the synopsis and its attachments.

[16] The men were all represented by their union at the final meeting with Mr Swanink. A union representative also accompanied Mr Matthews at the two investigation meetings he attended however Mr Poko and Mr Heather did not have a representative with them when they were questioned about the incident, despite having been told that the meeting was disciplinary in nature.

[17] The applicants have concerns about the fairness of the process. In submissions it is argued that the respondent did not put to the three applicants the specific allegations they were required to answer.<sup>1</sup> This in turn causes the applicants to take issue with some of the respondent's factual findings, including the respondent's conclusions about where in the trench Mr Poko was said to be. The interview with Mr Heather and Mr Poko was very brief and issues arise about the conclusions drawn from it, including conclusions about what Mr Matthews told the other two men when he left the site at midday. Finally the applicants are concerned that Mr Swanink overlooked important information including Mr Jackman's account of what he said to Mr Matthews at the depot.

[18] The first issue for determination here will therefore be whether the respondent's inquiry and conclusions about what happened were fair and reasonable.

[19] Each individual dismissal will then be reviewed in light of the other relevant circumstances including:

- i. the training given to each of the applicants in safe work practices;

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<sup>1</sup> Mr Matthews also has concerns that the copy of the synopsis provided for him to respond to did not have the attachments with it. However I note that if this were so, the union representative at the time should have picked this up (having access to the materials provided to all three men.) In the circumstances, given that he did not bring this matter to the respondent's attention at the time, I am not satisfied that the respondent failed to provide all the material to Mr Matthews.

- ii. what they could be expected to have known about identifying excavation hazards and making a trench safe to enter;
- iii. the level of skill and responsibility to be expected from workers in the roles in question, and
- iv. the level of support and supervision the crew received that day.

[20] In Mr Matthews's case the existence of a prior warning for breach of safety protocols is a further relevant circumstance.

### **The inquiry and conclusions**

[21] The disciplinary process began with each of the three men being given a letter which called them to attend a meeting:

*“to discuss the incident [of 7 April]...and to find out your reasons for the actions that were taken...The incident, and the issues that have arisen as a result of the incident, have been taken very seriously.”*

[22] Nothing more was said in the letter of the allegations to be answered. Nor were any specific allegations put at any of the meetings with the three men. (Although it must be noted that in the meetings with Mr Matthews the incident was traversed at in some detail with the effect, I find, that some of the respondent's concerns were able to be identified.)

[23] Some concerns were also identified in the “synopsis.” For example, that document records that when Mr Webber visited the site the first time, he found the hole was at a depth of two metres *“without sufficient battering or shoring, and one staff member is down the hole.”* In relation to Mr Webber's second visit, the synopsis records that the hole was approximately three metres deep and *“traffic management and battering in the hole is insufficient.”* Mr Poko's whereabouts were not mentioned at all.

[24] Mr Newman provided the Authority with clear and simple diagrams of the respondent's conclusions about the depth, width, and shape of the trench at both midday and in the afternoon. Mr Poko's alleged location (at the deepest part of the trench on both occasions) was also shown. On the first, the trench was said to be two metres deep and to have no shoring. On the second it was shown to be three metres deep and partially battered back, but not to sufficient slope for that depth.

[25] No such diagram was provided to the three men during the disciplinary process however. Apart from what was in the synopsis, at no time up to the dismissals did the respondent give the three men any information about the shape or dimensions of the trench, or where it said Mr Poko was. Mr Poko was not asked where in the trench he was standing or why he was in the trench. Mr Hammond told me he did not put these questions because he said it was obvious that Mr Poko was in the trench to probe for services.

[26] One end of the trench was "stepped" to provide access to the trench. The three men now say that Mr Poko was standing on one of these steps at the relevant times and that they would have raised this if they had understood the allegation to be that he was at the bottom of the trench.

