

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 49
5628200

BETWEEN JUSTIN KING
 Applicant

AND BALLANCE AGRI-NUTRIENTS
 LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Alex Kersjes and Greg Millard, Advocates for Applicant
 Gillian Service, Counsel for Respondent

Investigation Meeting: 20 April 2017 at New Plymouth

Submissions Received: 22 May and 7 June 2017 from the Applicant
 29 May 2017 from the Respondent

Determination: 15 June 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Justin King was employed by Ballance Agri-Nutrients at its Kapuni Plant in New Plymouth from 23 April 2012 until 6 March 2015. His employment ended when he was summarily dismissed for failure to report a chemical spill.

[2] Mr King claims his dismissal was unjustifiable and says he was bullied and harassed by the Production Manager during his employment. He seeks lost wages, compensation for hurt and humiliation, and costs.

[3] Ballance Agri-Nutrients Ltd (Ballance) denies Mr King's claims. It says he was dismissed for failing to report an accident or damage and failing to comply with

its safety rules and procedures. Ballance denies its Production Manager bullied and harassed Mr King during his employment.

Background

[4] Mr King's role at the Kapuni Plant was that of a Process Operator. The Plant manufactures ammonia-urea and Operators work with large equipment and hazardous materials and chemicals. Accordingly, there is an emphasis on health and safety.

[5] During his employment Mr King received two written warnings and a final written warning. The first warning was issued approximately four months after Mr King had started at the Plant. It related to a night shift in July 2012 when Mr King, after developing a migraine, left his work area and went to the nurses hut to lie down. The employer accepted his migraine had occurred suddenly but found that, in leaving the work area without telling anyone, he interfered with the ability of others to complete their task or work function.

[6] The second written warning was issued on 23 January 2013 and related to Mr King's lateness for work on two consecutive days. The third and final written warning was issued 19 months after the second warning, on 22 August 2014, and related once again to Mr King's late arrival at work, which was described as non-compliance with time-reporting requirements.

[7] The events that led to Mr King's dismissal occurred in the early hours of the morning of 19 February 2015. Sometime after 4.00am a switch on a machine Mr King was operating malfunctioned resulting in an overflow, or spill, of polyelectrolyte, a chemical. Mr King cleaned up the spill but did not report it during his shift. Whether he reported it to the supervisor of that shift at the commencement of his next shift later the same day is a matter of dispute between the parties.

[8] There is no dispute that the Production Manager, John McKay, saw Mr King in conversation with that supervisor. He either interrupted their conversation (as Mr King asserts), or waited patiently for it to finish (as Mr McKay asserts), to call Mr King to a meeting with a number of other employees. Mr McKay asked those present what had happened to the "poly tank" whereupon Mr King advised Mr McKay of the spill caused by a faulty switch earlier that day.

[9] Mr McKay commenced an investigation into the incident, as part of which he, accompanied by two other managers, interviewed Mr King on 25 February. The other managers were Sam Stewart who, at that time, was a Shift Supervisor, and Stephen Cairns, Human Resources and Payroll Manager. At the end of the meeting Mr McKay informed Mr King his non-reporting of "an accident or damage" was considered to be serious misconduct and a disciplinary meeting would be held.

[10] That was confirmed in a letter from Mr McKay the same day under the heading "Re: Misconduct on the 18th of February – failure to report a chemical spill". Specifically, the letter referred to:

- a. Failure to report accidents or damage
- b. Failure to comply with Company's safety rules and procedures

[11] It informed Mr King a disciplinary meeting would be held on 2 March 2015 with Mr Stewart and Mr Cairns in attendance. Mr McKay's letter encouraged Mr King to bring a representative or support person to the meeting. It informed him the meeting could, depending on the outcome of the disciplinary process, result in disciplinary action including a further written warning, final written warning or dismissal from his employment.

[12] For reasons that are not clear the disciplinary meeting was held on 6 March, not 2 March as originally scheduled. Mr King chose to attend alone and provided responses to the concerns that were put to him. After a break of close to two hours the meeting reconvened and Mr McKay conveyed his decision that Mr King was dismissed without notice, effective that day. This was confirmed by letter to Mr King dated 11 March 2015.

[13] That letter noted that Mr King had accepted he had not reported the chemical spill but had indicated this was not on purpose. It referred to Mr King's explanation of believing the spill to have been an "incident" rather than an "accident" and that, due to the busy shift, he had insufficient time to report it. It noted that, although Mr King had cleaned up the spill by hosing the area, he had not checked the MSDS¹ to ensure the clean-up was being carried out appropriately. Mr McKay noted in the letter he had carefully considered Mr King's explanation, but he did not accept it justified the non-reporting of the chemical spill.

