



number of other lost benefits is also claimed, and compensation of \$28,000 for humiliation, distress and injury to feelings caused by the dismissal.

[4] Up to his dismissal Mr King had worked for 29 years as an electrician at NZ Steel's iron sand mining operation located at Taharoa near the Kawhia Harbour. He had been registered as an electrician for 25 years.

[5] After an inquiry by NZ Steel into his conduct on 7 January 2010, the company's Acting Mining Manager, Mr Murray Lye, decided to dismiss Mr King with immediate effect from 4 February 2010.

[6] Mr Lye confirmed his decision in a letter dated 8 February, in which he set out some of the circumstances leading to the dismissal and gave the following explanation for his decision.

*I have undertaken a full investigation and considered your explanation as part of this discipline investigation in relation to you incorrectly applying an electrical isolation.*

*I have also considered mitigating factors you have put forward and particularly the personal issues you have raised and letters of support.*

*I have reached the view that an extremely serious case of unsafe practice by you as a registered electrician has occurred.*

*Your job is to make sure that you isolate electrical equipment correctly and thus not endanger the lives of your colleagues. You failed by your own admission on two separate counts:*

- (1) *You failed to isolate the hydraulic pack correctly &*
- (2) *You also verified the equipment has been isolated correctly when this was not the case.*

*Your unsafe act could have easily resulted in serious harm or death to one of your colleagues. The ER Guide and Cardinal Rules very clearly state that life threatening incidents raise the prospect of dismissal.*

*I have listened to your explanation and while I sympathise with your personal issues, you also have stated that the company and your colleagues have offered you support and time off in relation to your issues.*

*I also appreciate your acknowledgment of your responsibility and the seriousness of the incident.*

*My decision is as follows:*

1. *I have reached the conclusion after a thorough investigation, I no longer have confidence and trust in you to properly fulfil your duties as an electrician due to the extremely serious unsafe practice committed by you.*
2. *I am therefore terminating your employment at New Zealand Steel effective 4 February 2010.*

[7] In concluding his letter Mr Lye advised Mr King that he could have three months to vacate the company house he lived in at Taharoa under a tenancy tied to the employment.

[8] Mr King has always accepted that on 7 January 2010 he failed to carry out instructions given to him to correctly apply an electrical isolation. He had been required to isolate eight electric motors to make them inoperative, so that maintenance work could be carried out safely on parts of the floating dredge NZ Steel uses at Taharoa to mine the iron sands there.

[9] The work required some employees to climb onto the dredge's cutter head and others to place themselves close to it. A 132kW motor that Mr King was required to isolate, one of several, provided the motive power enabling the cutting head to be driven.

[10] Early in the afternoon on 7 January after Mr King had confirmed he had isolated that electric motor, it started. The start button had been accidentally touched during cleaning, causing the hydraulic power pack that drives the cutter to become energised. At the time, fortunately, the drive was not engaged and the cutter head did not move.

[11] When the employees working on and near the cutter head were warned of the danger they were able to jump to safety and no-one was injured. There is no dispute, however, that if the cutter head had begun to rotate after the start button had been pushed, the men on or near it were likely to have been seriously injured, if not killed, by its sharp heavy moving parts and the speed of their rotation.

[12] From its inquiry NZ Steel assessed the incident "*Near Miss High Potential*" and there is no dispute about that being an accurate description of the high risk to safety presented by the circumstances.

[13] The procedure for isolation was to be carried out by Mr King at a switchboard. There he had to turn a single switch from “ON” to “OFF” position, to break the flow of electricity to the 132kW motor, and he had to apply a bar and padlock to hold the circuit open. An indication of its state was provided by three LED lights located just below the breaker switch on the switchboard. The lights glow red when the breaker is closed and allowing electricity to run to the cutter hydraulic pack motor. They go out when the switch is “OFF” and the breaker open.

[14] Once at the switchboard to apply the isolation, Mr King moved the bar into position on the breaker switch and locked it in place with a padlock he had for that purpose.

[15] That did not result in an isolation being correctly applied to the motor, as Mr King locked the breaker switch in the “ON” position instead of “OFF” as required. Consequently the LED lights underneath the switch remained on after Mr King had padlocked the bar in place.

[16] This failure was the first of the “*two separate counts*” found by Mr Lye against Mr King. His second failure was formally verifying that he had correctly applied the isolation as required of him.