[27] The respondent now argues that it is not credible for the men to say Mr Poko was on the stepped section of the trench at the times in question. It says its conclusions that Mr Poko was (on both occasions) at the bottom of the trench were reasonable, especially given that Mr Webber had felt it necessary, both times, to tell him to get out. Nonetheless, a fair and reasonable employer must put all the relevant information to the individuals concerned for comment. Without having done so the respondent cannot say that its conclusions about where Mr Poko was located were fair and reasonable.

[28] The respondent cannot therefore rely on the fact that Mr Poko was at the bottom of the trench in justifying the dismissal.

[29] The next factual issue between the parties concerns whether Mr Matthews told the other two to continue working when he left the site at midday to get shoring materials. It must be recorded first that the respondent agrees that there was no issue

about Mr Matthews leaving the site to get shoring materials. That was the right thing to do. Mr Matthews said that he went off to the depot in the belief that the other two were stopping for lunch. The respondent rejected this assertion on the basis that Mr Heather and Mr Poko (who were interviewed together) told their interviewer that Mr Matthews said to keep working because he would “only be ten minutes.” Mr Poko and Mr Heather now deny saying this to the interviewer.

[30] I did not find Mr Heather and Mr Poko to be credible witnesses. They both appeared to have difficulty with recall but rather than acknowledging this, they tended to deny much of what respondent witnesses said (even about non contentious background.) This had the effect of making it difficult for the Authority to place any reliance on their evidence. I have therefore relied on the respondent’s notes in checking what Mr Heather and Mr Poko said when interviewed.

[31] The notes (which are less than a page for the whole interview) start with the following:

“[Mr Hammond] *Did you discuss it [the digging of the hole] at around lunch time before Bill left?*

[Mr Heather] *Yep, we were going to keep digging out*

“[Mr Hammond] *was it below 1.5m when Bill left?*

[Mr Poko] *Nup.*

[Mr Hammond] *Why’d you keep digging?*

[Mr Heather]:

- *“Shoring was on its way*
- *Bill couldn’t get hold of someone to buy some ply*
- *Bill carried on when I left to dump slops*
- *As I left Bill was just coming back in*
- *Billy was still waiting for the ok to get some ply.”*

[32] Mr Hammond did not seek any clarification of the reference to Mr Heather leaving the site. Instead he followed with a question about training:

“[Mr Hammond]: *Have you had training in battering trenches?*”

[Mr Poko] *If you show me on a diagram I could, but I've never done it before.*

[Mr Heather]

- *There's nothing practical in the ITO*
- *Ants displayed on a whiteboard how far out to excavate with a 2m hole correctly*
- *We had training with Excel*

[33] Mr Hammond asked whether the two men had been at a tool box meeting on 19 March and Mr Heather confirmed that they were. Then Mr Heather volunteered the information that: “*we didn't go deeper when Bill was off-site, only wider.*” Mr Hammond responded by asking:

*“It wasn't over depth when Bill left, but it was when Kelvin arrived? So...you must have dug deeper?”*

[Mr Heather]:

- *Yes, Bill said just to carry on coz he'd only be ten minutes.*
- *All we were doing was taking out the slop so we didn't go any deeper while he was away*

[Mr Newman] *so you would have been at 2m when he left?*

[Both men]: *Yeah, yeah*

[Mr Newman]: *So when Kelvin came on site you were at the same depth as when Billy left?*

[Mr Poko] *Nah...it was deeper...*

[Mr Newman] *Did you make the trench any deeper while he [Bill] was away?*

[Both men] *No.*”

[34] The notes of the interview end there. Given the inconsistency of the responses, and the failure to clarify the puzzling reference to Mr Heather leaving the site, it is difficult to draw clear conclusions from this brief interview. It was also unhelpful that the two men were interviewed together.

[35] As well, the respondent needed to weigh in the balance the following facts:

- i. the two men knew that Mr Matthews was going back to get shoring materials because the excavation had reached a depth where it could not continue;
- ii. they had been working since 7.00 and it was lunchtime;
- iii. although the depot was not far, Mr Matthews could not literally have got there and back, and collected the materials, within ten minutes.