¹ Material Safety Data Sheet: each chemical used at the Plant has such a sheet which provides guidelines and advice for clean-up

[14] He also noted Mr King had been subject to previous disciplinary procedures and was currently on a final written warning for failing to comply with time reporting requirements. Mr McKay stated he had lost trust and confidence in Mr King's ability to change his behaviour to be consistent with the employer's rules.

Issues

[15] The main issue for the Authority to determine is whether Mr King's dismissal was justifiable. The test for determining the justifiability or otherwise of his dismissal is that contained in s.103A of the Employment Relations Act 2000 (the Act). The test, which is to be applied objectively, is whether the decision to dismiss Mr King was one a fair and reasonable employer could make in all the circumstances at the time.

[16] Mr King's assertion that he was bullied and harassed throughout his employment, although not brought as a separate personal grievance, will be considered as part of the background to his dismissal.

[17] If Mr King is found to have been unjustifiably dismissed, issues of contribution and remedies will arise.

Discussion

Bullying allegation

[18] Mr King says it was common knowledge at the Plant that Mr McKay would target him and treat him unfairly in relation to other operators. Evidence supporting that assertion, and giving examples of the type of treatment meted out to Mr King, was provided by four current and former employees of the respondent. Mr Stewart, who gave evidence for Ballance, acknowledged Mr McKay monitored Mr King closely and that the two men had "buted heads" frequently. He ascribed this to their different personalities and said he had advised Mr King to keep his head down.

[19] Mr McKay also acknowledged in oral evidence that he clashed with Mr King frequently and said he did treat him differently. This was mainly due to Mr King's timekeeping and related to a number of business interests Mr King had external to his work at the Plant. He denied bullying or harassing Mr King and noted he had never

received a complaint from him, or any other person, about his behaviour towards Mr King throughout his employment.

[20] After considering the evidence it is clear to me Mr McKay was not happy about the impact Mr King's outside interests sometimes had on his work. This included Mr King seeking, and on occasion being granted by Mr McKay, albeit reluctantly, different treatment from other operators in order that he could manage his business interests.

[21] I infer this concern led to Mr McKay being more zealous in managing Mr King than he was with other operators. I take into account also their very different personalities which led to clashes between them and heightened Mr King's perception of being targeted and bullied. I find no compelling evidence that Mr McKay bullied Mr King but I infer he was less inclined to give Mr King the benefit of the doubt than he would be with other operators.

Dismissal

[22] In Ballance's statement in reply it asserted that Mr King had been dismissed for failing to report an accident or damage and failing to comply with its safety rules and procedures. It said Mr King had known about the polyelectrolyte spill that had occurred on his shift but had not reported it. Ballance had put its concerns to Mr King and he had had the opportunity to respond before the company concluded his actions in not reporting the spill amounted to serious misconduct and made the decision to dismiss him. In its view the dismissal was both procedurally and substantively justifiable.

[23] In his evidence Mr King said he had not believed the spill required urgent reporting during the shift but said he did so at the first opportunity afterwards. His evidence was this was the first thing he did when he started his next shift later in the day on 19 February 2015.

[24] He also said had not been assessed or signed off on the equipment where the spill occurred. However, he said he had been told that polyelectrolyte was harmless and non-toxic. He said he had looked for a MSDS but was unable to find one for polyelectrolytes. One of Mr King's witnesses who is currently employed as an Operator at Kapuni supported his evidence on that matter and said there was no MSDS in the system at the time.

[25] Mr King said the Trainee Supervisor had shown him how empty the bund² from the polyelectrolyte area and had not informed him of the need to report a spill. That, and the absence of a MSDS, was the basis for his belief that a minor spill of polyelectrolyte, such as the approximately 15 litres spilt on 19 February 2015, did not need to be reported as an incident at the time it occurred.

[26] Mr McKay expressed surprised at Mr King's evidence regarding there not being a MSDS for polyelectrolyte but did not dispute its veracity. He acknowledged Mr King had reported the faulty switch on the polyelectrolyte skid to the supervisor at the beginning of his shift on 19 February 2015. However, he said Mr King had not reported the polyelectrolyte spill. Significantly, Mr McKay said in oral evidence that, if Mr King had reported the spill at the beginning of his shift on 19 February 2015, his employment would not have been terminated.