[17] On a standard Isolation Register form provided by NZ Steel for the purpose, with two sets of his initials Mr King recorded that he had “*isolated*” the cutter hydraulic pack motor, and he also “*verified*” that this had been done.

[18] Printed next to his initials on the form was a panel headed “*How To Isolate.*” It explained:

*Ensure the indication lamps are on. Turn isolator from ON to the OFF position. Apply a Multilock and an Equipment lock.*

[19] Printed next to that was “*How To Verify,*” which explained:

*Ensure that indication lamps have extinguished & the Isolation switch cannot be turned on.*

[20] Mr King told the Authority in his evidence that he had initialled the verification form straight after he had placed his padlock on the locking bar.

[21] It is not surprising that Mr Lye found this to be a second failure on the part of Mr King, because he had verified that the equipment had been isolated correctly when it had not.

### **Mr Willison's involvement**

[22] Another employee had an important role to play in conjunction with Mr King on 7 January in securing safe working conditions for the employees assigned to work on and next to the cutting head of the dredge. Mr Joseph Willison had been designated the role of Isolation Leader for the planned maintenance work.

[23] As a result of his conduct that day an inquiry was carried out by NZ Steel which subsequently took disciplinary action against Mr Willison, at about the same time it decided to dismiss Mr King.

[24] The conduct of Mr Willison and the disciplinary action taken against him have been examined by the Authority because of a strong claim made by Mr King that there was disparity of treatment by the employer and that his dismissal was not justified as a consequence.

[25] Mr Willison was found to have failed to follow the employer's isolation procedure.

### **Isolation procedure**

[26] NZ Steel has a handbook setting this out. The purpose of the procedure contained in the handbook is stated as being, "*Primarily to ensure the personal protection of those who may be in danger from the operation of plant or equipment whilst they are working on or around that plant or equipment.*"

[27] The Handbook explains that there are many sources of energy which can be released in a dangerous manner, including electrical, mechanical and chemical energy. It explains that equipment which has been correctly isolated cannot release that energy and cannot cause harm.

[28] Compliance with the procedure contained in the Handbook, which applies at all NZ Steel sites including Taharoa, is stated to be mandatory.

[29] The general safety policy of NZ Steel is stated in the Handbook to be:

*The safety and health of all employees involved in the company's activities is of the highest importance. It is our policy to conduct our business at all times, in such a manner as to eliminate the risk of accidents.*

[30] A stated policy in relation to the isolation of plant and equipment is that isolation shall be carried out in accordance with approved documented procedures. Persons who fail to obey the policies and procedures in the handbook “*commit a serious offence and are liable to severe disciplinary action which could involve summary dismissal.*”

[31] The responsibilities of an Isolation Leader are defined to include complying with the requirements of isolation procedures, reporting any incidents of non-compliance and “*Working at all times in a manner that does not put themselves or their colleagues at risk of harm.*”

[32] The responsibility of Mr Willison as Isolation Leader on 7 January was questioned because of the requirements of clause 3.4 in particular, which is contained in a part of the Handbook dealing comprehensively with responsibilities. The one provided at clause 3.4 is:

*Ensuring that an isolation has been applied correctly including the performance of any reasonable tests necessary.*

[33] There is no dispute that Mr Willison failed on 7 January to meet this responsibility. He failed to detect or establish the fact that Mr King had not correctly applied an isolation to the cutter hydraulic pack motor. Had he done so, and seen to it immediately that the isolation was properly applied, the motor would not have been able to start when the button was accidentally touched during cleaning. Employees working on and around the cutter at the time would not have become exposed to a high risk of injury, or even death, in the event that the cutter had been engaged to operate when the motor had started.

[34] The outcome of the disciplinary inquiry into Mr Willison's actions was confirmed to him in writing by Mr Lye on 14 January 2010. He was issued a formal written warning for failing to fully carry out the duties required of an Isolation Leader. This was explained by Mr Lye in the warning:

*You failed to comply with clause 3.4 of the Isolation Leader Criteria and Responsibilities Procedure (EN1201.040) that required you to not only ensure that an isolation has been applied correctly but requires you to perform any reasonable tests necessary.*

[35] Mr Lye outlined what Mr Willison ought to have done to discharge his responsibilities:

*You should have asked for one of the operators to attempt to start the dredge equipment as a means of confirming that the isolations were satisfactorily in place and work could safely begin.*

[36] As it happened, by accident the 132 kW electric motor was successfully started. Had the isolation been properly in place any attempt to start it, even deliberately, would have been unsuccessful.