[36] I am not satisfied that it was reasonable for the interviewer to have concluded that Mr Matthews told the men to keep working. There was more to support the alternative assertion, that Mr Matthews left the site in the reasonable belief that the other two men were stopping for lunch.

[37] The final major difference between the parties is related to the view Mr Swanink formed about the conversation at the depot between Mr Matthews, Mr Jackman and Mr Palmer. The respondent says that there was nothing more than a suggestion that the trench should be battered, coming from a supervisor who had not been to inspect the site. They say that when he went back to the site (if not before) Mr Matthews should have realised that battering was not appropriate and sought further help from his supervisors. The way Mr Matthews sees it, he had already explained the circumstances on the site and been instructed that the trench should be battered.

Nothing changed when he went back to the site (to cause him to seek further help) so he simply followed that instruction.

[38] Attached to the respondent's synopsis of events were notes recording what Mr Jackman had reported about the last part of his conversation with Mr Matthews. The relevant extract is as follows:

“[Mr Jackman] *do you know how to batter?*”

[Mr Matthews] *I have done it before and [Mr Heather] has done it before.*

[Mr Jackman] *How much room have you got?*

[Mr Matthews] *Three metre width*

[Mr Jackman] *Batter it and see how you get on and if not sure give us a ring and we may have a shield.*”

[39] It is clear from these notes that having been told that there was a “three metre width” available Mr Jackman told Mr Matthews to return and batter the trench. I accept that it was reasonable for Mr Matthews to consider himself under an instruction to do so.

### **Mr Matthews' dismissal**

[40] The collective agreement which covered Mr Matthews's employment provided for both skill and responsibility to be reflected in the pay rate. Mr Matthews was paid at Level 5 skill rate and at a Level 4 responsibility rate on the basis that he was (in terms of the collective agreement) “*Able to successfully supervise a work crew, including able to organise work on site.*”

[41] In his brief of evidence Kees Swanink set out the specific conduct relied upon to dismiss Mr Matthews. The first element was:

*“11.1 failing to notify the OSH division of the Department of Labour of the intention of excavating a trench in excess of 1.5 metres deep which was the applicant’s responsibility as the senior person on the site;*

[42] Mr Swanink explained in his evidence:

*“it was... Bill Matthews responsibility to ring our office to advise them he was actually digging in excess of 1.5 metres. Once our office is advised of this we complete the necessary documentation to notify OSH.”*

[43] Because there had recently been another break nearby, the foreman knew from the outset of the job where the pipe was likely to be, and that was at more than 1.5 metres deep. The respondent says that the time to report that the trench had in fact reached this depth came at around midday, and that it was Mr Matthews’s job to pass the information on.

[44] Mr Matthews did, of course, tell the supervisor and the foreman when he went back to the depot. Mr Swanink does not think this was good enough, but neither he nor any other respondent witness told me what instructions Mr Matthews had been given about the procedure to be followed or why telling Mr Jackman and Mr Palmer (to whom Mr Matthews reported) was not sufficient. As well, during the disciplinary process the respondent had recorded the following exchange in Mr Matthews’s presence:

*“[union organiser] Who’s responsibility was it to notify OSH?”*

*[Mr Hammond] The supervisor once they have information from the employees.”*

[45] Given the lack of explanation as to why it was not enough for Mr Matthews to have passed the information on to his foreman and supervisor, the respondent has not shown that Mr Matthews failed to report the fact that the trench had reached 1.5 metres. The first element of serious misconduct is not made out.

[46] The second element set out in Mr Swanink’s evidence was:

*11.2 failing to require that Maaraaraua Poko and Antonio Heather cease excavating and/or remaining in the trench when the depth of the trench was approximately 1.5 metres, while he left the work site to return to the office at midday on 7 April 2009;*

[47] I have already recorded my factual findings on this point: that Mr Matthews left the site in the reasonable belief that the other two men knew that the trench required shoring before work continued, and were stopping for lunch in the meantime. I have also concluded that there was insufficient basis for the respondent to think otherwise. In these circumstances, the respondent also fails to make out the second element of alleged misconduct.