[27] This seems at odds with the position of the employer as conveyed in Mr McKay's letter of 25 February 2015 to Mr King, notifying him the matter was proceeding to a disciplinary meeting. In that letter Mr McKay alleged Mr King failed, "on Wednesday 18 February 2015...to report a chemical spill of Polyelectrolyte". Mr King's shift had commenced on 18 February and ended at 7 am on 19 February. The tenor of Mr McKay's letter was that it was Mr King's failure to report the spill during the shift in which it had occurred that resulted in the matter being taken to a disciplinary meeting.

[28] That is also the tenor of the letter of 11 March 2015 confirming the termination of Mr King's employment. In that letter Mr McKay summarised Mr King's position as being:

"...you accepted that you had not reported the chemical spill of Polyelectrolyte; however you indicated that it was not on purpose that you did not report the accident as you believed it to be an 'incident' and **felt that you did not have time to report the incident as it was a busy shift.**" [emphasis added]

[29] There is nothing in the letter of termination to indicate any consideration had been given to Mr King's assertion that he had reported the spill as soon as he arrived for his next shift later in the day of 19 February 2015. Yet Mr McKay subsequently accepted that, had he done so, Mr King's employment would not have been terminated.

² an impermeable containment structure

[30] In the course of the investigation meeting Mr McKay gave evidence that he had spoken to the supervisor who had told him Mr King reported the faulty switch but not the resulting overflow. That supervisor did not attend the investigation meeting and Mr Stewart gave no evidence about having spoken to the supervisor during the investigation. The tenor of Mr Stewart's evidence was that Mr King should have reported the spill during the shift in which it occurred.

[31] Mr McKay's change of position from initially maintaining the spill should have been reported during the shift, to saying during the Authority's hearing that Mr King would not have been dismissed if he had reported the spill before starting work on his next shift raises the question of exactly what allegations were put to Mr King during the investigation and disciplinary meetings.

[32] Mr McKay's letter of 25 February, following the first investigative meeting, and notifying Mr King that the matter was to proceed to a disciplinary meeting, alleges Mr King failed to report the polyelectrolyte spill on Wednesday 18 February³ and says the spill was detected by another employee at approximately 7 am on 19 February. The letter went on to say not reporting the accident or damage constituted serious misconduct.

[33] The obvious inference from the letter is that the serious misconduct alleged against Mr King was his failure to report the spill during the shift in which it occurred. It was clear from Mr Stewart's evidence (given before that of Mr McKay) that he believed Mr King should have reported the spill during the shift. Notwithstanding that, Mr Stewart in oral evidence disclosed he had tried to persuade Mr McKay against dismissal and believed the decision to dismiss Mr King was harsh.

[34] There is a factual discrepancy between Mr McKay and Mr King as to whether Mr King reported to the supervisor at the beginning of his 19 February shift that there had been a spill of the chemical. There is no dispute between them that Mr King reported the switch which controlled the flow of polyelectrolyte into the skid had stuck in the early hours of that morning. However, Mr McKay said he had not reported the associated spill.

[35] Mr King was recalled to give further evidence after Mr McKay had completed his evidence, specifically for the purpose of being questioned about what he had said

³ Mr King's shift had commenced on 18 February but the spillage occurred after 4am on 19 February

to the supervisor when he reported the faulty switch. Mr King, whose written evidence it was that he had advised the supervisor of both the switch that had stuck and of the resulting polyelectrolyte overflow, said he could not remember the actual words he had used.

[36] He recalled telling the supervisor a work order was needed to replace the faulty switch and believed he had also told him of the polyelectrolyte spill that resulted from the switch sticking. He could not say categorically he had referred to the spill as the events had occurred two years earlier, but said it was "extremely likely" he had. He recalled that, while he was having this discussion with the supervisor, Mr McKay had interrupted in a "quite het up" state to tell him to attend a meeting about something serious.

[37] As noted earlier, Mr McKay's evidence was that he had waited outside the supervisor's office until Mr King's conversation was over before he went in and told him to attend a meeting immediately. Having heard evidence from both Mr King and Mr McKay I find Mr King's evidence on this point more credible. Mr McKay struck me as being a man to whom action was more important than observing niceties.

[38] I do not find it likely he would have politely waited until Mr King's conversation with the supervisor was over before conveying his message about the meeting he wished Mr King to attend immediately. I find it more likely than not that Mr McKay did interrupt the meeting and cut short Mr King's discussion with the supervisor over the faulty switch and resulting polyelectrolyte spill that had occurred on the shift earlier that day.