[37] The disciplinary action taken against Mr Willison by the issue to him of the written warning, placed him for 12 months under threat that “*any further isolation breaches or other serious misconduct could result in more serious disciplinary action.*”

[38] In addition to that warning, which was expressed to be a clear indication that his performance on 7 January had been unacceptable, Mr Willison was required to undertake isolation refresher training, to stand down for one month from any duties as an Isolation Leader and to undertake isolation system audits twice a month for three months, with the objective of educating other team members about the need for compliance with all aspects of the isolation process.

[39] At the beginning of February before he was dismissed, Mr King appealed to Mr Lye to find that the appropriate disciplinary outcome for him was the issue of a final written warning. While Mr King fully accepted responsibility for what he had done and the seriousness of his actions, he pointed to Mr Willison as the Isolation Leader being the person ultimately responsible for the isolation. He maintained that if Mr Willison had carried out his role properly the incorrectly applied isolation would have been discovered and corrected. Mr King emphasised though in his written comments made to Mr Lye that he was not trying to deflect blame or responsibility from himself.

[40] The claim of disparity is made quite simply as being that “*the Isolation Leader was not dismissed.*” It appears that Mr King’s sense of grievance about his dismissal may not have arisen so much from the disciplinary action that was taken against him, but from the disciplinary action that was not taken against Mr Willison. Mr King’s representative during the employer’s disciplinary inquiry, Mr Stuart Hurst, commented in his evidence to the Authority that if Mr Willison had been dismissed then Mr King may not have challenged his own dismissal. In introducing her final submissions made on behalf of Mr King, counsel Ms McNally said that the Authority’s investigation had occurred because of the treatment of Mr Willison.

[41] As well as disparity of treatment, Mr King has complained of being discriminated against by NZ Steel in its decision to dismiss him. He was then a delegate at the Taharoa site for the New Zealand Engineering Printing & Manufacturing Union (EPMU). Mr King alleges that he was dismissed at a time when the company had embarked on a deliberate and destructive change in its relationships with unions covering employees at Taharoa, and he considers that his dismissal was improperly motivated by the active role he had taken in advancing the interests of union members there.

[42] From the outset Mr King has always acknowledged that he was at fault on 7 January for not correctly isolating the cutter hydraulic pack motor, and also for verifying that he had isolated it when he had not. In mitigation of his conduct he has explained that he was under considerable pressure both at work and at home that had distracted him from doing properly what had been required.

[43] Although Mr King does not consider that he was fully to blame, he leaves it for the Authority to decide the extent of his fault, as it must do in the event his dismissal is found to have been unjustified.

### **Justification**

[44] The primary law to be applied in this case is s103A of the Employment Relations Act 2000.

[45] Under that provision the Authority is required to investigate and consider the way that NZ Steel inquired into what it thought Mr King had done or might have done, and the conclusion the employer reached that there had been serious misconduct

by him. Also, the Authority is required to investigate the conclusion reached by NZ Steel from its inquiries that dismissal was the appropriate final outcome.

[46] Section 103A requires the Authority to consider those matters against the standard of what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[47] Consideration and determination of the complaints of disparity of treatment and discrimination are ultimately governed by s103A as well.

[48] The Authority's determination must turn on the particular circumstances prevailing at the time NZ Steel dismissed Mr King, in the light of which the Authority must decide what the hypothetical fair and reasonable employer would have done.

[49] Foremost of all the circumstances is that the conduct for which Mr King was dismissed was in relation to a matter of safety in employment. Safety pervades this case, setting it apart from some of those referred to in submissions. Safety was a circumstance common to the employer, the employee Mr King, and to all employees involved in the maintenance work on 7 January.

[50] The circumstances of NZ Steel included its potential liability to be prosecuted for breaches of the Health and Safety in Employment Act 1992 if serious harm was caused to employees through any breach of the Act by the employer. Mr King was aware from the employer's "Zero Harm" policy that the attitude of NZ Steel was not to tolerate such breaches.

[51] I find from the evidence that safety was clearly the predominant circumstance as far as NZ Steel was concerned when commencing an inquiry into Mr King's conduct and in deciding to dismiss him. I find that the hypothetical fair and reasonable employer would also have viewed safety as a paramount factor in all the circumstances.