[48] The final three elements all relate to what happened after Mr Matthews returned from the depot and commenced battering. These were:

*11.3 attempting to batter the trench at a width and slope which was not sufficient for the depth of the excavation;*

*11.4 allowing Maaraaraua Poko and Antonio Heather to continue to dig the trench to approximately 3 metres deep and allowing Maaraaraua Poko to work in the trench at this depth without sufficient battering in breach of the health and safety requirements for excavating in excess of 1.5 metres deep;*

*11.5 failing to contact his supervisors, who had specifically requested that he do so if he was unsure of how to proceed;*

*11.6 Generally allowing the excavation to continue and allowing Maaraaraua Poko to remain working in the trench in an extremely unsafe manner and contrary to specific and well known health and safety requirements.”*

[49] The respondent’s case rests on an assertion that Mr Matthews should have known what he was doing or if he did not he should have asked for help.

[50] There is no dispute that Mr Matthews did seek help when he went to the depot at lunchtime. The respondent's assertion amounts to saying that when he got back to the site he should have realised that it was not possible to batter at that location, or at least have realised that he needed to get further advice about this. To assess the reasonableness of this assertion it is necessary to consider whether Mr Matthews had enough knowledge to realise when he needed further help.

[51] As Mr Newman confirmed to his colleagues during the respondent's own investigation, the three applicants had received no formal training in shoring or battering. At the time of his dismissal Mr Matthews had been employed by the respondent for approximately four years and was working his way through the modules of the National Certificate in Water Reticulation Level 3. Mr Matthews was close to having completed the standard excavation module in this course but this touched only briefly on working in trenches. He had yet to begin the deep excavation module. The technical aspects of battering were covered more fully in the training for digger drivers.

[52] Although Mr Matthews had battered a trench before (as he told Mr Jackman) his experience of this task was limited. There is no dispute that most of the time, broken pipes are found within 1.5 metres of the surface. When they are deeper than that, the generally preferred method of securing a trench is shoring (although Mr Jackman was known to favour battering) because battering produces a larger footprint and more disruption. The net result was that, over the course of his employment, Mr Matthews had been involved in "battering" a trench about once or twice a year. There was no evidence that he had ever previously been crew leader for such a job.

[53] In his evidence Mr Jackman (who had not been long with the respondent) acknowledged that he had no first hand knowledge of how much Mr Matthews knew about battering. He did know that Mr Matthews was on a warning for a previous health and safety breach but thought that it related primarily to traffic management issues.

[54] In February 2009 Mr Matthews received a newsletter with his payslip which made reference to three fatal trench collapses which had been in the news. It reminded staff to:

*“operate within operational safety requirements to keep ourselves safe and our workforce safe at all times.”*

[55] The newsletter also noted that:

*“Requirements and operations for safe trenching are set out in the Department of Labour Approved Code of Practice for Safety in Excavation and Shafts for Foundations. In summary, these are:*

*i. any excavations that are 1.5 metres deep or deeper must be shored unless:*

- the face is cut back to a suitable slope or benched...”*

[56] The newsletter did not set out what would be a “suitable slope” but noted that the Code of Practice was available through the respondent’s intranet. I was told that Mr Matthews could have gone in to the depot to look up the necessary specifications.

[57] In March Mr Matthews was crew leader for an excavation of just over two metres which was not shored. Mr Matthews received a formal warning over this incident. Mr Matthews told the Authority that he was very anxious, having been warned, to avoid dismissal but received no individual training or follow up afterwards.

[58] The respondent says that follow up came at “tool box” meetings on 17 and 19 March (which Mr Matthews and the other applicants attended.) At both meetings the importance of working safely in trenches was mentioned along with the fact that breaches of health and safety could result in dismissal.