[39] In any event there is no dispute that, as soon as Mr McKay asked the employees he had called to the meeting what had happened with the "poly tank", Mr King told him about both the equipment failure and the resulting spill. Mr McKay's evidence was that, if Mr King had reported the spill before his shift started on 19 February, he would not have been dismissed. Mr King's evidence, which I accept, was that as soon as he arrived at work on 19 February he went straight to the supervisor's office where he reported the faulty equipment and either reported the resulting polyelectrolyte spill or was interrupted by Mr McKay while still providing details of the incident to the supervisor.

[40] I note Mr King's view that, even if he had omitted specifically telling the supervisor about the spill, the supervisor would have known that, if the polyelectrolyte skid switch had failed, the result would have been an overflow as the switch controlled the flow of the chemical. While that appears logically sound, I have insufficient knowledge of the operation of the switch to make a finding that its failure would inevitably lead to a spill and I do not find it necessary to consider that point further.

[41] Whichever of the two scenarios described above is correct, it is clear to me Mr King did make his employer aware of both the equipment failure and the polyelectrolyte spill before he started his shift on 19 February. I have reviewed the notes of the investigation and disciplinary meetings, and the correspondence from Mr McKay to Mr King regarding the disciplinary meeting and confirming the termination of his employment.

[42] Those documents make it clear the focus was on Mr King's failure to report the spill during the shift in which it occurred or at the end of shift meeting. There was no indication at that stage that, had he reported the spill before starting work on his next shift on 19 February, dismissal would not have been in the employer's contemplation. The focus of Mr King's answers is likely to have been quite different had he been informed of this at the time.

[43] The importance of this is that Ballance failed to disclose material information to Mr King before, during and after the investigation and disciplinary process that resulted in his summary dismissal. That undermines the fairness of the process and brings into doubt the evidence Ballance relied upon to dismiss Mr King. Accordingly I find his dismissal was unjustifiable in all the circumstances at the time.

Remedies and contribution

[44] Much evidence was given about the importance placed by Ballance on reporting accidents and damage and the knowledge Mr King would have had of such matters. While Mr King rejected having the detailed knowledge his employer attributed to him, I find he had, or should have had, sufficient awareness of his employer's focus on health and safety issues to know he needed to report the polyelectrolyte spill.

[45] However, that becomes of little relevance given Mr McKay's acknowledgement that reporting the matter before starting work on his next shift on 19 February was sufficient. I have found Mr King fulfilled that requirement and conclude that he did not contribute to the situation that gave rise to his personal grievance for unjustifiable dismissal.

[46] Mr King seeks compensation and lost wages. In his statement of problem lodged in the Authority on 31 May 2016 he sought \$12,500 as compensation for the humiliation, loss of dignity and injury to feelings he had experienced as a result of his dismissal. In submissions he requested this be increased to \$20,000. I do not doubt that Mr King felt the shame of his dismissal and was badly affected by it. Compelling evidence was given by witnesses, including one of the employer's witnesses, of the change Mr King had undergone since his employment had been terminated.

[47] I accept compensation is appropriate but do not accept an increase in the amount between lodging the statement of problem and the Authority's investigation is warranted. I find \$12,500 to be an appropriate sum.

[48] Mr King also seeks reimbursement of lost wages for a 12 month period. His evidence is that he made efforts to mitigate his losses by seeking alternative employment. He says the decline in the oil and gas industry has restricted the opportunities available to him and he has also lost self-confidence as a result of his dismissal. This has impeded him from obtaining alternative employment.

[49] As has been referred to above, Mr King has a number of business interests. In oral evidence he explained that, while he has devoted more time to those businesses since his dismissal, his businesses have not flourished. Mr King provided no evidence to support his assertions about his businesses. Nor did he provide documentary evidence of the attempts he made to find alternative employment. In the circumstances I am not persuaded an award of wages over the three months' ordinary time remuneration provided for in s. 128 of the Act is warranted.

Orders

[50] Ballance Agri-Nutrients Limited is ordered to pay Mr King:

- a. compensation of \$12,500 pursuant to s. 123(1)(c)(i) of the Act; and

- b. three months' ordinary time remuneration under s. 128(2) of the Act⁴.

[51] I do not expect the remuneration calculation to be complex but, in the event the parties are unable to agree on it, leave is granted to come back to the Authority.

Costs

[52] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority

⁴ Assessed in accordance with Mr King's remuneration at the time of his dismissal