[52] Other NZ Steel employees, as well as Mr King himself, who were to be involved in the maintenance work planned for 7 January placed their lives in Mr King's hands when he was entrusted with the isolation of electrical energy from the various motors that enable the dredge to operate.

[53] Viewed objectively, according to the standards of a fair and reasonable employer, I consider that it was not a matter of excuse or mitigation for Mr King to point to Mr Willison and his failure to meet his particular responsibilities under the Isolation Procedure.

[54] The fact that two employees had individual safety responsibilities under the procedure did not diminish the overall responsibility of either. The responsibility given to Mr Willison as Isolation Leader was a reasonable precaution against human fallibility on the part of the electrician responsible for applying the isolation correctly. I agree with the view expressed by the company that even if Mr Willison had discharged his responsibility properly there would still have been an inquiry into serious misconduct alleged on the part of Mr King.

[55] In considering the respective disciplinary treatment of Mr King and Mr Willison, the former being summarily dismissed while the latter receiving a written warning, I must take into account what has been said by the Courts about cases where safety issues are involved.

[56] In *Fuiava v. Air New Zealand Limited* [2006] ERNZ 806, at para.[68], the Court reiterated the need to exercise caution in reaching a decision contrary to that of the employer in such cases. The Court noted that issues of safety may therefore be critical in considering whether the actions taken by the employer are those that would have been taken by a fair and reasonable employer in all the circumstances. To some extent therefore Mr King's situation is to be considered independently of Mr Willison's.

[57] I do however find that there was significant disparity between the way NZ Steel dealt with Mr Willison's infringement of safety requirements and the way it dealt with Mr King in that regard.

[58] The breach by Mr Willison was rated level 6/7 in seriousness by Mr Lye as a High Potential Near Miss Isolation Incident. Mr King's incident was also found to be of that type but was rated 9.

[59] Looking at the nature of the failure by Mr Willison and the relatively high level of seriousness it was assessed as having, his was misconduct to a serious degree. So too was that of Mr King, yet Mr Willison was not dismissed or even given a final warning, whereas Mr King was.

[60] I am satisfied from the evidence that Mr Lye had a sufficient reason for distinguishing between the two men in the way they would be treated in a disciplinary context. That reason was the compounding nature of Mr King's failure through verifying, formally and in writing, that he had correctly applied the isolation when he had not. By contrast, Mr Willison in his actions seriously failed to discharge his responsibility but did not represent or hold out to anyone that he had done any particular thing.

[61] Mr King by his failure took the seriousness of it a step higher when he potentially gave encouragement through his incorrect verification to Mr Willison, and possibly others who read the verification form, to believe the isolation had been correctly applied. In a safety context all of this created a potentially disastrous situation. Mr King I find contributed more to it than Mr Willison. Viewed objectively, by the hypothetical fair and reasonable employer, Mr King, could be seen to be more culpable for his actions than Mr Willison, although both had high degrees of blame for what happened.

[62] Once it is seen that there is a basis on which apparent disparity can be explained, as the cases have held it is not the role of the Authority to review the employer's assessment of the seriousness rating it had given to see whether, for example in this case, Mr Willison ought to have been rated 8 and perhaps Mr King rated 8 as well, as indeed he had been for a short time to begin with. That was a matter for the employer's judgment which I am satisfied was exercised by Mr Lye with considerations of safety at the front of his mind.

[63] I find that despite the presence of disparity, it is readily apparent that safety was not simply a pretext for the employer to dismiss Mr King for some other reason such as his involvement in or with a union.

[64] It is also a key circumstance to be considered under s 103A whether Mr King's conduct was capable of amounting to serious misconduct. To be so the conduct must be such that it would destroy or deeply impair the mutual trust and confidence essential to the employment relationship.

[65] I am satisfied that viewed objectively, according to the standard of the hypothetical fair and reasonable employer, Mr King's conduct was of that nature.

[66] It is understandable that Mr Lye held deep concerns about allowing Mr King on any basis to return to the performance of his duties in which he carried so heavy a responsibility for the safety of other employees. In confirming the dismissal decision Mr Lye professed to Mr King his lack of trust and confidence in him.

[67] Having reached those conclusions about the actions of the employer and the way the employer acted, I also find no grounds for the claim of discrimination against Mr King made on the basis that he was a union official for the EPMU at Taharoa. Although a fair and reasonable employer would not have dismissed him for that reason, his dismissal was justified for an entirely different reason, being a serious and unexplained failure to carry out a major responsibility with regard to safety.