[59] Respondent witnesses asserted that the 17 March meeting also covered the key elements of battering and shoring. Health and Safety was one of eight topics covered on 17 March in a half hour meeting with a large group of staff. The notes of the meeting do not indicate what was covered and no information was provided to staff to take away. I cannot accept that this amounted to adequate follow up after the warning or to sufficient training in battering.

[60] The use of the term “a suitable slope” in the Code might be taken to indicate that the correct slope depends on the conditions. This would indeed be consistent with the fact that the angle of repose differs for different materials. In fact, the Code of Practice does not provide for variation. It states that to safely batter excavations to depths in excess of 1.5 m each of the sides of any trench must be “battered back” to a slope of 45 degrees.

[61] For its sides to be properly battered to an angle of 45 degrees, a trench two metres deep and one metre wide at its base would need to be five metres wide at the top. At three metres deep the top would need to be seven metres wide. Mr Matthews did not of course have seven or even five metres to work within at Matepihi Road. As he reported to Mr Palmer and Mr Jackman when he went back to the depot, he had just three metres. It was simply never going to be possible to batter at that particular location. Unfortunately, he was sent away to do just that.

[62] When I asked him, Mr Jackman could not explain what he had said to Mr Matthews except by saying that he must have thought he meant three metres on each side. Given the importance of this issue, I do not consider this to be satisfactory. This inadequacy of this advice is even more concerning because Mr Jackman had already been alerted to the problems at the Matepihi site. As recorded already, after Mr Webber had been down to the site at midday he immediately rang Rob Newman about his concerns. Mr Newman passed this on to Mr Jackman who confirmed that he would talk to Mr Matthews about the job. Although he did so, he mentioned nothing of Mr Webber’s call to Mr Newman, or that fact that Mr Matthews needed to address the fact that mistakes had already been made on the site that day.

[63] As for the foreman, Greg Palmer, he had worked with Mr Matthews for some time. He stated in his evidence that he knew that “*Bill’s knowledge of battering was pretty basic.*” He was also familiar with the location of the job and realised that there would not be enough room to batter the trench. His evidence was that he said nothing about this because he thought that “*there were other options*” and that Mr Matthews would eventually follow up on his original advice to buy shoring materials. However he did not say any of this in front of the supervisor, or before Mr Matthews left the site, because the supervisor was “*higher than him.*”

[64] Mr Matthews, like the other men, considered the trench to be a “work in progress” when Kelvin Webber came back the second time. He disputed that the trench had reached three metres deep and said:

*“When I returned to the site, I made the trench safe by battering, and understood that this is what I had been instructed to do...Kelvin then arrived back at around 3.10pm. By that time the trench was 2 metres deep and 2 metres wide. When Kelvin came at around 3pm, he stated that the battering of the hole was insufficient.”*

[65] When I sought further explanation from Mr Matthews it became apparent that he was still unclear (at the time of the Authority investigation meeting) about the correct specifications for a properly battered trench. He was not alone in this. Even some of the respondent witnesses demonstrated the same lack of understanding. Chris Harris, business process specialist, attended the site with Mr Newman and took a photo. He told the Authority:

*“The deepest part of the trench would have been close to 3 metres. For the trench to be battered correctly this would mean it would have to be around 5m to 6m wide at the top (or even more if the soil was wet)...”*

[66] Previous references to the Code will have made it clear that “5m to 6m” would not have been sufficient for a trench that was three metres deep and at least a metre wide at the bottom.

### **Determination**

[67] I find that Mr Matthews (like at least one of the respondent’s managers) was ignorant of the correct specifications to “batter” a trench safely and failed to realise his mistake. He did not correctly assess when it was safe to enter the trench and, as a consequence, he put Mr Poko at risk.

[68] The Respondent says that Mr Matthews must bear full responsibility for this. It says he should have known when a trench was properly battered, or if he did not, he

should have sought help. The Respondent says that Mr Matthews was equipped to identify the hazards in his work and could have looked up the information he needed on the intranet. It says it had reminded staff of the importance of safe work practices via the newsletter and tool box meetings, that Mr Matthews had received a warning about this issue, and that he was “experienced and competent.”

[69] There was no evidence however that Mr Matthews had ever been shown the dimensions for a properly battered trench. Mr Newman acknowledged Mr Matthews’s lack of formal training and Mr Palmer confirmed that Mr Matthews had very little practical experience. Even if he had at some stage been told that a slope of 45 degrees was required (perhaps at the toolbox meeting of 17 March) no one had checked whether he had heard and understood this information. As for the intranet, I do not accept that this is an appropriate medium to get information to staff who are out in the field and very rarely access a computer during their working day. Finally, the prior warning cannot be effective in circumstances where it had not been made clear to Mr Matthews what was required of him in the future.

[70] The assertion that Mr Matthews should have realised that he did not know what he was doing and sought further help cannot hold up in the face of the evidence about the conversation with the foreman and supervisor. When Mr Matthews returned to the depot (to get help) he was given incorrect advice from Mr Jackman. His foreman failed to speak up and identify the potential problems with the supervisor’s advice, despite knowing that battering would not work at that location and that Mr Matthews had very little experience in battering. Mr Matthews went away thinking he was on the right track because the supervisor and foreman led him to think so.

[71] The crew leader of a properly functioning crew must be able to identify hazards and ensure that the crew works safely. All other things being equal, the standard expected of Mr Matthews would have been entirely reasonable. All other things were not, however, equal. Weighing all the circumstances in the balance, including the training Mr Matthews had received, what he had been shown about how to recognise when a trench was unsafe, and the level of support and supervision he and his crew received that day, a reasonable employer would not have dismissed Mr Matthews. I conclude that Mr Matthews was unjustifiably dismissed.

## **Mr Poko's dismissal**

[72] Mr Poko was paid at a Level 3 responsibility rate and a Level 5 skill rate. Mr Swanink told the Authority that Mr Poko:

*“37.1 ...returned to work in a trench which had been assessed by a Council Inspector at midday on 7 April 2009 at 2 metres deep and after the Council Inspector had required the applicant to cease working in the trench;*

*37.2 after midday he continued to work in the trench which was in excess of 1.5 metres deep and was assessed at 3 metres deep by the Council Inspector at 3.30 pm on 7 April 2009;*

*37.3 our representatives and a Council Inspector viewed him working in the trench at a depth in excess of 1.5 metres.”*

[73] In other words, the respondent does not seek to rely on the fact that Mr Webber found Mr Poko working in an unsafe trench at midday, but only on the fact that he was found working in the inadequately battered trench during the afternoon.

[74] I find Mr Poko's dismissal unjustified for two principal reasons. The first is procedural. The respondent's allegations were not properly put to him, and he did not have the benefit of a full individual interview. The respondent relied on information elicited at the joint meeting with Mr Heather. As the notes of that interview show, the answers the two men gave were confused and inconsistent. Further inquiry was needed before final conclusions could be drawn about what happened.

[75] The second reason for finding this dismissal unjustified is that the respondent has again failed to show a reasonable basis for concluding that Mr Poko had been equipped with the knowledge to recognise an unsafe trench when he saw one, and to know that Mr Matthews's instructions were not safe to follow.

[76] Mr Poko had been provided with similar training to Mr Matthews. As already noted, this training did not specifically set out the specifications for battering. I am unable to conclude that Mr Poko knew or should have known the correct slope of a

properly battered trench, any more than Mr Matthews did. He was not able to identify this potential hazard and it follows that the respondent has not established that Mr Poko's conduct amounted to serious misconduct.