[68] I have considered whether it makes a difference that Mr King acted negligently rather than wilfully, as there is no suggestion that he deliberately set out to leave any electric motor energised. His was a one-off act of inadvertence, oversight or negligence, although the actions of verifying that he had applied an isolation elevated the degree of negligence high enough to amount to recklessness. Negligent as well as deliberate behaviour was proscribed by the employer's Cardinal Rules, any breach of which could lead to dismissal.

[69] In looking at these circumstances the approach of the Authority is to stand back and consider whether a fair and reasonable employer would characterise Mr King's conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, and thus justify dismissal. I find the answer to that inquiry must clearly be yes, particularly in this case which involved safety in the workplace.

[70] The employer was entitled to take this view of Mr King's actions, or his omissions, regardless of the consequences of them which, fortunately, did not lead to injury or death. The risk of such was clearly viewed as unacceptable by NZ Steel, which had developed comprehensive procedures designed to eliminate that risk if they were followed.

[71] Mr King gave as a reason for his failure the distractions he was suffering at the time he applied the isolation, or attempted to. I find that a fair and reasonable employer would have been sympathetic but would not have placed such weight on those reasons as to displace its concerns to provide and maintain a safe workplace.

Safety considerations, as Mr King would have known from his longer experience as an electrician, also required him to take some initiative and be pro-active to discharge his responsibilities to take all reasonable steps to ensure safety.

[72] After Mr King had commenced the work he found that a further Plant Item had to be added to the list of motors for isolation. He did that and verified he had isolated the additional motor.

[73] That does not seem to provide a reasonable explanation for acting in a state where Mr King had his eyes open presumably but his brain not registering what they saw; which was the switch left “ON” and the LED lights also on. It is understandable that Mr Lye required Mr King to be tested for the presence of drugs and alcohol as possibly having impaired his faculties. The result was negative.

[74] In the months before the incident occurred on 7 January, Mr King suffered tragedy followed by upheaval in his family life. His young daughter had died in May 2009 and other children in his care were progressively taken away by welfare agencies. On 8 January he had an important appointment in this regard to see CYFS Officers who could help him recover the children into his care.

[75] While aware of Mr King’s loss of his daughter, Mr Lye was not aware of the meeting that was due to take place with CYFS. There is little the employer could be expected to do without being given some knowledge of what was happening and without having it made clear that Mr King was likely to be under stress that might affect the performance of his work. A responsible employee can be expected to speak up about these matters, and even ask to be relieved from duties if there is a risk to safety caused by an inability to concentrate in performing vital work.

[76] In considering whether a fair and reasonable employer in all the circumstances would have imposed the ultimate disciplinary sanction of dismissal, it is relevant to take account of the rehabilitative measures NZ Steel had introduced in the workplace for preserving employment relationships rather than ending them. It is also relevant to consider the community in which Mr King lived at Taharoa. As well as losing employment in his trade as an electrician of long service for NZ Steel, to find a new job Mr King is now faced with the prospect of relocating a long way to a possibly very different community among different people and losing some contact with family

and whanau. As well he will lose the status and respect he was accorded as a leader in his community and lose the opportunity to contribute to its welfare.

[77] I am satisfied that NZ Steel through Mr Lye did not ignore those matters. Ultimately the test under s 103A is one of asking what a fair and reasonable employer would have done.

[78] In this case, where the misconduct was in relation to safety in employment, I find that a fair and reasonable employer would have dismissed Mr King notwithstanding the availability of other lesser forms of disciplinary action, particularly those with an emphasis on retraining and education, and notwithstanding the sympathy it had for Mr King's personal and domestic circumstances.

### **Determination**

[79] For the above reasons the Authority determines that the dismissal of Mr King was justifiable.

[80] For completeness I also determine that Mr King does not have any personal grievance for a reason other than unjustified dismissal.

### **Costs**

[81] Costs are reserved. In the usual way the Authority expects that the parties through counsel Mr Skelton and Ms McNally will try and resolve any issue as to costs by agreement. If that is not possible written application may be made for a determination. NZ Steel may apply within three weeks of the date of this determination (or within such longer period as may be directed by the Authority), and Mr King or the EPMU may respond to such application within a further three week period after service of the application.