### **Mr Heather's dismissal**

[77] Mr Heather's specific breaches were said by Mr Swanink to be that :

*"25.1 He had allowed his colleague Maaraaraua Poko to enter the trench after the trench had been assessed by a Council Inspector at midday on 7 April 2009 at 2 metres deep and after the Council Inspector had required Maaraaraua Poko to get out of the trench;*

*25.2 He had continued to dig the trench to a depth of approximately 3 metres, as assessed by the Council Inspector at 3.30pm on 7 April 2009, while Mr Poko entered and excavated the trench;*

*25.3 He had continued to excavate between midday and 3.30 pm while he was aware that the depth was below 1.5 metres and that sufficient shoring and battering had not been put in place by Bill Matthews to prevent the sides collapsing; during the course of a meeting on 20 April Antonio Heather was able to display accurately on a whiteboard how to batter a 2 metre hole correctly."*

[78] Mr Heather was paid at Level 4 responsibility rate and Level 6 skill rate. The notes of his interview indicate that he had demonstrated (by drawing a diagram) that he did in fact know how to batter back the sides of the trench. (Something neither Mr Matthews nor Mr Poko had demonstrated when interviewed.) He confidently asserted that he knew how to batter and told the Authority this even though he had not, in fact, done the battering module for digger drivers.

[79] I am satisfied that of the three men at Matepihi Road that day, Mr Heather was the most at fault. Battering could not have proceeded unless Mr Heather (as the digger driver) had been prepared to do it, and he was the person in the best position to know

that the trench was unsafe. I find that there was substance to the respondent's concerns about Mr Heather's judgement in this matter.

[80] As with Mr Poko, however, the respondent has failed to demonstrate that it conducted a full and fair inquiry, with an opportunity for representation, all allegations properly put to him, and all factual matters thoroughly canvassed. For these reasons Mr Heather's dismissal too is unjustified.

## **Remedies**

[81] All three of the applicants seek reinstatement, lost wages and compensation for hurt and humiliation. Only Mr Matthews had found work by the time of the Authority's investigation meeting, and that was at a lower rate of pay than he had received in City Care's employment.

[82] As should be clear from the foregoing findings, there is no basis for any reduction of remedies for contributory conduct in respect of Mr Matthews or Mr Poko. I find that Mr Heather's conduct has contributed to the personal grievance by 25%.

[83] Mr Swanink stated in his evidence that the positions the three applicants held have been filled by employees who would otherwise have been made redundant when the respondent closed its construction division in April/May 2009. Had it not been for the evidence relating to the closure of the construction division I would consider this a case where reinstatement would have been appropriate. However as a result of those circumstances I accept that it is not practicable to reinstate the applicants.

[84] Mindful of this, I propose to deal with remedies as follows. The respondent is ordered to pay to Mr Matthews and Mr Poko the full quantum of their lost earnings for a period from the date of dismissal to the completion of the Authority's investigation on 26 February 2010. To Mr Heather the respondent is ordered to pay lost earnings for the period from the date of dismissal to the completion of the Authority's investigation on 26 February, less 25%.

[85] At this stage I leave it to the parties to calculate quantum. If agreement on that issue does not prove possible the applicants should advise the Authority that a supplementary determination is required. In that event a teleconference will be convened to discuss how this is to be approached and what further evidence is required for the determination of quantum.

[86] All three applicants are relatively young men with families to support. As very low wage workers they did not have significant resources to fall back on when faced with sudden unemployment in a recession. All have struggled to survive on the unemployment benefit and each spoke convincingly of the hardship, distress and relationship problems they and their families have suffered as a result. I am satisfied that this should be compensated for.

[87] The respondent is therefore ordered to pay to Mr Matthews and Mr Poko the sum of \$15,000.00 compensation for hurt and humiliation. To Mr Heather the respondent is ordered to pay \$15,000.00 compensation for hurt and humiliation less 25% contribution.

[88] Similarly, costs are reserved. Any request that the Authority determine costs should be made no later than 28 days from the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority